SEVEN NETWORKS LIMITED (NO 4)

(2005) ATPR ¶42−056

Australian Competition Tribunal

Judgment delivered 23 December 2004

Trade practices — Access — Telecommunications — Digitisation — Subscription television services — Exemptions — Section 87B undertakings — Terms and conditions of access — Whether exemptions and undertakings in the long−term interests of end−users — Exclusion of interactive services — Trade Practices Act 1974, s 152ATA; 152CBA.

In December 2003, the Australian Competition and Consumer Commission ("the ACCC") had granted anticipatory exemption orders pursuant to s 152ATA of the Trade Practices Act 1974 ("the Act") to Foxtel Management Pty Limited for and on behalf of the Foxtel partnership and Foxtel Cable Television Pty Ltd (together "Foxtel") and to Telstra Corporation Limited and Telstra Multimedia Pty Ltd ("Telstra") exempting Foxtel's subscription cable television service ("the Service") and Telstra's hybrid fibre coaxial cable network ("the Network") from the standard access obligations set out in s 152AR of the Act.

Telstra owned and managed the Network, and Foxtel accessed that Network to provide analogue and digital pay television services to its consumers. Foxtel also provided the same services by means of satellite.

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Both Foxtel and Telstra had, in November 2002, made a number of undertakings pursuant to s 87B of the Act. Both s 87B undertakings contained a conditional commitment to digitise the Network and Services and a promise of access to third party access seekers on certain terms and conditions upon digitisation. The undertakings were to run for a five−year period, however could be extended, at Foxtel's and Telstra's option, for a further seven years

The decision of the ACCC

In granting the exemptions, the ACCC had considered whether the grant of the exemption order to Foxtel would have promoted the long−term interest of end−users ("LTIE"), and would have encouraged the economically efficient investment in the use of infrastructure.

Foxtel's agreement with access seekers had sought to exclude access to interactive services and provided that access seekers could only be connected to end−users that subscribed to Foxtel's basic subscription television package ("the Key Provisions").

The ACCC had concluded that the non−price terms and conditions in Foxtel's access agreement provided an effective form of access having regard to the interests of access seekers and Foxtel, and that the price terms and conditions were reasonable, subject to the following conditions:

- that interactive services be excluded from the exemption
- that Foxtel modify certain parameters of its pricing methodology (as the ACCC was concerned with the pricing methodology employed by Foxtel, in particular that the weighted average cost of capital as determined by Foxtel and used to establish the cost of capital for its digital set top units), and
- that the term of access granted to access seeks run for a full five years.

The ACCC concluded that Telstra's access agreement provided for effective access and that the exemption order would have provided Telstra with certainty about terms and conditions upon which it would be required to provide access. Together, the ACCC found that these factors would provide an incentive for investment.

In both instances, the ACCC was of the view that the LTIE would be promoted by the grant of the exemption orders to Foxtel and Telstra. As with the undertakings, the exemption orders were to run for a period of five years.

Seven Network's application

Seven Network Limited and C7 Pty Limited (together "Seven Network") applied to the Tribunal for a review of the ACCC's exemption orders. Seven Network submitted that:

- the ACCC had incorrectly exempted services under s 152ATA on the basis of effectively accepting access undertakings that should have been considered under s 152CBA
- Foxtel and Telstra were about to digitise irrespective of the grant of the exemption orders
- the requirement that the connection of an access seeker to an end−user required the end−user to subscribe to Foxtel's Basic Package was unreasonable and not in the long−term interests of end−users
- the exemptions prevented access by Seven Network to interactivity regimes, whereas Foxtel had such access

- the pricing methodology of Foxtel and Telstra was wrong, in particular in determining costs, and
- the term of access was inadequate and was not in the interests of end−users or access seekers.

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At an earlier stage of the proceedings, the Tribunal had held that the review of the decisions of the ACCC was to be a full merits review. While the review was not limited to a review for error, it was limited to a review of information and evidence given, documents produced to the ACCC, and the information referred to in the ACCC's reasons for making the decisions, in accordance with the provisions of 152AW(4) of the Act.

Held: ACCC decision set aside; applications for anticipatory individual exemption refused.

Jurisdiction

1. The Tribunal's task was to review the two decisions de novo. The finding of the ACCC that the Foxtel access agreement provided an effective form of access did not address the issue of whether the exemptions granted were in the LTIE. The ACCC had failed to directly address the consequences for access seekers and end−users of being denied the protection of the standard access obligations and the other procedures and protections found in Pt XIC.

2. The ACCC had jurisdiction and power to hear and determine the applications under s 152ATA. However, the statutory regime under s 152CBA was more suited to dealing with a situation of approving the terms of an access undertaking.

The LTIE test

1. The LTIE test required an assessment of the interests of actual and potential end−users, in obtaining lower prices, increased quality of service, and increased diversity and scope in product offering over the a five year period.

2. To satisfy the criteria established under s 152ATA(6) and s 152AB(2)(c), it was necessary to form a general view as to the particular market in order to determine whether the opportunities and environment for competition would be better with or without a declaration (Re Sydney Airports Corporation Ltd (2000) 156 FLR 10). Different forms of competition, other than those suggested by Seven Network, were to be considered. Where an application was made for an exemption order and it involved the determination of the conditions of access, including price, which were acceptable, it was necessary to balance and evaluate the relative weight of the objectives in s 152AB(2).

3. Key pricing principles were to be observed in applying the LTIE test including the minimum costs that an efficient firm would have incurred in the long−run in providing the service; a normal return on efficient investment (taking into account the risk involved); and the prospective costs of using best−in−use technology.

4. Where access prices needed to be regulated, efficient investment and, in turn, competition, was unlikely to be encouraged unless pricing was on a total service long run incremental cost basis. It was not in the LTIE to depart from this method of pricing where access was regulated. A different regime was unlikely to encourage the efficient use of, and investment in, infrastructure.

Assessment of the future irrespective of exemption orders

1. Notwithstanding the fact that the Tribunal was required to make a determination as to the happening of an event that had already occurred prior to the publication of the Tribunal's decision, for it to require the ACCC to give information as to whether digitisation had occurred would have disregarded a clear legislative direction. The Tribunal was to make an assessment of the likelihood of digitisation occurring within the same or similar timeframe as would have been required by the undertakings if the exemption had been granted as at the date of the ACCC's decisions.

2. It was clear on the evidence that Foxtel, and consequently Telstra, would have digitised within the same or similar timeframe, whether or not exemption orders had been granted.

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Exemption orders and the LTIE

1. The granting of the exemption orders would have done less to achieve the objective of promoting competition in markets for listed services as there would have been fewer opportunities available for access seekers to obtain access on satisfactory terms. In the absence of exemption orders, access seekers would have had the opportunity to obtain access on terms which would have enabled them to be more competitive generally, and in particular with Foxtel.

2. The granting of the exemption orders would not have achieved the objective of encouraging the economically efficient use of, and investment in, the infrastructure by which listed services were supplied. Nor would the granting of the exemption orders have given any certainty of investment, as Foxtel and Telstra had already committed to using the infrastructure. Refusing to make the exemption orders on the grounds that digitisation was going to occur in any case would not have deterred future investors.

3. While granting the exemption orders would have provided Telstra and Foxtel with certainty concerning the terms and

conditions on which they would have been required to provide access, such certainty was achievable considering that digitisation was going to occur within a similar timeframe had the exemption orders not been granted.

Terms and conditions of access

1. The Key Provisions placed substantial limitations on the commercial prospects of any access seekers to the Network and Services to the point where it was doubtful whether they provided for meaningful and effective access, thereby entrenching Foxtel's market position.

Interactivity

2. The fact that the exemption orders had not extended to interactive services was not in the LTIE, although the separation of interactive services from general digital carriage services had removed any disconformity between the access offered under s 87B undertaking and the scope of the exemption.

3. Access to digital subscription television services without interactivity was likely to deter new entry of access seekers to the market, and was therefore uncompetitive. With interactive services likely to be available from Foxtel in the short−to−medium term, a potential access seeker would not have entered the industry without first having obtained access to interactive services. Potential investors were likely to have waited until such time as interactive services became available to gain access to the more general digital subscription television services available under the Foxtel and Telstra access agreements.

4. Access terms and conditions were to be considered jointly and determined in respect of the whole of digital subscription television services provided by each of Foxtel and Telstra. Interactive services were likely to be an integral element of subscription television services within the short−to−medium term. An inability to provide interactivity would result in an inferior product offering compared to the suite of services able to be offered by Foxtel. Interactivity was imminent and would be a feature intrinsic to the development and promotion of an attractive and competitive product. The LTIE was best served if both price and non−price terms of access for the whole of pay television services were considered together at the same time.

Tie to Basic Package

5. The terms of access offered by Foxtel precluded an access seeker from expanding its potential market beyond current Foxtel subscribers. A prospective access seeker was vulnerable to potential manipulation by Foxtel of the Basic Package to prevent or preclude competitive conduct. Imposing a condition to fix the content of the Basic Package was not a suitable remedy, as it would have imposed an inappropriate handicap on Foxtel's ability to conduct its business. Accordingly, the tie of the Basic Package to access to Foxtel's services as

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contained in the access agreement was a significant deterrent to entry. It unnecessarily prevented an access seeker using Foxtel's infrastructure and services, other than its set top units, to deliver subscription television services.

Term and duration of access

6. The evidence had been too limited to determine whether a five−year period was insufficient to permit reasonable prospects of entry. The duration of access was not to prevent the sustainable entry of an access seeker providing a competitive product. Rather, it enabled an access seeker to recover its sunk costs and to receive a reasonable return on the investment assets underpinning the product offered. Reasonable access terms did not require profitable entry by the access seeker.

Pricing methodology

7. Foxtel's pricing methodology, including cost allocation, was satisfactory. While it was appropriate to include the installed base acquisition costs in the cost base, it was important to ensure that these costs did not include Foxtel specific marketing costs.

Duration of the undertakings and the exemptions

8. Foxtel's and Telstra's unilateral right to extend the undertakings until for a further seven years provided no certainty to potential access seekers and was inappropriately one−sided. The extension period was significantly longer than the initial term. As such, it could be inferred that Telstra and Foxtel would have been able to reassess their terms of access at an early stage, and then elect to continue them only if it was in their commercial interests to do so, with possible adverse consequences for competition. Accordingly, the potential life of the undertakings and any exemption orders were contrary to the LTIE.

9. An exemption of such a length was inappropriate in an industry characterised by rapid technological development. It was not in the LTIE that access seekers be precluded from seeking declaration or, that access seekers and end−users alike be unable to benefit from any ministerial pricing determination under s 152CH. The potential length of the exemption and its control by Foxtel and Telstra also magnified the problems of the Key Provisions.

10. In light of the duration of the undertakings, it was not in the LTIE that Telstra and Foxtel be exempted from the statutory regime in respect of the Services.

[*Headnote by CCH TRADE PRACTICES EDITORS*]

N Young QC with JRJ Lockhart (instructed by Freehills) for the applicants.

NJ O'Bryan SC with MH O'Bryan (instructed by Allens Arthur Robinson) for Foxtel Management Pty Ltd.

TF Bathurst QC with T Castle (instructed by Malleson Stephen Jaques) for Telstra Multimedia Pty Ltd.

T Ginnane SC with D Star (instructed by Australian Competition and Consumer Commission) for the Australian Competition and Consumer Commission.

Before: Goldberg J, GF Latta and RF Shogren.

Full text of judgment below

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Goldberg J, GF Latta, RF Shogren:

Introduction

1. The decisions in these two applications were announced and published on 30 September 2004. The Tribunal now publishes its reasons for those decisions.

2. The applicants, Seven Network Limited and C7 Pty Limited (collectively "Seven Network") filed an application with the Tribunal on 30 December 2003 pursuant to s 152AV(1) of the *Trade Practices Act* 1974 (Cth) (the "Act") for a review of the decision of the Australian Competition and Consumer Commission (the "Commission") made on 12 December 2003 whereby the Commission made a written order pursuant to s 152ATA(3)(a) of the Act that:

> "[I]n the event that the proposed Exempt Service becomes an active declared service, Foxtel is exempt from all of the obligations referred to in section 152AR of the Act, to the extent to which the obligations would otherwise relate to the Exempt Service."

In the Commission's written order the expression "Exempt Service" was defined as meaning:

"(a) a service for the carriage of digital signals used for the purposes of transmitting a Subscription Television Service or Related Service by means of any part of a hybrid fibre co−axial network owned, controlled or operated by Telstra Multimedia Pty Ltd (Telstra Multimedia) or satellite (other than a satellite owned or controlled by Foxtel); and

(b) services that facilitate the carriage of digital signals used for the purposes of transmitting a Subscription Television Service or a Related Service by means of a hybrid fibre co−axial cable or satellite, including, without limitation:

- services that allow a service provider to determine the entitlement of end−users to receive particular services through conditional−access customer equipment (CA services);
- services for the processing of information necessary to be received by conditional−access customer equipment which permits the reception of a digital Subscription Television Service or Related Service (SI Services);
- subscriber management services; and
- services for the reception and decryption of digital signals in customer premises by conditional−access customer equipment."

3. Put shortly, the Commission granted an anticipatory exemption order to Foxtel Management Pty Limited ("Foxtel Management"), for and on behalf of the Foxtel partnership (between Telstra Multimedia Pty Ltd and Sky Cable Pty Ltd) and Foxtel Cable Television Pty Ltd (collectively "Foxtel"), exempting them from the standard access obligations set out in s 152AR of the Act in relation to the Exempt Service, which may be described very generally as Foxtel's subscription cable television service. The effect of an exemption granted under s 152ATA is to exempt the applicant from one or more of the "standard access obligations" (as contained in s 152AR) which would otherwise apply if the service(s) the subject of the application were ever to be declared.

4. There is also before the Tribunal an application filed by Seven Network on 30 December 2003 pursuant to s 152AV(1) of the Act for a review of the decision of the Commission on 12 December 2003 whereby the Commission made a written order pursuant to s 152ATA(3)(a) of the Act that:

> "[I]n the event that the proposed Exempt Service becomes an active declared service, Telstra Corporation and Telstra Multimedia are exempt from all of the obligations referred to in section 152AR of the Act, to the extent to which the obligations would otherwise relate to the Exempt Service."

In that written order, the expression "Exempt Service" was defined as meaning:

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> "(a) a service for the carriage of digital video signals associated with subscription television services by means of any

part of a hybrid fibre co−axial network owned, controlled or operated by Telstra Multimedia (***Carriage Service***) or a service that facilitates the supply of any part of the Carriage Service (***Facilitating Service***); or

(b) any other service which is capable of being used to provide the carriage provided by the Carriage Service or the functionality of a Facilitating Service (***Broader Service***)".

5. By this decision, the Commission granted an anticipatory exemption order to Telstra Corporation Limited and Telstra Multimedia Pty Ltd exempting them from the standard access obligations set out in s 152AR of the Act in relation to the above Exempt Service, which may be described very generally as Telstra's cable network.

6. Seven Network through wholly−owned subsidiaries operates a free−to−air commercial television network in Australia. C7 Network Pty Ltd, a wholly−owned subsidiary of Seven Network, operated a pay television business that provided pay television channels to Optus Vision Pty Ltd, Austar United Communications Limited and Austar Entertainment Pty Ltd from March 1999 until March 2002.

7. Telstra Corporation Limited and Telstra Multimedia Pty Limited (collectively "Telstra") own and manage a hybrid fibre coaxial cable ("HFC") which delivers analogue and digital pay television carriage services to consumers' homes and are carriers of digital signals associated with subscription television services by means of its HFC network.

8. Foxtel is a pay television provider currently providing analogue and digital pay television services to consumers' homes and users' homes via Telstra's HFC network. Foxtel also provides services by means of satellite.

9. Each of the orders was made subject to a number of conditions. Relevantly, each of the orders was effective, and only had effect, while certain undertakings given by Telstra and Foxtel pursuant to s 87B of the Act and accepted by the Commission on 21 November 2002, remain in place. Each order was also subject to a limitation that Foxtel and Telstra were not exempted from the standard access obligations in s 152AR insofar as they related to, *inter alia*, "Interactive Services".

10. Further:

- The order in relation to Telstra ceased to have effect if Telstra ceased to supply a digital subscription television carriage service.
- The order in relation to Foxtel ceased to have effect if the digital access undertaking provided by Telstra in relation to the digital subscription television carriage service terminated or otherwise ceased to have effect.

11. In substance, the Commission made the exemption orders because it considered that the undertakings given by Telstra and Foxtel in accordance with s 87B of the Act and the access agreements scheduled to those undertakings, which specified the price and non−price terms and conditions on which Telstra and Foxtel were to supply digital services to third parties, provided for effective access to such digital services and that, as a consequence, exemption from the standard access obligations was in the long−term interests of end−users of carriage services or of services provided by means of carriage services. In these reasons, wherever the expression "LTIE" appears it is to be taken as a shorthand reference to the long−term interests of end−users of carriage services or of services provided by means of carriage services.

The applications for exemption orders

12. In December 2002, Telstra and Foxtel Management, for and on behalf of the Foxtel Partnership and Foxtel Cable Television Pty Ltd (collectively "Foxtel"), lodged anticipatory individual exemption order applications under s 152ATA of the Act with the Commission. The applications concerned the proposed provision of digital pay television services via Telstra's HFC network or satellite.

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13. Section 152ATA provides for "anticipatory individual exemptions" from the access regime established under Pt XIC of the Act. Such exemptions are specific to individual applicants (as distinct from the class exemptions available under ss 152AS and 152AT), and precede any declaration of the services in question (as distinct from the exemptions available under ss 152AS and 152AT). An order for exemption can only be made, in the words of s 152ATA(6), if the Commission (or, on review, the Tribunal) "is satisfied that the making of the order will promote the long−term interests of end−users of carriage services or of services provided by means of carriage services". The statutory framework of Pt XIC of the Act will be discussed in more detail below.

14. In October 2003, the Commission released draft decisions indicating its preliminary view that granting the anticipatory exemptions orders, subject to conditions and limitations, would promote the long−term interests of end−users. On 12 December 2003, the Commission announced its final decisions to accept Telstra's and Foxtel's applications, again subject to certain conditions and limitations (the conditions largely concerned the form of the s 87B undertakings provided by each of Telstra and Foxtel to the Commission in November 2002). These decisions were taken on review to the Tribunal by Seven Network as a person affected by a decision of the Commission, pursuant to s 152AV. In accordance with the decision and determination of the presidential member presiding, Goldberg J, at an earlier stage of these proceedings, the reviews of the decisions undertaken by the Tribunal have been full merits review, not limited to review for error, but nevertheless limited, in accordance with the

provisions of s 152AW(4), to information given, documents produced and evidence given, to the Commission in connection with the making of the decisions and information referred to in the Commission's reasons for making the decisions.

15. Insofar as, and to the extent that, these reasons, set out or refer to questions of law that have arisen in the course of the reviews, those questions have been determined in accordance with the opinion of the presidential member presiding, Goldberg J.

Background to the applications

16. In March 2002, Foxtel and Optus announced their intention to enter into a content supply arrangement, whereby each would carry pay television channels of the other in its network and through its set top units.

17. The Commission considered the arrangement would contravene certain provisions in Pt IV of the Act. Various parties addressed the issues raised by the Commission and parties including Telstra and Foxtel provided the Commission with undertakings pursuant to s 87B of the Act which the Commission accepted. These included an undertaking by Telstra and Foxtel to provide third parties with access to digital pay television carriage services. In general terms, the digital access undertakings were expressed to be conditional upon the Commission making an order that Foxtel's and Telstra's digital pay television carriage services would be exempt from the access regime provisions of Pt XIC of the Act. Accordingly, the terms of these digital access undertakings formed the basis of the parties' exemption applications.

18. Telstra explained the nature of its digital service and network in the following terms:

> "A digital subscription television service ('**DSTS**') is, from a technical perspective, a better quality service than an analogue subscription television service. Digital television offers several advantages, including a clearer, sharper picture and increased audio quality. This is because digital signals do not degrade or vary as much as analogue waves during transmission. Digital technology also allows for error correction at the STU and ensures that the quality of the received signal is identical to that of the signal transmitted by the supplier of the DSTS."

An important characteristic of digital services is that they take up far less capacity on the HFC cable and therefore many more channels are able to be provided.

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19. An STU is a set top unit, sometimes also known as a set top box, and is a piece of "conditional−access customer equipment" (as defined by s 152AC of the Act) that receives the transmission of subscription television services and enables them to be viewed on television screens and monitors.

20. Content, whether digital or analogue, can be transmitted over Telstra's HFC network. This network, which passes more than 2.5 million homes in Australia, is capable of delivering services other than digital subscription television services, such as cable modem internet access services and telephony. Telstra submitted, however, that its HFC network was primarily used for the transmission of subscription television content.

21. There are three main components to the HFC network:

- "headends", to which suppliers of DSTS deliver their signals for transmission;
- the HFC transmission network;
- customer connections.

22. The headends are the points from which signals carried on the HFC network originate. A headend contains the transmission equipment necessary to broadcast digital signals over the HFC network. The Telstra HFC network has five digital headends, one in each of Brisbane, Sydney, Melbourne, Adelaide and Perth. At each headend, the digital subscription television signals to be carried on the HFC network are received from the subscription television broadcasters over terrestrial lines (which do not form part of the HFC network).

23. In essence, therefore, the services proffered by Telstra under its proposed terms of access are the receipt of access seeker signals at the headends, the processing of those signals into digital streams and the carriage of the signals via the HFC network to the "wall plates" in customer homes. It is at the wall plate that the Telstra HFC network terminates.

24. By way of a "fly cable", the wall plate of a given house is connected to a subscriber's STU, which in turn is connected to a television set or video recorder. Accordingly, the provision of "Set top unit services" involves delivery of subscription television signals from the wall plate to the television. Access to subscription television services, however, is typically managed by the scrambling of signals prior to broadcasting (by way of a conditional access or "CA" system), with only those subscribers who have paid to receive the services having the codes required to unscramble the signals. The encryption data required for the scrambling of signals is generated by Foxtel at its "play−out centre" and sent to Telstra for encryption at the headends. The conditional access system regulates each subscriber's access to signals by use of a "smartcard" installed in each subscriber's STU.

25. There is also a service information ("SI") system, which produces network, service and event based data that is used to

"inform" STUs as to the services that are available, upcoming events and where on the network (ie the frequency) those services are located. Foxtel creates a combined "CA/SI data" stream in relation to all digital subscription television and related services delivered to Foxtel STUs connected to the HFC network (whether its own or, potentially, those of other network users). This data stream carries the data required by the STUs to determine the location of the various services within the bandwidth of the HFC network, as well as to determine which subscribers are entitled to receive which services.

Relevant legislation

26. A number of definitions of expressions in the Act need to be identified at the outset. Telstra is "a carriage service provider". Foxtel is also "a carriage service provider". A "carriage service" is "a service for carrying communications by means of guided and/or unguided electromagnetic energy". A "carriage service provider" is a person who supplies, or proposes to supply a "listed carriage service" to the public using:

"(a) a network unit owned by one or more carriers;

(b) a network unit in relation to which a nominated carrier declaration is in force ..."

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A "listed carriage service" is, *inter alia*, "a carriage service between a point in Australia and one or more other points in Australia". A "declared service" is a "listed carriage service" or a service that facilitates the supply of a listed carriage service, which is supplied, or is capable of being supplied by a carrier or carriage service provider, which has been declared by the Commission after undertaking the procedure set out in s 152AL(3). A "declared service" is also, in accordance with s 152AL(7), a service supplied by a person who has given the Commission a special access undertaking in relation to that service and the undertaking is in operation and the service is being supplied.

27. "Conditional−access customer equipment" is customer equipment that:

"(a) consists of or incorporates a conditional access system that allows a service provider to determine whether an end−user is able to receive a particular service; and

(b) either:

(i) is for use in connection with the supply of a content service; or

(ii) is of a kind specified in the regulations."

28. At the time the s 87B undertakings by Foxtel and Telstra were being negotiated, proffered and accepted, Pt XIC of the Act had not been amended so as to include s 152ATA and the opportunity for a carrier or a carriage service provider to obtain exemption from the standard access obligations referred to in s 152AR of the Act before, and in anticipation of, its service becoming an active declared service. Prior to the amendment of Pt XIC of the Act which introduced s 152ATA into Div 3 of Pt XIC, only a carrier or carriage service provider whose service had become an active declared service was entitled to apply for an exemption from the obligations to comply with the standard access obligations pursuant to s 152AT of the Act.

29. A number of the obligations of Telstra and Foxtel under their respective s 87B undertakings and in particular the obligation to supply digital services were conditional upon what was called "Revised Legislation" being passed which enabled service providers such as Foxtel and Telstra to apply for, and obtain from the Commission, an exemption from the access obligations that would be applicable if the service were subject to a statutory access regime. At the time the s 87B undertakings were accepted the Telecommunications Competition Bill 2002 was still before the Parliament and it was not assented to until 19 December 2002. We note that in its s 87B undertaking, Foxtel undertook to supply Digital Set Top Unit Services in any event if it commenced supplying Commercial retail digital cable Subscription Television Services, whether or not an exemption order had been granted by the Commission in relation to standard access obligations.

30. On 24 December 2002 Telstra lodged an application with the Commission for an exemption order pursuant to s 152ATA(1) of the Act. On 31 December 2002 Foxtel lodged with the Commission a similar application seeking anticipatory exempt status. On 12 December 2003 the Commission made written orders pursuant to s 152ATA(3) of the Act exempting Foxtel and Telstra from obligations under s 152AR of the Act.

31. Parts XIB and XIC were introduced into the Act in 1997 by the *Trade Practices Amendment (Telecommunications) Act* 1997 (Cth), as an industry−specific regulatory regime for telecommunications. Part XIB was established as a special regime regulating anti−competitive conduct in the telecommunications industry. Under Pt XIB the Commission is able to seek remedies in respect of anti−competitive conduct by a carrier or carriage service provider and to issue a competition notice stating that a carrier or carriage service provider has engaged in such conduct.

32. Part XIC sets out a telecommunications access regime for the industry, providing for the declaration of carriage services (as defined in the *Telecommunications Act* 1997 (Cth)) and related services. Once declared, the regime provides for certain "standard access obligations" to apply to carriers and carriage service providers supplying those services, unless an access provider is exempted. Under Pt XIC, conditions of access could be determined by agreement, incorporated in an access

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undertaking (if accepted by the Commission), or in the absence of agreement or an undertaking, be determined by the Commission in an arbitration. Under the initial terms of Pt XIC, access undertakings and exemptions from the standard access obligations were only available in respect of services which had already been declared pursuant to s 152AL of the Act.

33. Section 152AT enables individual carriers or carriage service providers to apply to the Commission for an exemption from all or any of the standard access obligations. The Commission must either make an order exempting the carrier or provider from one or more of the standard access obligations or refuse the application. The Commission may only make an order exempting the carrier or carriage service provider from one or more standard access obligations where it is satisfied that the making of the order will promote the long−term interests of end−users of carriage services or of services provided by means of carriage services.

34. Section 152CH provides that the Minister may make a written determination setting out principles dealing with price or a method of ascertaining price relating to the standard access obligations set out in proposed s 152AR. A Ministerial pricing determination is a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act* 1901 (Cth).

35. Amendments to the access regime were made by the *Trade Practices Amendment (Telecommunications) Act* 2001 (Cth), which were generally designed to streamline the access regime established under Pt XIC. Specifically, the amendments "aim[ed] to encourage commercial negotiation and expedite the resolution of access disputes notified" to the Commission. Of particular relevance for present purposes, however, were the amendments made by the *Telecommunications Competition Act* 2002 (Cth), including the introduction of ss 152ATA and 152CBA.

The 2002 amendments

36. The 2002 amendments, which, *inter alia*, made undertakings and exemptions available in cases where declaration had not occurred (and even when the service was not yet in existence), were implemented in response to the Productivity Commission's inquiry report on Telecommunications Competition Regulation (December 2001). The Explanatory Memorandum to the Telecommunications Competition Bill 2002, which introduced the amendments, noted that they were aimed "to increase the level of competition and investment in the telecommunications market to the benefit of consumers and business". This was to be achieved by, *inter alia*, facilitating timely access to basic telecommunications services, facilitating investment in new telecommunications infrastructure, encouraging a more transparent regulatory market, enhancing accountability and transparency of decision−making under Pt XIB of the Act.

37. The purpose of each of the new provisions relating to access undertakings and the ability to seek anticipatory exemption orders was stated in identical terms "to provide certainty for potential investors in telecommunications infrastructure and services in relation to access to that infrastructure or service in the future ...".

38. Prior to the exemption created by s 152ATA, a potential investor was unable to receive an order exempting it from the obligation to provide access to a declared service or to lodge an access undertaking until it supplied an active declared service. The Explanatory Memorandum to the Bill stated:

> "This can provide a disincentive for investment because it means potential access providers cannot obtain regulatory certainty as to whether or not their service will be declared, and if so, on what terms they will be required to provide access. In particular, where 'risky investments' are subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty."

While it was noted that the costs were difficult to quantify, the potential for lost or delayed investment was highlighted in the Explanatory Memorandum.

39. In considering how s 152ATA was likely to be used, the Explanatory Memorandum stated:

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> "Longstanding exemptions may be appropriate in circumstances where a service is 'ex−post' contestable, and therefore would not normally be declared, but an investor may wish to obtain a ruling that this is the case beforehand."

Alternatively, exemptions for a limited period could be granted as "an incentive to invest and innovate in otherwise uncertain circumstances".

40. In considering the conditions which may attach to an anticipatory exemption order, the Explanatory Memorandum noted:

> "[A]n order may contain a limitation that the exemption applies to a service that is supplied using a particular facility, or particular infrastructure and/or in a certain geographical area. This also provides flexibility for the ACCC to grant an exemption in relation to any combination of standard access obligations."

41. Item 62 in the Bill inserted s 152ATA after s 152AT. Section 152ATA allowed a person who is, or expects to be, a carrier or carriage service provider to apply to the Commission to make an order exempting the person from any or all of the standard access obligations in the event that a specified service or a proposed service become an active declared service.

42. The terms "specified service" and "proposed service" allow for exemptions to apply to services not yet in existence or not yet being supplied. An order made by the Commission under s 152ATA may be unconditional or subject to conditions or limitations specified in the order. For example, as noted in the Explanatory Memorandum, an order may contain a limitation that the exemption applies to a service that is supplied using a particular facility, or particular infrastructure and/or in a certain geographical area. This also provides flexibility for the Commission to grant an exemption in relation to any combination of standard access obligations.

43. Section 152ATA is relevantly in the following terms:

"**Application for exemption order**

(1) A person who is, or expects to be, a carrier or a carriage service provider may apply to the Commission for a written order that, in the event that a specified service or proposed service becomes an active declared service, the person is exempt from any or all of the obligations referred to in section 152AR, to the extent to which the obligations relate to the active declared service.

(2) An application under subsection (1) must be:

(a) in writing; and

(b) in a form approved in writing by the Commission for the purposes of this paragraph.

Commission must make exemption order or refuse application

(3) After considering the application, the Commission must:

(a) make a written order that, in the event that the service or proposed service becomes an active declared service, the applicant is exempt from one or more of the obligations referred to in section 152AR, to the extent to which the obligations relate to the active declared service; or

(b) refuse the application.

(4) An order under paragraph (3)(a) may be unconditional or subject to such conditions or limitations as are specified in the order.

(5) An order under paragraph (3)(a) has effect accordingly.

Criteria for making exemption order

(6) The Commission must not make an order under paragraph (3)(a) unless the Commission is satisfied that the making of the order will promote the long−term interests of end−users of carriage services or of services provided by means of carriage services.

[There is no (7)−(9)]

[42704]

Expiry time for exemption order

(10) An order under paragraph (3)(a) must specify the expiry time for the order. If an order expires, this Part does not prevent the Commission from making:

(a) a fresh order under paragraph (3)(a) in the same terms as the expired order; or

(b) if the service or proposed service has become an active declared service − an order under section 152AT in relation to the service.

(10A) The expiry time for the order may be described by reference to the end of a period beginning when the service or proposed service becomes an active declared service.

(10B) Subsection (10A) does not, by implication, limit subsection (10).

Consultation

(11) If, in the Commission's opinion, the making of an order under paragraph (3)(a) is likely to have a material effect on the interests of a person, then, before making the order, the Commission must first:

(a) publish the application for the order and invite people to make submissions to the Commission on the question of whether the order should be made; and

(b) consider any submissions that were received within the time limit specified by the Commission when it published the application.

..."

44. The obligations referred to in s 152AR of the Act are defined as the standard access obligations. Section 152AR is relevantly

in the following terms:

"(1) This section sets out the ***standard access obligations***.

Access provider and active declared services

(2) For the purposes of this section, if a carrier or a carriage service provider supplies declared services, whether to itself or to other persons:

(a) the carrier or provider is an ***access provider***; and

(b) the declared services are ***active declared services***.

Supply of active declared service to service provider

(3) An access provider must, if requested to do so by a service provider:

(a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and

(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and

(c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

...

Conditional−access customer equipment

(8) If an access provider supplies an active declared service by means of conditional−access customer equipment, the access provider must, if requested to do so by a service provider who has made a request referred to in subsection (3), supply to the service provider any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the active declared service and using the equipment."

45. The criteria for the Commission's satisfaction (in s 152ATA(6)) that the making of the exemption order will promote the long−term interests of end−users of carriage services or of services provided by means of carriage services are found in s 152AB of the Act.

46. Indeed, s 152AB(1) provides that the LTIE are the object of Pt XIC. Section 152AB(2) sets out the matters to which we must have regard in determining the LTIE and, by virtue of s 152AB(3), this is intended to limit the matters to which regard may be had. Section 152AB provides:

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"**Object**

(1) The object of this Part is to promote the long−term interests of end−users of carriage services or of services provided by means of carriage services.

Promotion of the long−term interests of end−users

(2) For the purposes of this Part [Part XIC], in determining whether a particular thing promotes the long−term interests of end−users of either of the following services (the ***listed services***):

(a) carriage services;

(b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;

(d) the objectives of achieving any−to−any connectivity in relation to carriage services that involve communication between end−users;

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

Subsection (2) limits matters to which regard may be had

(3) Subsection (2) is intended to limit the matters to which regard may be had.

Promoting competition

(4) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(c), regard must be had to the extent to which the thing will remove obstacles to end−users of listed

services gaining access to listed services.

Subsection (4) does not limit matters to which regard may be had

(5) Subsection (4) does not, by implication, limit the matters to which regard may be had.

Encouraging efficient use of infrastructure etc.

(6) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(e), regard must be had to the following matters:

(a) whether it is technically feasible for the services to be supplied and charged for, having regard to:

(i) the technology that is in use or available; and

(ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable; and

(iii) the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;

(b) the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;

(c) the incentives for investment in the infrastructure by which the services are supplied.

Subsection (6) does not limit matters to which regard may be had

(7) Subsection (6) does not, by implication, limit the matters to which regard may be had.

Achieving any−to−any connectivity

(8) For the purposes of this section, the objective of any−to−any connectivity is achieved if, and only if, each end−user who is supplied with a carriage service that involves communication between end−users is able to communicate, by means of that service, with each other end−user who is supplied with the same service or a similar service, whether or not the end−users are connected to the same telecommunications network."

[42706]

47. The LTIE test was introduced into the Act as part of the new telecommunications regime in 1997. The Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 provides guidance as to the interpretation and application of the LTIE test. In particular, guidance is provided in relation to the term "end−user". In this respect, the Explanatory Memorandum (under the heading "Proposed section 152AB − Object of this Part") states:

"The term ’end−users’ recognises that telecommunications networks and services are used both by customers with a direct contractual relationship with a carrier or service provider and other end−users of carriage or content services (such as the members of a customer’s household)."

48. The Explanatory Memorandum is also helpful in explaining the role of s 152AB(4) in relation to which the Memorandum states that it was "intended that particular regard be had to the extent to which the particular thing would enable end−users to gain access to an increased range or choice of services".

49. As the basis for the application of both Foxtel and Telstra was the undertaking to give access in the terms of the annexed agreement, which terms Foxtel and Telstra contended were reasonable, it is necessary to turn to subdiv B of Div 5 of Pt XIC which contains provisions for the giving of special access undertakings which may be approved by the Commission.

50. Section 152CBA provides for actual or prospective carriage service providers to give a special access undertaking. This provision is similar to s 152ATA, in that it is "anticipatory" of declaration. Section 152CBA provides:

"**Scope**

(1) This section applies to a person who is, or expects to be, a carrier or a carriage service provider supplying:

(a) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or

(b) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);

whether to itself or to other persons, so long as the service is not an active declared service.

Undertaking

(2) The person may give a written undertaking (a ***special access undertaking***) to the Commission in connection with the provision of access of the services.

(3) The undertaking must state that, in the event that the person supplies the service (whether to itself or to other persons), the person:

(a) agrees to be bound by the obligations referred to in section 152AR, to the extent that those obligations would

apply to the person in relation to the service if the service were treated as an active declared service; and

(b) undertakes to comply with the terms and conditions specified in the undertaking in relation to the obligations referred to in paragraph (a).

(4) The undertaking must be in a form approved in writing by the Commission.

(5) The undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking.

Expiry time

(6) The undertaking must specify the expiry time for the undertaking.

(7) The expiry time of the undertaking may be described by reference to the end of a period beginning:

(a) when the undertaking comes into operation; or

(b) when the person begins to supply the service (whether to itself or to other persons).

(8) Subsection (7) does not, by implication, limit subsection (6)

(9) The undertaking may provide for the person to extend, or further extend, the expiry time of the undertaking, so long as:

(a) the extension or further extension is approved by the Commission; and

(b) the undertaking sets out criteria that are to be applied by the Commission in

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deciding whether to approve the extension or further extension.

(10) If the undertaking expires, this Part does not prevent the person from giving:

(a) a fresh special access undertaking in the same terms as the expired undertaking; or

(b) an ordinary access undertaking that deals with the same service as the expired undertaking.

Related services

(11) A reference in paragraph (1)(b) to a service that facilitates the supply of a carriage service does not include a reference to the use of intellectual property except to the extent that it is an integral but subsidiary part of the first−mentioned service.

Definition

(12) In this section:

active declared service has the same meaning as in section 152AR (disregarding subsection 152AL(7))."

51. The framework of Pt XIC establishes certain criteria that must be met before the Commission can accept a special access undertaking (pursuant to s 152CBC) and a number of obligations which apply thereafter. Notably, s 152CBD provides:

"(1) This section applies if a person gives the Commission a special access undertaking relating to a service.

(2) The Commission must not accept the undertaking unless:

(a) the Commission is satisfied that the terms and conditions referred to in paragraph 152CBA(3)(B) would be consistent with the obligations referred to in paragraph 152CBA(3)(a); and

(b) the Commission is satisfied that those terms and conditions are reasonable; and

(c) the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and

(d) the Commission has:

(i) published the undertaking and invited people to make submissions to the Commission on the undertaking; and

(ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking."

52. The reference to "reasonable" in s 152CBD(2)(b) in turn directs attention towards s 152AH, which establishes criteria that must be considered in the course of determining whether particular terms and conditions are reasonable. Section 152AH provides:

"(1) For the purposes of this Part [Part XIC], in determining whether particular terms and conditions are reasonable, regard must be had to the following matters:

(a) whether the terms and conditions promote the long−term interests of end−users of carriage services or of services supplied by means of carriage services;

(b) the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;

(c) the interests of persons who have rights to use the declared service concerned;

(d) the direct costs of providing access to the declared service concerned;

(e) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

(f) the economically efficient operation of a carriage service, a telecommunications network or a facility.

(2) Subsection (1) does not, by implication, limit the matters to which regard may be had."

These criteria, which include, but are not limited to, the LTIE, are not required to be established in any application under s 152ATA. In relation to applications under that section, attention is rather directed to s 152AB, which relates only to the LTIE.

53. A critical consequence of the acceptance of a special access undertaking under s 152CBA is that, pursuant to s 152AL(7), the [42708] service the subject of the undertaking is deemed a declared service. This in turn means that both the standard access obligations set out in s 152AR apply, and so does the general machinery of Pt XIC which attaches to the standard access obligations. This machinery includes:

- confidentiality obligations owed by the carrier or carriage service provider to an access seeker (s 152AYA);
- various enforcement rights, exercisable both by the Commission and by actual or prospective access seekers before the Federal Court (see ss 152BB, 152CD and 152EG);
- the ability of the Commission to give directions in any negotiations between an access provider and access seekers (s 152BBA), which are in turn enforceable in the Federal Court (s 152BBB);
- an ability for the Commission to act as an observer, mediator or arbitrator in relation to negotiations between access providers and prospective access seekers (whether pursuant to s 152BBC or, more generally, Div 8);
- that any provision of the special access undertaking that is inconsistent with any Ministerial pricing determination made pursuant to s 152CH (see further s 152CI) has no effect to the extent of the inconsistency; and
- section 152EF, which provides that a person subject to the standard access obligation must not engage in conduct "for the purpose of preventing or hindering" the fulfilment of the obligations or any other obligations imposed by the Commission pursuant to an arbitration process under Div 8.

Foxtel's s 87B undertaking and commitment to digitise

54. Foxtel's s 87B undertaking contains a conditional commitment to digitise, that is, to supply Digital Set Top Unit Services and a promise of access upon certain terms and conditions once digitisation had occurred. The undertaking includes the following defined terms of significance:

"***Commercial retail digital cable Subscription Television Service*** means a retail digital Subscription Television Service supplied using the Telstra HFC network in Australia but does not include a trial or test service

Commercial retail digital satellite Subscription Television Service means a retail digital satellite Subscription Television Service provided in Australia which uses 12 or more transponders but does not include a trial or test service

Digital Set Top Unit Services means:

(a) use of digital Set Top Units and customer cabling... controlled and used by FOXTEL, for the purpose of provision of a Subscription Television Service or Related Service; and

(b) the provision of Conditional Access Services; and

(c) the provision of Service Information Services; and

(d) the provision of smartcard authorisation verification information reasonably necessary for the access seeker to invoice its customers but limited to that information that can reasonably be produced by the Conditional Access system

For the avoidance of doubt, (a), (b), (c) and (d) must be taken together.

Final Order means:

(a) a written order made by the relevant statutory body pursuant to the Revised Legislation exempting a service provider from the access obligations that would be applicable to the service provider in relation to a service if the service were subject to an access regime and in respect of which no appeal is lodged and any applicable appeal

period has expired; or

(b) if an appeal is lodged, there is a final resolution of that appeal and any subsequent appeals in a way which permits the written order of the relevant statutory body referred to in paragraph (a) to take effect according to its terms.

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Revised Legislation means legislation enabling a service provider that provides a service, or expects to provide a service, to:

(a) apply for an exemption from the access obligations that would be applicable to that service provider in connection with that service if that service were subject to a statutory access regime and for the relevant statutory body to make an order exempting the service provider; and

(b) give a written access undertaking in connection with the provision of access to that service which sets out the circumstances in which the service provider agrees to provide that service and for the relevant statutory body to approve in writing of the undertaking.

Subscription Television Service means a content service that provides television programs to consumers in Australia where the service is:

(a) a subscription broadcasting service; or

(b) a subscription narrowcasting service."

55. Foxtel provides a commitment to digitise in cl 4 in the following relevant terms:

"4.1 Subject to this Clause 4, FOXTEL undertakes to supply Digital Set Top Unit Services in accordance with the terms in Schedule 2 to these undertakings from the date it commences supplying Commercial retail digital cable Subscription Television Services and to make available at least the following amount of capacity for such supply:

(a) 15% of the total capacity of FOXTEL to supply Digital Set Top Unit Services during the Simulcast Period; or

(b) 35% of the total capacity of FOXTEL to supply Digital Set Top Unit Services after the Simulcast Period,

based on the quantity of digital cable or digital satellite capacity that addresses the relevant STU. It is the responsibility of the access seeker to obtain an equivalent volume of digital cable or satellite carriage capacity as the case may be.

4.2 FOXTEL has no obligation to negotiate the supply of Digital Set Top Unit Services with an access seeker unless:

(a) the access seeker has arranged for the carriage of its digital Subscription Television Services and Related Service; or

(b) the access seeker has provided:

(i) where the access seeker's digital Subscription Television Service and Related Services are to be transmitted using Telstra's network:

(A) an application to Telstra for carriage of its digital Subscription Television Services and Related Services (which application has been accepted by Telstra); and

(B) a bank guarantee to Telstra as required pursuant to the application to Telstra for carriage of its digital Subscription Television Services and Related Services (which bank guarantee is acceptable to Telstra);

(ii) a confidentiality agreement to FOXTEL in the form of Annexure C;

(iii) a bank guarantee to FOXTEL as required pursuant to Schedule 2; and

(iv) a deposit of $50,000, in cleared funds, to FOXTEL which will be applied towards the access seeker's fees once it commences acquiring the Digital Set Top Unit Services or, if the access seeker does not commence acquiring the Digital Set Top Unit Services and asks FOXTEL to terminate negotiations, will be refundable to the access seeker with interest after FOXTEL deducts any reasonable costs incurred by FOXTEL,

and the access seeker has provided to FOXTEL, if requested, such proof of the access seeker's compliance with Clauses 4.2(a) or 4.2(b)(i) (as the case may be), as FOXTEL may require.

4.3 FOXTEL undertakes to notify the Commission three months before it commences supplying a Commercial retail digital cable Subscription Television

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Service. However, in the event that FOXTEL and Telstra have received Final Orders in accordance with Clause 5.1 nothing in this Clause 4.3 will prevent FOXTEL from commencing a Commercial retail digital cable Subscription Television Service prior to the expiry of the notice period, if it so wishes."

56. Under cl 5 of the undertaking, Foxtel committed to commence supplying a Commercial retail digital cable Subscription

Television Service and a Commercial retail digital satellite Subscription Television Service no later than 12 months (but not before 23 October 2003) after each of Foxtel and Telstra obtained a "Final Order" on acceptable terms (ie if subject to conditions, those conditions did not have a "material adverse effect" on the financial or operational assumptions underlying either Foxtel's or Telstra's decision to digitise). A "Final Order" was, in substance an order granting exemption under s 152ATA(3) that was not subject to review.

57. Clause 5 is relevantly in the following terms:

> "5.1 So long as the Revised Legislation commences prior to 31 December 2003 and there has been no Regulatory Change, FOXTEL will commence supplying a Commercial retail digital cable Subscription Television Service and a Commercial retail digital satellite Subscription Television Service no later than 12 months after the latter of the date on which:
>
> > (a) FOXTEL obtains a Final Order relating to its proposed digital cable and digital satellite Subscription Television Service for the duration of FOXTEL's Digital Access Undertaking (including any period of continuation of the Digital Access Undertaking pursuant to Clause 15.4) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in FOXTEL's reasonable opinion, not having a material adverse effect on the financial or operational assumptions on which the decision of either FOXTEL or Telstra to give the commitment to commence supplying the relevant service was made or on the extent of the exemption obtained under the Revised Legislation; and
> >
> > (b) Telstra Multimedia obtains a Final Order relating to its proposed digital cable subscription television carriage service for the duration of Telstra Multimedia's undertaking in relation to that service (including any period of continuation of Telstra Multimedia's undertaking) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in FOXTEL's reasonable opinion, not having a material adverse effect on the financial or operational assumptions on which the decision of either FOXTEL or Telstra Multimedia to give the commitment to commence supplying the relevant service was made or on the extent of the exemption obtained under the Revised Legislation,
>
> but in any event not before 23 October 2003.
>
> 5.2 FOXTEL undertakes to apply to the relevant statutory body for a Final Order for exemption relating to the digital cable and digital satellite Subscription Television Services under the Revised Legislation for the purposes of Clause 5.1 within 28 days of the Revised Legislation commencing.
>
> 5.3 If FOXTEL's application for a Final Order is rejected, FOXTEL will, as soon as reasonably practicable but no later than 2 months of the Commission advising FOXTEL of the reasons for the rejection, make a further application for a Final Order and a variation of the s 87B undertaking pursuant to s87B(2) based on a revised Schedule 2, if the variations required to Schedule 2 are acceptable to FOXTEL, acting reasonably."

Access was to be phased in over the course of the "Simulcast Period" (the period when both analogue and digital subscription television services were being provided), with 15% of available capacity to be made available during the Simulcast Period, and 35% thereafter. Schedule 2 contains a pro forma access agreement, setting out the terms and conditions of the access that Foxtel was undertaking to provide.

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58. Clause 13 provides:

> "For a period of 3 years from the date these undertakings take effect, the price of the FOXTEL Basic Package on FOXTEL's cable and satellite service will not exceed the price calculated in accordance with the following formula
>
> > Year 1 $47.95 plus CPI ($X)
> >
> > Year 2 $X plus CPI ($Y)
> >
> > Year 3 $Y plus CPI"

59. Clause 15 provides that the digital access undertaking contained in cl 4 was in force until 31 December 2007, unless extended by Foxtel until 31 December 2015. While it was terminable upon 12 months' notice during this extension period, the undertaking was otherwise only able to be withdrawn if the Final Order granted to either Foxtel or Telstra was varied, revoked or abrogated. Nonetheless, where Foxtel "is unable to comply with its obligations in these undertakings, or believes it is necessary to seek some modification due to changed circumstances", there was provision for negotiation in good faith with the Commission for a variation or revocation.

60. As can be seen by the emphasis on the obtaining of a Final Order and the definition of Revised Legislation, the undertaking was structured in anticipation of amendments to the Act, permitting both an exemption from the standard access obligations contained in Pt XIC and the provision of written access undertakings in relation to the provision of access. Further, cl 1.9 of the undertaking made it clear that Foxtel would be relying on the undertaking as to access contained in it and the terms of access as

a reasonable alternative to the standard access obligations and as a justification for the making of an exemption order. Accordingly, upon the introduction of s 152ATA, Foxtel applied for an exemption.

Foxtel's access agreement

61. The Digital Access Agreement scheduled to Foxtel's s 87B undertaking sets out the terms and conditions for access. Upon satisfaction of a number of conditions precedent, Foxtel agrees to supply to an access seeker the Digital Set Top Unit Services. This term is broken down in sch 1 to the Digital Access Agreement to various subsets of services, as follows:

> "Set Top Unit Services: 'The delivery of a digital Subscription Television Service which complies with the Interface Specifications from the Network Termination Point to the Subscriber's television or VCR using the Digital Subscriber Equipment for the purpose of provision by the Access Seeker of digital Subscription Television Services and Related Services to its Subscribers';
>
> CA Services: 'The services and Operational Procedures that allow a service provider to determine whether a Subscriber is entitled to receive a particular service through a Digital Set Top Unit using a smartcard';
>
> Service Information Service: 'The processing of information necessary to be received by a Digital Set Top Unit which, in addition to CA Information, permits the reception of a digital Subscription Television Service but does not include the content which forms the digital Subscription Television Service'; and
>
> Smartcard Authorisation Verification Information Services:
>
> > '(a) The provision of information to allow the Access Seeker to verify the Access Seeker's digital Subscription Television Service enabled on the Smartcard but only that information which can reasonably be produced by the FOXTEL Equipment to provide CA Services.
> >
> > (b) FOXTEL to provide this information on a monthly basis.
> >
> > (c) For the avoidance of doubt, the Access Seeker is not entitled to use or access the subscriber management system.'"

62. Clause 4.1(c) of the Digital Access Agreement provides that Foxtel is only obliged to supply, and continue to supply, Digital Set Top Unit Services:

> "(i) where the Digital Set Top Unit to which the Digital Set Top Unit Services are to be supplied is actually in use by a Subscriber for reception of FOXTEL's digital Subscription Television Services;
>
> [42712]
>
> (ii) as a total package and not as one or more component parts;
>
> (iii) where the Access Seeker's digital Subscription Television Service and Related Services are broadcast via satellite, provided that these are broadcast using the Satellite Network or otherwise using the same transmission configuration and same satellite orbital location as FOXTEL's digital Subscription Television Services;
>
> (iv) where the Access Seeker's digital Subscription Television Services and Related Services:
>
> > (A) are transmitted using the Telstra Network, provided that only Digital Set Top Units for cable are used; and
> >
> > (B) are transmitted using the Satellite Network, provided that only Digital Set Top Units for satellite are used; and
>
> (v) for so long as the Access Seeker's broadcast signal comprising the Access Seeker's digital Subscription Television Services and Related Services complies with the relevant Interface Specifications at each of the Interface Points (including the Network Termination Point).
>
> For the avoidance of doubt, in circumstances where the Access Seeker both enters into this Agreement in respect of part of the delivery of Subscription Television Services and installs or arranges for the installation of its own digital set top units in respect of other parts of the delivery of Subscription Television Services, then Clause 4.1(c)(iv) will not apply in respect of the Access Seeker's digital set top units."

63. Clause 4.2(a), however, excludes from the services to be supplied a number of services, including (in subcl (vi)) what is known colloquially as interactivity (discussed in further detail later in these reasons). Clause 4.2(a) is in the following terms:

> "The Access Seeker acknowledges and agrees that the Digital Set Top Unit Services do not include the provision by FOXTEL of
>
> > (i) Carriage Services up to the Network Termination Point (including LANs, WANs or any Carriage Services from, to and between all Interface Points);
> >
> > (ii) interconnection or interfacing with any points other than Interface Points;
> >
> > (iii) call centre services;

(iv) Subscriber management and related services (including billing);

(v) Electronic Program Guide services;

(vi) any Digital Set Top Unit functionality (other than decryption of the Access Seeker's digital Subscription Television Services and Related Services), including return path or interactive functionality;

(vii) dedicated access to any second or subsequent tuner and/ or hard drive in the Digital Set Top Unit;

(viii) access to or use of Flash Memory;

(ix) marketing;

(x) magazine and program guide listings; or

(xi) content creation playout or management.

..."

64. The access fee payable for acquisition of the Digital Set Top Unit Services is in accordance with a pricing methodology set out in Sch 3. This methodology was the subject of extensive submissions before the Commission and the Tribunal.

65. The methodology determines two cost pools − attributable costs and shared costs. Attributable costs, which are relatively small, are those arising directly from the provision of access to third parties and are charged directly to access seekers. Shared costs − being a combination of annualised future digital capital and operating costs and a mark−up for corporate overheads − are allocated between all users (including Foxtel itself) according to the benefit derived from the supply of the service, as assessed by revenue or ratings (whichever is the greater). The methodology provides for a deemed minimum rating of 0.25% of the total subscription television ratings.

66. Certain key principles underscored the price methodology put forward by Foxtel. The first is that pricing is to be based on a total service long−run incremental cost ("TSLRIC") methodology. In addition, the shared costs discussed included past expenditure on

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analogue STUs (referred to as installed base acquisition costs, or "IBAC"). Further, Foxtel proposed the use of the weighted average cost of capital/capital asset pricing model ("WACC" and "CAPM" respectively) to establish the cost of capital for its digital STU cost base. The parameters put forward by Foxtel resulted in an initial "vanilla" WACC of 17.08%. Finally, as with Telstra, the price determined by the Foxtel methodology is subject to upward movements in the CPI, as assessed on each anniversary of the date of execution.

67. Aside from these specific issues, the content of the Foxtel access agreement is not controversial with clauses concerning liability and indemnities, intellectual property rights, dispute resolution, force majeure and confidential information. With some minor exceptions, these provisions did not give rise to specific concerns before the Tribunal.

Telstra's s 87B undertaking and commitment to digitise

68. Like Foxtel's undertaking, Telstra's s 87B undertaking contains a conditional commitment to digitise and a promise of access upon certain terms and conditions once digitisation had occurred. In addition to the same definition for terms such as "Final Order" and "Revised Legislation", the undertaking included a definition of "Digital Subscription Television Carriage Service":

"a point−to−multipoint service for the carriage over Telstra Multimedia's HFC network of digital video broadcast signals associated with subscription television services."

69. Following a similar structure to the Foxtel s 87B undertaking, by cl 6.1, Telstra undertook to commence supplying a Digital Subscription Television Carriage Service no later than 12 months following the obtaining of an acceptable Final Order by both Foxtel and Telstra (but not before 23 October 2003). Pursuant to cl 6.4, Telstra also undertook to "supply a Digital Subscription Television Carriage Service in accordance with the terms in Schedule 2 to this undertaking if it commences supplying a Digital Subscription Television Carriage Service, other than a test or trial service". The Telstra undertaking was of the same duration as Foxtel's undertaking, with identical provisions concerning its extension, revocation and variation.

70. The following clauses in Telstra's s 87B undertaking are also relevant for present purposes:

"1.8 Telstra Multimedia is providing an undertaking in relation to a digital subscription television carriage service in reasonable anticipation that the Government will enact the Revised Legislation.

...

1.9 Telstra Multimedia will rely on the terms of Schedule 2 to this undertaking in any application to the relevant statutory body under the Revised Legislation for an order exempting Telstra Multimedia from the obligations that would apply to it if the Digital Subscription Television Carriage Service, or services of a substantially similar nature, were subject to a statutory access regime.

...

6.1 So long as the Revised Legislation commences prior to 31 December 2003 and there is no Regulatory Change, Telstra Multimedia undertakes to commence supplying a Digital Subscription Television Carriage Service no later than 12 months after the later of the date on which:

(a) FOXTEL obtains a Final Order in relation to a digital cable and a digital satellite subscription television service for the duration of FOXTEL's undertaking to supply a commercial retail digital cable subscription television service and a commercial retail digital satellite subscription television service (including any period of continuation of the FOXTEL undertaking) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in Telstra Multimedia's reasonable opinion, would not have a material adverse effect on the financial or operational assumptions on which any decision of Telstra Multimedia or FOXTEL to give the commitment to commence supplying the relevant service was made or on the extent of the

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exemption obtained under the Revised Legislation; and

(b) Telstra Multimedia obtains a Final Order in relation to a Digital Subscription Television Carriage Service for the duration of Telstra Multimedia's undertaking referred to in paragraph 6.1 (including any period of continuation of the undertaking pursuant to paragraph 7.3) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in Telstra Multimedia's reasonable opinion, would not have a material adverse effect on the financial or operational assumptions on which any decision of Telstra Multimedia or FOXTEL to give the commitment to commence supplying the relevant service was made or on the extent of the exemption obtained under the Revised Legislation,

but in any event not before 23 October 2003.

6.4 Telstra Multimedia undertakes to supply a Digital Subscription Television Carriage Service in accordance with the terms in Schedule 2 to this undertaking if it commences supplying a Digital Subscription Television Carriage Service, other than a test or trial service."

Telstra's access agreement

71. The pro forma access agreement scheduled to the Telstra undertaking, the Telstra Multimedia Access Agreement − Digital Services, is complicated in its structure. For present purposes, its key components are the General Terms and Conditions, Annex Five (being the digital channel allocation process) and the Digital Services Module.

72. The preface to the General Terms and Conditions sets out a "Simplified outline" which states:

"1. Telstra conducts the Digital Channel Allocation Process in accordance with Annex Five for the Available Digital Channels. If the Customer is allocated a Digital Channel it will be supplied Digital Services using that Digital Channel pursuant to the Digital Services Module. If the Customer is not allocated a Digital Channel, this Agreement will terminate.

2. Telstra has no obligation to supply the Digital Services until the conditions precedent set out in the Digital Services Module have been fulfilled, including the completion of any Enhancements and Extensions. The Customer must pay the annual charges for the Digital Services from the date that Telstra notifies the Customer that the Digital Services are available for acquisition.

3. Telstra supplies each Digital Channel in accordance with the Digital Services Module for the Digital Module Term. The Customer can elect to encode its own Customer Input Signal in certain circumstances via the Customer Encoding Election, otherwise Telstra will encode the Customer Input Signal. This Agreement expires at the end of the Digital Module Term unless renewed or terminated earlier."

73. The General Terms and Conditions set out provisions governing the relationship of the parties, billing and payment obligations, branding and intellectual property obligations, provisions concerning allocation of risk and limitations on liability, dispute resolution procedures and so forth. More detailed provisions relating to billing and payment are set out in Annex Two. Annex Three describes the operations, maintenance and fault procedures, while Annex Four contains the IT Systems interface procedures.

74. There are two digital channel allocation processes as set out in Annex Five. The first applies during the "Simulcast Period" − being the period during which both analogue and digital services are to be provided, and 15% of the total number of Digital Channels are to be made available for access seekers. For the purposes of this period, an auction process has been established. The Reserve Price for the auction is $750,000 per channel per year (increased to reflect inflation, on each anniversary of 1 October 2002). For the post−Simulcast Period, during which 35% of the total number of Digital Channels would be made available to access seekers, the auction process is no longer applicable. Instead, channels may be purchased upon application for the Channel Price, which is $750,000 per channel per year, subject to inflation. The "Simulcast End Date"

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is defined in Annex One (the dictionary of definitions) to be the date at which Telstra ceases carriage of Foxtel's subscription television signals in analogue mode on the Telstra HFC network on a commercial basis.

75. The Digital Services Module, which contains the substantive access provisions, contains a number of conditions precedent that must be satisfied before Telstra has an obligation to supply the Digital Services the subject of the agreement. The Digital Services Module also provides that Telstra "intends to activate Digital Channels on a per 8 MHz Stream basis [and] will usually delay activation of Digital Channels until at least 6 Digital Channels in each 8 MHz Stream have been allocated" (cl 1.27).

76. "Digital Services" are defined in Pt 1 of the Digital Services Module as "the digital subscription television broadcast carriage service described, and subject to the limitations set out in Part 2 of this Digital Services Module and any other service to be provided by Telstra under this Digital Services Module as part of that service". Clause 2.2 of Pt 2 sets out that description and limitations, providing:

> "The Digital Services comprise a digital subscription television broadcast carriage service, specified and subject to the limitations contained in the Digital Specifications, comprising:
>
> (a) if the Customer has not made, or has revoked, the Customer Encoding Election for a Supplied Digital Channel:
>
> (i) the receipt of the Customer Input Signal to be carried by that Supplied Digital Channel from the Customer at the relevant Interconnection Point;
>
> (ii) the creation of the Carried Signal from the Customer Input Signal;
>
> (iii) the point to multi−point carriage of the Carried Signal using that Supplied Digital Channel from the Headends over, and subject to the performance characteristics of, the Telstra HFC Network to each Network Termination Point.
>
> (b) if the Customer has made the Customer Encoding Election for a Supplied Digital Channel:
>
> (i) the receipt of the Pre−Encoded Input Signal from the Customer at the relevant Interconnection Point;
>
> (ii) the creation of the Carried Signal from the Pre−Encoded Input Signal;
>
> (iii) the point to multi−point carriage of the Carried Signal using that Supplied Digital Channel from the Headends over, and subject to the performance characteristics of, the Telstra HFC Network to each Network Termination Point; and
>
> (c) the point to multi−point carriage of the Service Information Signal from the Headends over, and subject to the performance characteristics of, the Telstra HFC Network to each Network Termination Point."

The Commission's decisions

Foxtel

77. Each application was granted subject to conditions. In the case of Foxtel, the Commission was concerned to ensure that the exemption granted was not broader than the access granted under its s 87B undertaking. This would have given rise to a lacuna, whereby Foxtel was exempt from the standard access obligations in relation to certain services in relation to which it would not be obliged to provide access. Particular concern had been expressed regarding interactivity, in relation to which the Commission said (at 70):

> "The issue before the Commission is whether to provide an exemption for subscription television services. It is ensuring that interactive services are not exempted, due to the lack of clear terms and conditions of access to such services. If it occurs that access to interactive services is important in its own right, or as a supporting service to subscription television, then this is a matter the Commission will need to consider in the future."

78. Accordingly, the Commission, in drafting its exemption order, included express limitations ensuring that it did not extend to interactive services.

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79. The Commission had concerns regarding the pricing methodology put forward by Foxtel. While the Commission accepted the basic framework underlying Foxtel's methodology, it did not accept certain of the WACC parameters included in that methodology. A condition of the exemption order was that certain parameters, such as the asset beta, debt margin and risk free rate, be changed, resulting in a lower WACC than that proposed by Foxtel.

80. The Commission also required the term of access provided under the Foxtel access agreement to run for five years (as distinct from five years less any time required to satisfy conditions precedent).

81. Other than these reservations, which the Commission considered could be addressed by appropriate conditions, the Commission concluded that "the price and non−price terms and conditions of access in Foxtel's Digital Access Agreement are likely to provide for effective access on reasonable terms and conditions". Accordingly, subject to the conditions and limitations

set out in its exemption order, the Commission accepted that providing Foxtel with an exemption order pursuant to s 152ATA(3)(a) of the Act would promote the LTIE.

82. In considering whether the grant of the exemption order to Foxtel would promote the LTIE, the Commission addressed the objectives referred to in s 152AB(2)(c) and (e) (par [46]). The Commission considered whether the grant of the exemption order would promote competition in the markets for carriage services and for services supplied by means of carriage services. The Commission considered that the likelihood of future regulation was an important issue for it to consider because the possibility of regulation under Pt XIC was removed by the granting of an exemption. The Commission stated (at 67):

> "[G]ranting an exemption should provide for greater certainty for access than leaving the issue to potential declaration. Granting an exemption at this time, with the modifications that are required to the section 87B undertakings, means that the terms and conditions of access are clearer for all parties at a significantly earlier time than leaving the issue to potential declaration after a further public inquiry ..."

Overall the Commission took the view that the non−price terms and conditions in Foxtel's access agreement provided an effective form of access having regard to the interests of access seekers and Foxtel. The Commission also took the view that the price terms and conditions were reasonable subject to certain conditions.

83. The Commission then considered whether providing Foxtel with the exemption order would encourage the economically efficient investment in use of infrastructure, as required by s 152AB(2)(e) and (6). Foxtel had submitted to the Commission that the key reason it was seeking an exemption order was to relieve it from regulatory uncertainty in relation to its future investment. The Commission found it difficult to determine how providing Foxtel with an exemption order would impact on the likelihood of it digitising. The Commission acknowledged that it may have been that Telstra would eventually digitise the HFC network and Foxtel invest in a digital subscription service regardless of the Commission's decision. However, the Commission regarded it as likely that the granting of the exemption order would result in a more timely investment decision as Foxtel and Telstra would have greater certainty on which to proceed.

84. Overall, and in conclusion, the Commission considered that the terms and conditions in Foxtel's access agreement provided an effective form of access subject to Foxtel agreeing to the Commission's modifications. Accordingly, it was the Commission's view that providing Foxtel with the exemption order would promote the long−term interests of end−users.

85. As noted earlier, it is no part of the Tribunal's task to identify error on the part of the Commission; rather the Tribunal is reviewing the two decisions *de novo*. However, as we have reached a different conclusion from that of the Commission we would point out that the finding that the Foxtel agreement provides an effective form of access does not address the question or issue whether exempting Foxtel from the standard access obligations is in the long−term interests of end−users. The approach

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of the Commission did not directly address the consequences to access seekers, and thereby end−users, of being denied the protection of the standard access obligations and the other procedures and protections found in Pt XIC and the extent of any disadvantages or detriment to access seekers arising out of the terms and conditions of Foxtel's access agreement.

Telstra

86. As with Foxtel, the Commission was concerned to ensure that any exemption granted was co−extensive with the access offered under Telstra's s 87B undertaking. Again, therefore, the Commission granted the exemption order, subject to certain conditions and limitations, including a limitation in relation to interactivity.

87. The conditions imposed by the Commission, however, were generally less significant than those required in the case of Foxtel. The Commission required that certain ancillary undertakings enjoy the same life as the substantive digital access undertaking. It also imposed a slight variation, which allowed for future price resets to reflect any changes to the usage of the HFC network. Again, the Commission required the term of access to run for five years (as distinct from five years, less any time required to satisfy conditions precedent).

88. Telstra had submitted to the Commission that the granting of an exemption order would provide access seekers and end−users with certainty regarding the introduction of a digital service and the terms and conditions upon which they could gain access to Telstra's carrier service. Again the Commission considered the likelihood of future regulation. What loomed large for the Commission was the fact that the terms and conditions of access were clearer at a significantly earlier time than leaving the matter to potential declaration. The Commission reached the same view in relation to Telstra's access agreement as it did in relation to Foxtel's access agreement, namely that it provided for effective access. What permeated the Commission's reasoning in relation to Telstra was that the granting of the exemption order would provide Telstra with certainty about terms and conditions upon which it would be required to provide access and that such certainty would provide Telstra with an incentive for investment.

89. As with Foxtel, the Commission took the view that the LTIE would be promoted by the grant of an exemption order in relation to Telstra. The Commission concluded:

> "Based on the view that the price and non−price terms and conditions in Telstra's digital access agreement provide for an

effective form of access, the Commission's view is that providing Telstra with an exemption order pursuant to section 152ATA(3)(a) of the Act would promote the LTIE."

Little, if any, attention was paid by the Commission to the detriments or difficulties associated with access contained in the Telstra terms and the corresponding protections given to access seekers if the standard access obligations were imposed upon Telstra.

The significant issues before the Tribunal

90. As the hearing developed and oral submissions elaborated on written submissions, it became apparent that there were a number of significant issues:

- the appropriateness of the Foxtel and Telstra applications pursuant to s 152ATA within the statutory framework which included specific provisions for approval of special access undertakings;
- assessment of the terms and conditions of access;
- the relevance and significance of interactivity;
- the meaning of the LTIE and the manner in which it was to be approached;
- Telstra's and Foxtel's pricing methodologies;
- assessing the future without the exemption order, including the likelihood of digitisation, and the admissibility of evidence under s 152AW(4).

Submissions by Seven Network

91. A threshold submission by Seven Network was that the Commission's decision to grant the exemption orders was in error as a matter of either jurisdiction, power or discretion. The basic premise of the argument was that it was inappropriate to 'exempt' services under s 152ATA on the basis of effectively accepting an access undertaking that more properly should be considered by [42718] reference to s 152CBA and its associated provisions.

92. Accordingly it was submitted that, on the proper construction of Pt XIC, the power to grant an exemption on conditions cannot be exercised in the manner it had been exercised by the Commission, and could not be so exercised by the Tribunal, because to do so circumvented the intended statutory protections in relation to approval of particular access undertakings.

93. Seven Network's further submissions in relation to Foxtel may be conveniently summarised as follows:

- Foxtel was likely to digitise in the near future and accordingly there was no need or justification for the exemption order as no certainty was required before the digital service was launched.
- The requirement that an access seeker could only be connected to an end−user that was taking Foxtel's Basic Package was disadvantageous to access seekers and was not reasonable or in the long−term interests of end−users.
- The granting of an exemption order had the result that Seven Network did not have access to interactivity regimes whereas Foxtel did and this would unfairly disadvantage Seven Network.
- There were defects in Foxtel's pricing methodology and calculations upon which access prices were based. In particular the figures selected for IBAC and the WACC were inappropriate and not reasonable.
- There was an issue as to whether the term of access was adequate.
- The period for which access was given which excluded access seekers from the opportunity to obtain access under Pt XIC of the Act was not in the interests of end−users or access seekers. The initial period of access was five years but Foxtel had the option to extend the period of the agreement until 2015.

94. Seven Network's submissions in relation to Telstra were, that the exemption order was not in the long−term interests of end−users for the following reasons:

- Foxtel and Telstra were in fact seeking to have the terms of their access agreements approved in terms where they could not be varied by any obligation under the standard access obligations so that the more appropriate application to have been made was an application pursuant to s 152CBA and not s 152ATA of the Act.
- Foxtel and Telstra were likely to launch a digital service in the near future so that an order pursuant to s 152ATA was unnecessary and not required as the digital service would be launched whether or not the exemption was granted.
- Telstra's access price was not in the long−term interests of end−users because the wrong methodology had been adopted and insufficient allowance had been made in determining the costs from which the access price was to be derived for the costs of the telephony defence.

- The same range of services that were available from Telstra to Foxtel should be available to all other access seekers, but this would not occur if the exemption order was made because of the exclusion of the opportunity for interactivity that was available to Foxtel. Interactivity would not be available to access seekers under the agreements that were scheduled to the s 87B undertakings.
- The initial term of access granted by Telstra, five years, was inadequate for any access seeker to attain an adequate return.
- The possible duration of access in accordance with the s 87B undertaking and scheduled agreement would, at the option of Telstra, last until 2015 and this was too long a period for access seekers to be locked into a situation where they could not get the benefit of changing technology.

Threshold issue

95. Seven Network submitted that the threshold issue of jurisdiction was that the Commission and the Tribunal had no jurisdiction to entertain an application under s 152ATA for exemption in relation to what was essentially an application for approval of a private set of access terms and conditions. It submitted that it would be a circumvention of

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the statutory scheme to use the provisions of s 152ATA for the purpose of approval of access terms. Seven Network developed this submission by submitting that if what was being offered was an access undertaking then the undertaking had to be proffered subject to the conditions laid down in Pt XIC of the Act which included the package of provisions that commenced with s 152CBA which would govern in relation to any application for the approval of the terms of access. This was important because when one adopts, and follows through, the s 152CBA process it becomes apparent that the standard access obligations are to apply where an undertaking is given as to access.

96. Seven Network also contended that the general power of the Commission to accept undertakings pursuant to s 87B, which was the only power available in 2002 to accept an undertaking that extended to access, had been supplanted by more particular statutory provisions intended to govern issues of access in the telecommunications field.

97. Seven Network contended that in 2002 the amending Act introduced two companion mechanisms, each of which had the same purpose of providing certainty for potential investors in relation to the applicability of the standard access obligations. The first mechanism (pursuant to s 152ATA) was to apply where complete quarantining was sought from access obligations altogether or in some particular respect or in some particular geographic region or for some particular time period, but exemption was aimed at the situation where there was to be either no access at all or access only to a limited extent.

98. The companion mechanism (pursuant to s 152CBA) was that of undertakings as to access that were aimed to give certainty as to the terms and conditions of access as the provision shows and as the Explanatory Memorandum stated.

99. We do not accept that the grant of an exemption order in favour of Foxtel or Telstra would be a use of the power conferred by s 152ATA for a purpose not contemplated by or found in the statute. An exemption order under s 152ATA may take a number of forms. It can be a blanket exemption without conditions or, pursuant to s 152ATA(4), it may be subject to such conditions or limitations as the Commission may specify. In the present circumstances Telstra and Foxtel do not wish to be constrained by the standard access obligations. In particular, they did not wish to be subjected to the machinery attaching to the standard access obligations.

100. Section 152ATA is expressed in general terms and the only specified criterion to be satisfied is that the making of the order will promote the long−term interests of end−users. In these circumstances it is open to a carrier to apply for an exemption and we do not consider that the present application is for an improper purpose. However, an issue arises as to the relationship between the provisions and scheme of s 152ATA and the provisions and scheme of s 152CBA and their associated sections. Is it in the long−term interests of end−users to have an exemption granted under s 152ATA or is it more in their interests for an access undertaking or scheme to be proffered pursuant to s 152CBA? Which statutory mechanism is more suited to a determination or order that sets out access conditions that are premised on an affirmative view that the conditions are in the long−term interests of end−users?

101. We consider that it is the statutory mechanism applying to an application under s 152CBA, rather than an application under s 152ATA, which is more suited to an application that requires consideration of the suitability or adequacy of conditions of access to a carriage service or a carriage service provider. An application under s 152CBA focuses directly on the core key issue, namely, the access conditions. By way of contrast, an application under s 152ATA focuses upon the extent to which an exemption from an obligation to comply with the standard access obligations will be in the long−term interests of end−users. In such a framework or context any consideration of the suitability, adequacy or reasonableness of the conditions of access to the service is derivative and not a primary consideration.

102. This is not to say that the Commission and the Tribunal should not consider applications pursuant to s 152ATA such as have been made by Foxtel and Telstra. They should

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do so, but they should be particularly vigilant in focusing on the key criterion − is the order exempting the applicants in the

long−term interests of end−users? That is a different focus from one that considers the reasonableness of conditions of access. In the present reviews Foxtel and Telstra focused on the reasonableness and adequacy of the conditions of access found in the agreements scheduled to their s 87B undertakings and the terms of the undertakings rather than upon the reason why the granting of an order exempting Foxtel and Telstra from an obligation to comply with the standard access obligations would promote the long−term interests of end−users. To the extent to which they relied upon the immediate access that would be available on the making of the order for access, they did not give significant consideration to the effect of the exemption order on, and the consequences of that exemption for, end−users or whether such exemption order was in their long−term interests.

103. To the extent that Foxtel and Telstra gave consideration to the long−term interests of end−users they relied upon the certainty that would exist in relation to the terms upon which access would be given to the digital network. In that respect they were addressing the objective in s 152AB(2)(e) of encouraging the economically efficient use of, and the economically efficient investment, in their infrastructure. However, as we address later in these reasons the orders for exemption would not facilitate such investment and use because the investment was being made without waiting for the final outcome of any review or appeal in relation to the applications for exemption.

104. Seven Network submitted in the alternative that any access undertaking offered must be subject to the conditions laid down in Pt XIC in the package of provisions that commenced with s 152CBA as the effect of that package was to apply the standard access obligations where an undertaking was given as to access. It was submitted that in such circumstances there was no power to accept an undertaking under s 87B of the Act as an alternative route to avoid the statutory protections contained in Pt XIC.

105. Seven Network made a further alternative submission that Telstra and Foxtel had not made out a case that addressed the question why it was in the long−term interests of end−users for access to be provided in a manner that was shorn of the statutory protections found in s 152ATA in relation to the standard access obligations.

106. The final submission was again put in the alternative to the effect that the Tribunal had a discretion to refuse an application when an exemption regime was used to proffer a method of access that was devoid of statutory protection.

107. There is no substance in the argument that the Commission had no power to accept the access undertaking under s 87B of the Act at the time it did. At the time that undertaking was proffered and accepted Pt XIC of the Act had not been amended to include the provisions found, *inter alia*, in ss 152ATA and 152CBA.

108. Seven Network repeatedly emphasised that the critical question had not been addressed by Telstra or Foxtel. That critical question was whether it was in the long−term interests of end−users that the statutory protections found in the standard access obligations be removed and not be available to any access seeker in the access that was proffered by Telstra and Foxtel. There is merit in Seven Network's submissions. Most of Foxtel and Telstra's submissions and material (as were the Commission's determinations) was directed to the proposition that the terms of access offered by Foxtel and Telstra in their s 87B undertakings were in the long−term interests of end−users and that they were as good as would be granted under any access regime created under the Act. However, it must be recognised that s 152ATA(6) requires the Commission to be affirmatively satisfied that the making of the order will promote the long−term interests of end−users. The making of the order sought is an order for exemption from the standard access obligations and it is that matter which, in all the circumstances, must be in the long−term interests of end−users. The point is not whether the access conditions proposed by Telstra and Foxtel are in the long−term interests of end−users but, whether there are other (favourable) consequences of exemption such that the

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abrogation or withdrawal of the protection provided by the standard access obligations, by way of exemption from those obligations can be justified having regard to the proposed access conditions.

109. The focus of the Commission and the Tribunal must be upon the fact that it is the exemption from the standard access obligations that will promote the long−term interests of end−users. This is made clear by the provisions of s 152AB of the Act, particularly in subs (2). It is made clear that it is a "particular thing" that is to promote the long−term interests of end−users. In the particular cases before the Tribunal, the "particular thing" is the making of an order exempting the carrier or carriage service provider from all the standard access obligations. Accordingly, it is necessary to ask whether the exemption from those obligations will achieve the objectives set out in subs (2) of s 152AB. Examining the terms and conditions of access provided for by the undertakings is part, but only part, of an assessment of all the circumstances that would apply were an exemption to be granted and thus of whether the exemption was in the LTIE.

110. Seven Network relied upon the principle that where a statute confers a power upon a body that is intended to be exercised only for a particular purpose, then the exercise of the power not for such purpose but for some ulterior object will be invalid: *R* v *Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170 at 186. We do not consider that there is any room for the application of this principle in the present circumstances. It was always intended in the overall arrangement that was entered into with the Commission that there be applications for exemption. In any event, the purpose of the applications was not to lay down an access regime, this having been, in effect, sanctioned by the Commission when it accepted the s 87B undertakings. Rather, the purpose of the applications was to gain exemption for Foxtel and Telstra from the standard access obligations. It so happens that part of their case for such exemption was to rely upon the earlier undertakings. We do not consider there was any improper

purpose in applying under s 152ATA. In this context we also observe that under the s 87B undertakings access was not only contingent upon the exemption application being granted but also became available upon Foxtel and Telstra commencing digital transmissions even in the absence of the exemption application being granted.

111. Seven Network also relied upon the principle that where the Parliament explicitly gave a power by a particular provision that prescribed the mode in which it was to be exercised and the conditions and restrictions upon its exercise, the existence of such a provision excluded the operation of general expressions in the same instrument that might otherwise have been relied upon for the exercise of the same power: *Anthony Hordern & Sons Ltd* v *Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *Refrigerated Express Lines (A'asia) Pty Ltd* v *Australian Meat and Livestock Corporation* (1980) ATPR ¶40−156 at 42,228−42,229; (1980) 29 ALR 333 at 347; *Leon Fink Holdings Pty Ltd* v *Australian Film Commission* (1979) CLC ¶40−553 at 32,254−32,255; (1979) 141 CLR 672 at 678; *David Grant & Co Pty Ltd* v *Westpac Banking Corporation* (1995) 13 ACLC 1,572 at 1,578; (1995) 184 CLR 265 at 276.

112. We do not consider that there is such a relationship between the provisions in s 152ATA and associated sections and s 152CBA and following sections. Although s 152CBA prescribes a regime to be followed if a party wishes to obtain approval for an access undertaking, the party has the opportunity to go along the s 152ATA route. The regime found in s 152ATA is not a regime which can be regarded as a more general provision. Whether or not it is appropriate for a party to obtain approval for terms of access to a listed service by going down the s 152ATA route in the manner that Foxtel and Telstra have done is a matter that requires consideration of the merits of the applications. It is not a matter, however, of saying that an application under s 152ATA for exemption from the standard access obligations is foreclosed to Foxtel and Telstra simply because one of the factors upon which they rely for the exemption is that they have an existing access regime in place. We will address separately the issue whether in the circumstances of this case it is in the long−term interests of end−users for an exemption to be

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given under s 152ATA where one of the grounds for supporting the exemption is that there is in place already an access regime, albeit not one propounded through the recent introduction of s 152CBA into the legislation.

113. It was put by Seven Network that the operation of s 152ATA of the Act was repugnant to the particular provisions governing approval of access arrangements found in s 152CBA of the Act.

114. Section 152ATA and s 152CBA cover quite different areas and each section starts from a different premise. We do not consider there is any repugnancy in relation to s 152ATA and s 152CBA in the manner submitted by Seven Network. See generally *Downey* v *Trans Waste Pty Ltd* (1991) 172 CLR 167 at 181. As noted earlier the two statutory provisions refer to, and contemplate, different scenarios and different propositions. Indeed, the statutory criteria that need to be satisfied in the two cases are quite different. In relation to an application under s 152ATA the governing criterion is that the Tribunal must be satisfied that the exemption sought is in the long−term interests of end−users. In an application under s 152CBA, there are different criteria to be satisfied that are set out in subs (2) of s 152CBD. One can conceive of an application for exemption failing under s 152ATA where there was an underlying access arrangement propounded but an application for acceptance of a special access undertaking, based on exactly the same access arrangement, succeeding under s 152CBA. The consequence of an application succeeding under s 152ATA is that the standard access obligations are excluded either in whole or in part, whereas in an application under s 152CBA, the standard access obligations are embraced and other criteria, such as reasonableness, are applied to the access conditions.

115. We note in passing that the chronology of events in this matter is such that there was never a point of time where there was competition between the giving of the s 87B undertakings and an application under s 152CBA. At the time the s 87B undertakings were entered into, the context was the resolution of a content supply issue which had arisen between Foxtel and Optus, so that it was well within the power of the Commission to accept undertakings. It is true that the revised legislation was either expected, anticipated or imminent but it was not part of the legislative scheme at the time the s 87B undertakings were proffered and accepted. Even if a provision like s 152CBA had been in existence at the time the s 87B undertakings were given, that provision would have been an inappropriate vehicle for the resolution of the content supply issue that had been the catalyst for the undertakings given under s 87B.

116. Further, it is clear that the intention of the parties and the Commission was that an application for an anticipatory exemption order would be lodged, and not a special access undertaking. This is the case notwithstanding that the definition of "Revised Legislation" appears to encompass either option. As early as 5 July 2002, when Foxtel was making a presentation to the Commission concerning its proposed s 87B undertaking, it was clear that an exemption application was contemplated on the basis of the digital undertakings.

117. It follows that we reject the submission that the Commission had no jurisdiction or power to hear and determine the applications under s 152ATA. However, as noted earlier, we do take the view that the statutory regime under, or in relation to, s 152CBA is more suited to dealing with a situation of approving the terms of an access undertaking, than is the regime under s 152ATA. The difficulty with s 152ATA is that the primary beacon or touchstone to be considered is whether the exemption sought is in the long−term interests of end−users. As we have observed earlier, any consideration of the terms of access is derivative and not directly addressed by that question. Conversely, with s 152CBA the issue of the terms of access is dealt with

directly and in a manner addressed by the statute which is not a manner found under s 152ATA. By contrast, the Commission considered it necessary to import concepts such as "effective" and "reasonable" that are not to be found in s 152ATA.

118. We reject the contention that an application under s 152ATA for exemption is to be refused simply because there is underlying it an aspect of approval of access conditions. It

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may however, be the case that when the Commission or the Tribunal is considering an application for exemption from the standard access obligations under s 152ATA, as we have found in this matter, it is very difficult to address the suitability or adequacy of access conditions within the framework of the requirements of s 152AB, which develops the statutory criterion of the long−term interests of end−users.

Long−term interests of end−users

119. We accept that the "future with and without" approach provides helpful guidance in applying the LTIE test. In making this assessment we are guided by the fact that, in the words of s 152AB(2), the "particular thing" that is before us is the granting of the exemption applications and not, for example, the terms of access offered by Telstra and Foxtel. However, it should be noted that the "future with and without" test requires the forecasting of future market behaviour, competitive activity and market conduct in a particular area or region and the development of an investment. But the answer to the application of that two−fold enquiry (the future with and without the exemption) is not the ultimate or final answer to the issues posed. That answer must be couched in terms of an appropriate degree of satisfaction that the making of an order exempting each of Foxtel and Telstra from the standard access obligations in s 152AR will promote the long−term interests of end−users of the services they provide. This degree of satisfaction is reached by applying the future with and the future without test, that is to say we compare the future situation with the exemption orders having been made with the future situation without the exemption orders having been made. We then ask the question: which situation is in the LTIE; *cf Re Queensland Independent Wholesalers Limited* (1995) ATPR ¶41−438 at 40,960−40,961; (1995) 132 ALR 225 at 276.

120. Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary, in our view, to take the following matters into account when applying the touchstone − the long−term interests of end−users:

- **End−users:** in this matter, "end−users" include actual and potential subscribers to subscription television services and other viewers in their households. The term is also likely to include businesses, such as hotels and other places where people congregate, that subscribe or may potentially subscribe to subscription television services;
- **Interests:** the interests of end−users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. In our view, this would include access to innovations such as interactivity in a quicker timeframe than would otherwise be the case; and
- **Long−term:** the long−term will be the period over which the full effects of the Tribunal's decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the subscription television industry) to adjust to the outcome, make investment decisions and implement growth − as well as entry and/or exit − strategies.

121. In considering how these elements may combine, it may be the case, for example, that very low prices are in the short−term interests of end−users. Over the long−term, however, sustainably low prices (which may be higher than the "very low prices" referred to above) are more likely to enhance their interests, as the long−term interests of end−users are likely to suffer in an environment characterised by short−lived operators who fall over soon after the customer signs with them, as distinct from one in which reliable service−providers offer competitive, but sustainable, services. Moves that enhance the quality and diversity of service may be subject to a similar analysis.

122. The use of the "long−term" may also assist in resolving the apparent tension between the criteria in s 152AB(2)(c) and (e). For example, action that promotes competition in the short−term may deter investment and hence, over the longer−term, competition may lessen (resulting in reduction to efficiency and innovation). Moreover, an action may promote competition at the retail level (resulting in more channels offered by more operators), but may

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deter facilities−based competition, with fewer service providers being prepared to establish delivery mechanisms of their own than would otherwise be the case. Assessed over the long−term, however, there is less likely to be any conflict between the promotion of competition and efficiency. Nonetheless, to the extent that there are mixed effects, we will have regard to the overall or net effect.

Promoting competition and encouraging economically efficient use and investment

123. It was put to us that the earlier decision in *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 ("*Sydney Airports*") provided assistance in interpreting the "promotion of competition" criterion. In *Sydney Airports*, a review of a decision to declare a facility pursuant to Pt IIIA of the Act, it was stated (at par [106]):

> "The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration."

124. In our view, this description is apt for the criterion established under s 152ATA(6) and s 152AB(2)(c). In addition, we consider that this description is equally applicable to assessing whether the "particular thing" encourages economically efficient use of, and investment in, infrastructure pursuant to s 152AB(2)(e).

125. It was put before both us and the Commission that, in relation to the applications by Telstra and Foxtel, it was possible to assess whether competition was promoted within the terms of s 152AB(2)(c) without reaching a conclusion as to market definition. This view is arguably reflective of the position of the Commission as set out in its Declaration Guidelines, where it is stated (p 42):

> "In identifying relevant markets, Part XIC of the Act does not require the Commission to take a definitive stance on market definition. Furthermore, over time, declaration itself might affect the dimensions of these markets, particularly in relation to the functional dimension. Accordingly, market analysis under Part XIC should be seen in the context of shedding light on how declaration would promote competition rather than in the context of developing 'all purpose' market definitions."

In the absence of detailed submissions as to the appropriate markets, we note the position of the Commission in its decisions. In the Foxtel decision, for example, the Commission stated (at p 63):

> "The Commission is of the view that it is not necessary to form a view regarding the exact boundaries of the relevant market(s) because the Commission's assessment of whether providing Telstra and Foxtel with an exemption order is primarily based on an assessment of whether the terms and conditions of access in the access agreements are effective. Therefore the Commission is of the view that forming a view about the definition of relevant market(s) will not affect the Commission's conclusions about whether it would promote the LTIE to provide Telstra and Foxtel with exemption orders pursuant to section 152ATA(3)(a) of the Act."

126. In our view, however, if one is to assess whether a "particular thing" promotes competition in a market, one must have at least formed a general view as to the market in question. We therefore propose to assess the effect of granting the respective exemption orders on competition in the market for the provision of subscription television services. In the absence of guidance from the parties or the Commission on this issue, this may at best be described as a 'working' market definition.

127. In assessing whether granting the exemption orders would promote competition, we must be open to a consideration of different forms of competition other than those suggested by Seven Network. It would be inappropriate to assume that Seven Network necessarily

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represents all or even typical access seekers. Even if we were to consider that granting the exemption orders would not promote the type of competition that may be posed by Seven Network, this does not necessarily mean that competition, as represented by alternative business models, more generally will not be promoted. Nonetheless, we agree with the Commission's approach of considering competition in terms of rivalrous behaviour. We adopt with respect, as did the Commission in its Declaration Guidelines, the statement by the Trade Practices Tribunal in *Re Queensland Co−operative Milling Association Ltd, Defiance Holdings Ltd* (1976) ATPR ¶40−012 at 17,246; (1976) 25 FLR 169 at 188−189:

> "In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price−product−service packages offered to consumers and customers.
>
> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate ..."

128. Accordingly, if a "particular thing" (cf s 152AB(2)) facilitates the entry into the market of a particular product or service with a limited appeal to the market, there is little promotion of competition because there will be little change in purchasing habits. What would promote competition would be a situation where a new product or service was seen to be a viable option to purchase in place of or in addition to a product or service acquired hitherto.

129. This criterion requires first the assessment of the likely impact of the "particular thing" on the prospective use of, and investment in, the infrastructure by which listed services are supplied whether by the access provider, other potential access providers or access seekers. We accept the Commission's analysis of this criterion in its Declaration Guidelines, but would add that consideration should be given to signals for future unrelated investment. At the hearing little attention was paid to the economically efficient use of infrastructure; rather, the parties concentrated their attention on investments in infrastructure.

130. Encouraging investment by access providers may be at the expense of investment by access seekers that would otherwise

occur. Efficient investment, however, implies the right mix. That is, efficient outcomes mean that optimal buy/build decisions are being made, as assessed from the perspective of end−users. By "optimal" is meant providing the best outcome in terms of prices, quality and diversity.

131. Where an application is made for an exemption order and the basis for it involves the determination of the acceptability of conditions of access including price of access it is necessary to balance and evaluate the relative weight of the objectives in s 152AB(2).

132. The key to ensuring an optimal mix of building, as against buying access to, infrastructure is (where regulated) the imposition of an appropriate access price. Ascertaining an appropriate price is a direct product of the LTIE test. That is, regulated access prices must promote the LTIE. This will be achieved by sending the right signals for investment and the use of (whether "buying" or building) infrastructure. The right signals means prices that will allow sound investments to make a reasonable, but not excessive, return.

133. This approach, however, is not to guarantee an investor’s return. A well−based investment may yet fail as a consequence of changes in circumstances since the time of the investment decision; for example, new technology may result in lower demand (and hence lower price) for the investment in question. A sound investment may even fail in the absence of a change in circumstances; despite prudent planning, the expectations as to market take−up may never be met, and the lack of demand renders the investment unprofitable.

134. Furthermore, caution must be exercised to ensure that the access price attaching to infrastructure is not excessive, as this would be unlikely to encourage efficient use of investments. Where certain infrastructure has excess capacity but is overpriced, further investment in infrastructure (designed to avoid the excessive access price) may not − from an end−user’s perspective − be efficient.

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Accordingly, a balance must be reached between allowing a reasonable, but not excessive, return to access providers. Reaching this balance will assist in encouraging both the efficient use of, and investment in, infrastructure. Such balance, in turn, is likely to promote competition in the long−term.

135. In our view, there are some basic pricing principles that should be observed in applying the LTIE test. In considering these principles, we are in general agreement with the approach established by the Commission in its guide to Access Pricing Principles − Telecommunications (as published in July 1997). In our view, key principles include:

- The price of a service should not exceed the minimum costs that an efficient firm will incur in the long−run in providing the service.
- The costs are the forward−looking costs, including a normal return on efficient investment (which takes into account the risk involved).
- Forward−looking means prospective costs using best−in−use technology. The access provider should only be compensated for the costs it would incur if it were using this technology, not what it actually incurs, for example in using out−of−date technology which is more costly. Of course, a firm may be using older technology because it was the best available at the time the investment was made and replacing it cannot be justified commercially. In a competitive market, however, that firm would only be able to charge on the basis of using the most up−to−date technology because, if it did not (in this hypothetical competitive market) access seekers would simply take the service from an alternative service provider.
- The cost of providing the service should be the cost that would be avoided in the long−run by not having to provide it. Thus, it is the additional or incremental costs necessarily incurred, assuming other production activities remain unchanged. In this matter, it assumes that Telstra and Foxtel would be providing subscription television services to subscribers.

136. This version of cost−based pricing is known as "total service long run incremental cost" ("TSLRIC"). It includes operating and maintenance costs, a normal commercial return (moderated by the risk involved) and a contribution to common costs. In our view, in the general case where access prices need to be regulated, unless pricing is on a TSLRIC basis, efficient investment is unlikely to be encouraged. This, in turn, would fail to promote competition in the long−term, as end−users would not be able to benefit from new investment (thereby also missing out on more efficient and diverse product offerings). It is always the case that once an investment is made and sunk (it cannot be undone and the money recovered by selling the infrastructure as "parts" or scrap), it is unnecessary − strictly speaking − to charge anything more than marginal cost to ensure the investor stays in business. After all, the investor is better off receiving its marginal costs rather than closing down. Such an approach, however, disregards the signals sent to other prospective investors who, if observing enforced marginal−cost pricing, are less likely to invest in the future.

137. This discussion should not be taken to suggest that TSLRIC pricing should be imposed at every opportunity. It will often be the case that regulation, including regulated pricing, is not appropriate in given circumstances. It does mean, however, that, in our view, it would generally not be in the LTIE to depart from TSLRIC pricing where access is regulated. Accordingly, where an access regime requires, or creates an unacceptable risk, of non−TSLRIC pricing, the Tribunal considers that such a regime is

unlikely to encourage the efficient use of, and investment in, infrastructure.

138. In considering the exemption applications we:

- consider the "future with and without" the exemptions;
- assess the extent to which each respective exemption order will promote competition, in markets for listed services;

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assess the extent to which each respective exemption order will encourage the economically efficient use of, and economically efficient investment in, infrastructure; and

- to the extent there are likely to be mixed effects, consider what is likely to be the overall or net effect.

Assessing the future without an exemption order: articulating the counterfactual

139. A key issue before the Tribunal is the question whether, absent an exemption under s 152ATA, Foxtel and Telstra would digitise and, if so, when. The expressions "digitise" and "digitisation" are used in these reasons:

- in the case of Telstra, to describe Telstra's commencement of the supply of a Digital Subscription Television Carriage Service; and
- in the case of Foxtel, to describe Foxtel's commencement of the supply of the use of digital Set Top Units and customer cabling, controlled and used by Foxtel for the purpose of the provision of a subscription Television service or Regulated Service and the provision of associated services.

It was common ground that since the date of the Commission's decision in December 2003, digitisation had in fact occurred (notwithstanding that the Commission's decision did not constitute a "Final Order" as defined by the undertakings). Nonetheless, the evidentiary limitations imposed upon the Tribunal by reason of s 152AW(4) were said by Foxtel and Telstra to prevent the Tribunal from having regard to this fact.

140. Section 152AW(4) provides:

"For the purposes of a review, the Tribunal may have regard only to:

(a) any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates; and

(b) any other information that was referred to in the Commission's reasons for making the decision to which the review relates."

141. Under s 152AXA, the Commission, in making a decision and publishing its reasons under s 152ATA, is required to specify the documents it examined in the course of making the decision. This approach was not adopted in the present case, although appended to each final decision was a list of submissions made by Telstra and Foxtel.

142. While there was considerable debate as to whether certain documents − for example, those mentioned in footnotes in submissions to the Commission − fell within the scope of s 152AW(4), there was no doubt that as at the date of the Commission's decision, digitisation had not occurred. Accordingly, Telstra and Foxtel submitted that the Tribunal was not entitled to take into account the fact that Telstra had commenced supplying a Digital Subscription Television Carriage service and that Foxtel had commenced to supply digital Set Top Units for the purpose of the provision of a Subscription Television Service in March 2004 in reaching its decision. By contrast, counsel for Seven Network submitted that there were grounds to read s 152AW(4) down in the present circumstances; alternatively, it was suggested that the Tribunal could exercise its powers under s 152AW(3), and request that the Commission provide a report to the Tribunal concerning the current status of digitisation. Telstra and Foxtel submitted, however, that it would be inappropriate to use s 152AW(3) to subvert the legislative intention underlying s 152AW(4).

143. Although the present applications give rise to a degree of artificiality in relation to the manner in which we should approach the issue of whether digitisation was likely to occur at any particular time, as at the date of the publishing of the Commission's determinations, namely 12 December 2003, the legislative intent of s 152AW(4) is clear. The Tribunal is to be limited to a consideration of whatever was available to the Commission at the time of the making of its decision. The legislative prescription is underlined by the use of "only" in the sentence identifying the material to which the Tribunal "may have regard".

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144. The fact that digitisation occurred in March 2004 is not a matter that falls within the categories of "information given" to the Commission in connection with the making of the decision, nor is it contained in "documents produced" to the Commission in connection with making of the decision, nor does it form part of the "evidence given" to the Commission in connection with the making of the decision. Further, it does not fall within the category of "other information" that was referred to in the Commission's reasons. The most that can be said is that on 11 December 2003 Foxtel sent a letter by email to the Commission informing it that Foxtel "currently intends" to commence the supply of the commercial retail digital cable subscription television

service on "8 March 2004" conditionally on Foxtel and Telstra obtaining exemption orders pursuant to s 152ATA of the Act. If "digitisation" had in fact commenced on that day, namely 8 March 2004, it is arguable that that was information given to the Commission in connection with the making of the decision and that the Tribunal was entitled to look at that date and see what in fact happened. However, digitisation did not occur on that date but somewhat later, albeit shortly, on 14 March 2004. That was not information given to the Commission at the time of its decision, nor was it information referred to in the Commission's reasons.

145. There is nothing in the Explanatory Memorandum that requires, or compels a different approach to s 152AW(4). The Explanatory Memorandum states:

> "The substantive amendments to section 152AW are to limit the information and evidence that the ACT may consider on a review to the information and evidence that was before the ACCC in making the original decision and to specify a 6−month period in which the ACT is to make a decision on review. ...
>
> Proposed subsection 152AW(4) limits the information to which the ACT may have regard on review to the information given, documents produced or evidence given to the ACCC in connection with the decision to which the review relates and any other information referred to in the ACCC's reasons for making the decision. This will mean that an applicant will not be able to put information, documents or evidence to the ACT for consideration in reviewing the decision of the ACT [*sic*] that was not first put before the ACCC, however, any information given to the ACCC by a person in relation to the original decision by the ACCC will be before the ACT on review."

146. It was in the light of that clear legislative prescription that the presiding member of the Tribunal did not accede to the suggestion that he exercise the power given to him by s 152AW(3) and require the Commission to give to the Tribunal information as to whether digitisation had occurred by Telstra and/or Foxtel on any and what date prior to the commencement of the Tribunal hearing. To have done so would have been, in the view of the presiding member, to have disregarded a clear legislative direction, notwithstanding the fact that it required the Tribunal to make a determination and predict or hypothesise as to the happening of a relevant event that had already occurred prior to the publication of the decision of the Tribunal. Lay people in the community may regard such an approach by the Tribunal as being one where the Tribunal has proceeded blindfolded. That is not what has occurred. Rather the Tribunal has proceeded on the basis that it has observed a clear legislative prescription.

147. It may be said that on one view of subs (4) the legislative intention was to prevent a party holding back material from the Commission and then presenting it to the Tribunal, or to prevent it from going on a search for new material to try and counter the reasons set out in the Commission's decision, neither of which is the case here. However, the legislative language is not couched in such terms and is not otherwise limited as to the categories of documents, information and evidence which are proscribed.

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148. Although it was not open to the Tribunal to take into account what in fact happened on or about 14 March 2004, it was for the Tribunal to make an assessment of the likelihood of digitisation as at the date of the Commission's decisions. The issue of digitisation is of much importance as its existence or likelihood or probability of existence in the short to medium term after 12 December 2003, the date of the Commission's decisions, has a substantial and most significant bearing on the long−term interests of end−users both with and without the exemption order.

The likelihood of digitisation as at 12 December 2003, the date of the Commission's decisions

149. We undertook a detailed review and examination of the evidence before the Commission as at the date of its decisions on 12 December 2003 in relation to digitisation. The Commission was requested to provide references to material that had been before it prior to the making of its final decisions. In requesting such material, we were seeking to ascertain whether the evidence disclosed, or it could be inferred from all that material, that digitisation would have occurred within the same or a similar timeframe as would have been required under the undertakings if the exemption orders had been granted.

150. Following an information request by the Commission on 17 February 2003, Foxtel set out, in a facsimile dated 24 February 2003, the steps required by itself and by Telstra to convert the service into a digital service. These were:

(a) Cable

FOXTEL Playout Centre	This centre is already digital but will need some further development.
Intercity Links	Need to increase the number of intercity links.
Regional Headends	Telstra will need to digitise the headends by including digital multiplexes and modulators at those headends.
CA	A new CA system will need to be implemented.
SMS	FOXTEL needs to upgrade the functionality of the SMS.

STUs	Digital STUs will be installed in homes. The STUs will be "return path ready" and will include a modem to enable interactivity.

(b) Satellite

FOXTEL Playout Centre	See above.
Satellite	The B3 satellite is already digital. Once FOXTEL transfers to the C1 satellite it will be able to increase capacity.
CA	A new CA will need to be implemented.
STUs	The satellite STUs are already digital however, they will be replaced with return path ready STUs with a modem.
SMS	See above.

The need to replace digital STUs already in use with "return path ready STUs" with modems is particularly notable in the light of Foxtel's submissions to the Tribunal on the likelihood and imminence of "true" interactive services, and will be considered later.

151. These various processes were said on numerous occasions to require a $600 million investment from Foxtel. We are not aware of the dollar figure required of Telstra to digitise its HFC network. However, we understand that this figure was substantially smaller than the cost of building the HFC network.

152. The timeframe we used in making this assessment was towards the end of 2005. This timeframe reflected the terms of each party's undertaking to digitise, as illustrated by cl 5.1 of the Foxtel undertaking (set out in [57] above). In this respect, particular attention should be paid to the definitions of "Revised legislation" and "Final order": see [54] above.

153. Clause 6.1 of the Telstra undertaking contained a substantially identical commitment: see [69] above.

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154. As the definition, "Final Order", specifically contemplates the final resolution of any appeal from the original (the Commission's) decision, it is necessary to assess the timeframe attaching to the commitments in the light of the statutory timetable for any appeal or review. Section 152AW(5), as it applies in the present circumstances, provides that the Tribunal must make a decision within six months of an application for review, or the Commission's final decisions to grant the exemption orders would be set aside. An application for review must be made within 21 days of the Commission's decisions (s 152AB(2)). The Tribunal may, pursuant to s 152AW(6) "extend, or further extend, the 6−month period referred to in subsection (5), so long as", relevantly, "(a) the extension or further extension is for a period of not more than 3 months".

155. While there were varying submissions as to whether this restricted the total time for any Tribunal decision to nine months or enabled various "further" extensions, each being limited to three months, it is instructive that both Telstra and Foxtel submitted the former construction. Accordingly, as at the date of the Commission's final decisions (12 December 2003), so far as the prospective investors were concerned, they would have had approximately 19 months to comply with their respective commitments − being 21 days for the lodging of an appeal, nine months for any appeal process, and then the 12 months referred to in the undertakings. As such, the commitment to digitise, as set out in the undertakings, would have required the supply of services to have commenced by October 2005.

Would digitisation have proceeded regardless of a "Final Order"?

156. On the basis of the evidence before the Commission as at the date of its final decisions, a number of matters compel us to conclude that digitisation was likely to occur within the same or a similar timeframe regardless of whether an exemption was granted. In respect of Foxtel, these facts are:

- interactive television, requiring digitisation, was likely to be an essential aspect of a competitive subscription pay television business. The evidence supporting this proposition includes the experience of other overseas subscription television providers and the views of Foxtel itself concerning the likelihood of digitisation;
- the considerable extent to which Foxtel had progressed digitisation prior to the final decisions (and even prior to the draft decisions); and
- increasing difficulties with obtaining analogue equipment.

157. On the basis of the evidence before the Commission, Telstra's position was substantially contingent on Foxtel's position. If

Foxtel were to digitise, this required digitisation by Telstra also. In addition, Seven Network submitted that the investment necessary to digitise the HFC network was not particularly significant (certainly relative to the cost of installing the HFC) and that, as originally constructed, the HFC was intended to be digitised.

158. In respect of the commercial imperative posed by interactive services, Seven Network made extensive submissions to the Commission (28 February 2002 and 30 October 2003), both in the course of the current applications as well as in relation to the content supply agreement that prompted the undertakings in the first place (letter from Freehills to the Commission, 16 October 2002). As described by Seven Network, interactive subscription television:

> "... allows viewers to interact in real time with the programming content they are viewing. It allows them to customise and personalise their viewing experience. It allows them to participate in, and actively change the outcomes of, the programming that they view.
>
> Interactive television allows viewers to watch sports from multiple camera angles, bet on the outcome of matches, participate in trivia quizzes, enter competitions, choose the news they want to watch (and participate in live discussions about it), participate in game shows, view movie trailers, or in−depth commentary, reviews, and background information on the shows they're watching, while they're watching them."

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159. The term "interactivity" is used to describe a broad range of activity, not all of which requires the support of a digital system. For example, Foxtel submitted that it is possible to bet on broadcast sporting fixtures simply by use of the telephone. It pointed to television programs such as "Big Brother" which already permit audience participation through votes submitted by telephone or SMS messages.

160. The interactivity that Seven Network was particularly focussed upon had two elements:

- the ability for content to be delivered to specific end−users − for example, by an end−user electing to view a particular video and that video being delivered to their television screen ("video−on−demand"); and
- the ability of viewers to communicate via their remote control − for example, by voting for particular contestants.

161. These two features are known respectively as point−to−point and return path services. Both Foxtel and Seven Network agreed that interactivity of this sort constituted "true" interactivity, as distinct from the basic interactivity discussed above or more sophisticated simulations, such as multi−channelling. Multi−channelling, for example, may permit a viewer to elect to view certain statistics whilst viewing a sporting fixture, or to tune into a given video that is scheduled to begin screening over several channels at short intervals. While these services are, as a matter of technology, delivered by way of several channels, so far as the viewer is concerned they can be delivered in a virtually seamless fashion such that the viewer is unaware of the underlying complexity.

162. The thrust of the Seven Network submissions was that "during the life of the exemption application it is expected that ... interactivity will become an essential part of pay television". Indeed, Seven Network asserted that without interactivity, digital subscription television "offers no benefits to access seekers or consumers over analogue STUs, other than an increased number of channels". This was in accordance with the view expressed publicly by Foxtel's Chief Executive Officer, Mr Kim Williams on 8 May 2003:

> "[Digital] is about empowering customers with more choice and convenience − with the added ingredient of 'interactivity' − and that is, from a Foxtel perspective, the essence of digital. Simply offering a 'digitally delivered' television service will not stimulate consumer interests alone (speech to Trans−Tasman Business Circle, *What is digital from a Foxtel perspective?*, 8 May 2003)."

163. In support of the contention that interactivity was likely to become an essential aspect of subscription television, Seven Network described the experience overseas. As is clear from the evidence put forward by Seven Network, by and large, this experience was with 'true' interactivity. Amongst the examples cited by Seven Network were:

- the experience in the United Kingdom where more than 39.5% of homes received digital television. C7 noted the BSkyB statement that "92% of Sky Digital customers use ... interactive services daily" (from the website: http://www1.sky.com/skyactive/whatisskyactive/print.html);
- BSkyB's Sky Sports Active which allows viewers to watch sporting events with the ability to choose different camera angles and multiple audio options, and to view match highlights and statistics on demand. This service, available since 1999, is used by 50% of Sky Sports Active viewers every week. On the basis of the information put before the Tribunal, this service could be achieved by multi−channelling. Nonetheless, Seven Network noted the popularity of the Sky Sports Quiz and a betting service, both of which appear to require "true" interactivity. BSkyB has stated that 6.3 million interactive bets were placed via Sky Bet in 2002 (speech by John Florsheim, Managing Director of Sky Interactive, "Interactive TV: learning from the first three years", Institute of Economic Affairs' *Interactive TV conference*, 26 November 2002);
- again in the United Kingdom, the use of interactive voting in Channel 4's reality television show "Big Brother 2", where

35% of all votes cast during the series came

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via the interactive services offered on the digital satellite platform;

- the use of interactivity in music and entertainment programs, such as the 2001 MTV Europe Music Awards. During the lead up to the awards ceremony, viewers were able to cast votes via their remote controls, compete in daily quizzes and obtain access to information about the awards not available to non−interactive viewers. In the three days prior to the ceremony, 710,000 votes were registered using the interactive services. Real−time voting was also possible during the ceremony, with viewers able to see the results of such voting on screen during the telecast. Seven Network noted a report that audience ratings for the channel increased by 50% within four weeks of the ceremony. Following this experience, MTV Europe introduced a service, MTV Hits, which allowed viewers to cast votes in real time for their favourite acts − following the introduction of this service, there was a 30% increase in audience;
- the use of interactivity in game programs, such as the interactive "Mastermind" offered by the Discovery Network Europe. This permitted viewers to compete against Mastermind contestants and other viewers by answering questions in real time using their remote controls. Following on from Mastermind, the Discovery Network Europe has deployed more than 45 interactive television programs;
- its application in news programs, citing the Sky News Active Voting system, as launched by BSkyB in March 2001. According to the BSkyB publication "Sky Factbook 2003", this had resulted in more than 3 million votes being cast, including 2.6 million in 2002;
- the use of interactive advertising, based upon demographics as well as individual advertisement response tracking. Such advertising has been offered by BSkyB, with more than 100 campaigns said to have been run (as at March 2002); and
- various ancillary services, such as BSkyB's Gamestar, an interactive gaming service, which is said to have an average weekly reach of 1.3 million individuals and is the most visited area of Sky Active.

164. BSkyB's experience with interactivity appears particularly significant, as News Corporation has a significant interest in the company, as well as having a 25% interest in Foxtel. According to results reported by BSkyB, interactive television revenues in the United Kingdom doubled in the 12 months to June 2002, from £93 million to £186 million. Seven Network also noted the comments by John Florsheim, Managing Director of Sky Interactive that, "[i]f there [are] any channel controllers out there who still think interactivity is a superfluous gadget, my advice is to look at MTV Hits. Its audience increased by 30% after the launch of the 'Your Chart' voting service".

165. In the light of these various examples, Seven Network claimed that interactive television would be a key subscription driver and revenue generator in Australia. It also used some of these examples to highlight the potential use for interactive services, such as interactive voting in programs like "Big Brother" and interactive advertising in home improvement programs.

166. Seven Network was also able to point to a number of public statements by Foxtel management concerning interactivity. These included:

"Mr Kim Williams, Foxtel CEO stating that interactive television 'will increase consumer appeal of subscription television. It will add more programming choices and it will add many more options for subscribers, including the introduction of video−on−demand and a lot of interactive television services ... We believe that it will increase subscriber growth and subscriber revenue opportunities and there's ample evidence available in terms of what has happened to digital rollout in North America, what has happened with digital rollout throughout Europe and of course most successfully what has happened with digital rollout via Sky in the UK' (Speech notes for the May 2002 Merrill Lynch Conference, *Looking for light: it's always darkest before dawn*); and

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Mr Mark Furness, Foxtel's Director of Corporate Affairs, saying 'We're a subscription business. We're about offering extra channels and interactivity to our customers' (as reported in the *Sydney Morning Herald*, 28 October 2003).

167. There was also considerable evidence as to Foxtel's progress towards digitisation prior to the Commission's final decisions. On 3 December 2002 Mr Williams, the CEO of Foxtel, gave the Commission notice that on 21 November 2002 the Foxtel Board had approved a resolution that Foxtel commence investing in a digital cable subscription television service. Foxtel made it clear in the letter that the obtaining of the exemption was fundamental to Foxtel's investment commitment:

"Nothing in this notice affects or is intended to affect the operation of the 87B undertaking and in particular clause 5.1 of that undertaking. FOXTEL still intends to apply for an exemption under the Telecommunications Competition legislation and, as the Commission is aware, the obtaining of such an exemption is fundamental to FOXTEL's investment commitment."

168. Seven Network outlined its understanding that Foxtel had "taken significant steps towards digitising its services, including ordering equipment" (submission of 28 February 2003, p 10). It also pointed to Foxtel's announcements that it had "secured a

digital set−top box supply agreement with UK outfit Pace Micro Technology" (*Sydney Morning Herald*, "FOXTEL gears up for digital launch", 9 May 2003) and that talks "to secure funding for the digital roll out were 'well progressed' " (*Australian Financial Review*, "FOXTEL closes in on digital funding", 1 September 2003). These statements were not disputed by Foxtel, although Foxtel submitted that the Tribunal was not in a position to know the terms of the agreement for digital STUs, with Mr O'Bryan S.C., Senior Counsel for Foxtel noting, "You may not have paid them [the other party] very much, you may have an option to rescind that contract or cancel it or not made an order under it or not paid any money. Contracts of that sort are let every day of the week in the business world". Whether due to the constraints of s 152AW(4) or otherwise, however, Mr O'Bryan did not inform the Tribunal whether the contract in question was on terms such as he hypothesised.

169. There was also evidence that it was becoming increasingly difficult to acquire certain analogue equipment. For example, the report by PricewaterhouseCoopers of September 2001 (commissioned by Foxtel) noted at p 29:

> "Analogue STUs ceased being manufactured
>
> Recently, FOXTEL has been the only purchaser of analogue boxes anywhere in the world. This proprietary technology is no longer used in manufacturing and as a result FOXTEL is no longer able to purchase analogue STUs other than in large quantities and at premium prices. The industry now uses digital STUs which are more expensive than analogue boxes and offer higher levels of functionality, however the pricing gap is closing."

170. Foxtel and Telstra had also noted in their submissions that analogue scramblers were no longer available. This had resulted in Foxtel and Telstra developing a 'work−around', requiring reconfiguration of the Gold Coast headend.

171. Although these matters were placed before the Commission by Telstra and Foxtel, Seven Network relied on them as further evidence that timely digitisation was inevitable. In response, counsel for Foxtel stated that there was no suggestion that the heading in the PricewaterhouseCoopers report was correct (notwithstanding that the report had been commissioned by Foxtel). Senior Counsel for Foxtel stated: "What's said there [in the report] is undoubtedly right. You have to buy them in big lumps and they were relatively, as it says, expensive for that reason. But the heading is plainly not the message given by the text of that statement and could not be relied upon for that." In relation to the scrambler issues, Senior Counsel for Foxtel submitted:

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> "A solution had been found to the problem in the Gold Coast and, whilst Foxtel was not altogether overjoyed with it, there's no suggestion that it was resulting in an inability to conduct this business for the foreseeable future. When one has regard to the fact that [the analogue] undertakings had been given to grant access in the circumstances that I've described, the opposite, it is submitted, is the reasonable conclusion that should be drawn."

172. Finally, there was evidence that, in Foxtel's words, "Australia is now behind all other industrialised countries in the introduction of digital subscription television services" (letter from Foxtel's solicitors to the Commission, 5 August 2003). Foxtel, however, noted:

> "... despite the fact that two and a half years ago [at the time of the PricewaterhouseCoopers report] we were told the rest of the world has gone digital but Australia hasn't, it is entirely consistent with the proposition that Australia hasn't gone digital because there's just too much risk in Australia to do it and people are not willing to commit to it."

173. The evidence that Telstra would digitise regardless of the outcome of its exemption application was more scant, largely as any move by Foxtel to digitise appeared to require Telstra to do likewise. Clause 7.11 of the Broadband System Deed between Foxtel and Telstra provided:

> "Telstra Multimedia must provide FOXTEL from 1 July 2001 (or from such earlier date as FOXTEL commences providing its Service offerings by means of Digital Channels pursuant to clause 7.9) until 30 June 2006, that number of Digital Channels contemplated by AML's business plans from time to time up to a maximum of 104 Digital Channels each of 4 megabits per second."

The reason why, and means by which, this timing of this obligation had been changed were not made clear to the Tribunal.

174. Seven Network also noted that the HFC cable was originally intended to be digitised. Furthermore, it was submitted that the investment by Telstra to digitise "is not particularly significant, and it is a very small fraction of the cost incurred by Telstra in building the network". The submission also noted that "Telstra will be reimbursed [by Foxtel] for much of its expenditure". These assertions were not substantiated, but nor were they disputed by Telstra or by Foxtel.

175. Perhaps the most significant document, evidence or information before the Commission prior to and in connection with the making of its decisions on 12 December 2003 which bears upon the issue of the likelihood or probability of digitisation of Foxtel and Telstra's facilities or services occurring in the near future was a letter sent by email from Lynette Ireland, Foxtel's Director of Legal Affairs to the Commission on 11 December 2003 which attached a notice. The letter was in the following terms:

> "To: **Michael Cosgrave**
> General Manager − Telecommunications
> Australian Competition & Consumer Commission, Melbourne

email: Michael.Cosgrave@accc.gov.au

cc: **Ken Walliss**
Director − Telecommunications
Australian Competition & Consumer Commission, Melbourne

email: Ken.Walliss@accc.gov.au

Dear Mr Cosgrave

I attach a notice pursuant to clauses 4.3 and 4.4 of FOXTEL's s 87B undertakings. The notice pursuant to clause 4.3 is 3 days shorter than the period required.

FOXTEL's planning has been focussed for some considerable time on a digital launch date of 8 March 2004. In view of the significant delay in finalising FOXTEL's application for an anticipatory exemption order, I assume that the Commission will not object to the notice period being 3 days short.

If, however, my assumption is wrong, please let me know as a matter of urgency.

Yours faithfully

Lynette Ireland
Direct of Legal Affairs
FOXTEL Management Pty Limited"

The attached notice was in the following terms:

"Dear Mr Cosgrave

FOXTEL Section 87B undertaking

1. Pursuant to Clause 4.3 of the Undertaking to the Australian Competition and Consumer Commission (the **Commission**) by FOXTEL Management Pty Limited (for and on behalf of the FOXTEL Partnership) and FOXTEL Cable Television Pty Limited (together, **FOXTEL**) dated 21 November 2002 (the **Undertaking**), FOXTEL gives notice that it currently intends to commence supplying a Commercial retail digital cable Subscription Television Service on 8 March 2004. This Notice is conditional on each of FOXTEL and Telstra Multimedia Pty Limited receiving anticipatory exemption orders pursuant to Section 152ATA of the *Trade Practices Act* 1974 (Cth) which are subject to conditions that, if they were Final Orders within the meaning of the Undertaking, would satisfy the requirements of paragraphs 5.1(a) and 5.1(b) of the Undertaking.

2. Pursuant to Clause 4.4 of the Undertakings, FOXTEL attaches the following documents:

- Schedule 1: Digital Set Top Units Services (including the Content Development Kit);
- Schedule 4: Interface Specifications (including the FOXTEL Platform Access Specification, the Access Seeker Platform Protocol and the Access Seeker Active Customer Smartcard Database Specification); and
- Schedule 5: Network Interface Points.

Together these documents comprise the technical specifications of the Digital Set Top Unit Services and other technical requirements not previously specified in Schedule 2 of the Undertakings. These documents form part of Schedule 2 and are marked to that effect.

Each of the documents provided to the Commission pursuant to paragraph 2 and the notification referred to in paragraph 1, are highly commercially sensitive and confidential to FOXTEL. Accordingly, it is critical that the Commission does not disclose this information, the contents of the documents or provide copies of the documents to any person without FOXTEL's prior written consent.

FOXTEL will make each of the documents referred to in paragraph 2 available to potential access seekers once they have signed a confidentiality agreement in favour of FOXTEL.

Yours faithfully

Lynette Ireland
Direct of Legal and Business Affairs
FOXTEL Management Pty Limited"

176. Part of the significance of this notice lies in the fact that it was a notice that Foxtel had undertaken to give in cl 4.3 of its s

87B undertaking before it commenced supplying a commercial retail digital cable Subscription Television Service. Clauses 4.3 and 4.4 of Foxtel's s 87B undertaking were in the following terms:

> "4.3 FOXTEL undertakes to notify the Commission three months before it commences supplying a Commercial retail digital cable Subscription Television Service. However, in the event that FOXTEL and Telstra have received Final Orders in accordance with Clause 5.1, nothing in this Clause 4.3 will prevent FOXTEL from commencing a Commercial retail digital cable Subscription Television Service prior to the expiry of the notice period, if it so wishes.
>
> [42736]
>
> 4.4 FOXTEL will publish and provide to the Commission the technical specifications of the Digital Set Top Unit Services and any other technical requirements not specified in Schedule 2 at the time it gives the notice referred to in Clause 4.3, and can change these on 3 months' notice or as otherwise specified in Schedule 2. Any published technical specifications clearly marked as forming part of Schedule 2 and provided to the Commission will be deemed to form part of Schedule 2 and, if not so marked, will not form part of Schedule 2."

177. Of more significance was the notification of Foxtel's then current intention to commence supplying the digital service on 8 March 2004, and the notification of the fact that the notice was only conditional on Foxtel and Telstra receiving a satisfactory decision from the Commission regardless of any appeal or review of those decisions.

178. This condition is curious but it states that if Foxtel and Telstra receive anticipatory exemption orders from the Commission then Foxtel will commence supplying a commercial retail digital cable subscription television service on 8 March 2004 even though the orders may be subject to review or appeal. Accordingly, as soon as the Commission made the exemption order, Foxtel was committed unconditionally to commencing its digital service on 8 March 2004 so long as the Order was not subject to conditions that had a material adverse effect of the type referred to in cl 5.1 of the s 87 undertaking.

179. Other evidence or submissions put before the Commission by Foxtel concerning the likelihood of digitisation included:

- A statement that "As the Commission is aware, over $8 billion has been invested in the industry to date, yet all operators ... have made and continue to make substantial losses. The $600 million capital required to establish a digital subscription television service is very significant, particularly in the light of FOXTEL's historical financial performance".
- Emphasis on the fact that, notwithstanding any investment to date, such investment was able to be "delayed or deferred" (presentation by Kim Williams to Ed Willett, 22 July 2003). This was supported by a confidential exhibit demonstrating the investment profile underlying digitisation.
- A submission noting that the commitment to digitise "will require substantial changes to FOXTEL's business, including managerial structure, operations and resourcing (including a significant number of new employees and acquiring technical equipment and expertise) and the management of the roll−out of in excess of 1.5 million STUs to subscribers over the next 3 years. The risks in undertaking a project of this nature and size are clearly enormous, not only financially but also in terms of how FOXTEL's business will operate in future".
- A submission stating that, "As the Commission knows, FOXTEL has delayed a number of years in introducing a digital cable service (so that Australia is now behind all other industrialised countries in the introduction of digital subscription television services) because it did not believe that Part XIC of the Act as administered by the Commission gave it sufficient certainty that it would recover the very large costs of investing in a digital service" (facsimile from Foxtel's solicitors to the Commission dated 5 August 2003). This submission appeared to be supported by the terms of the Broadband Services Deed (entered into by, *inter alia*, Foxtel and Telstra in 1997), which, pursuant to cl 7.10, required Foxtel to commence providing a digital service on or before 1 July 2001. As noted above, the reason why, and means by which, the timing of this obligation had been waived were not made clear to the Tribunal.
- Emphasis upon the fact that, absent an exemption order, "there is no obligation on FOXTEL to commence supplying a digital cable service or an expanded digital satellite service and therefore no certainty as to whether or when these services will commence".

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Evidence suggesting digitisation would have been delayed or would not have taken place

180. In submitting that there was no certainty of digitisation as at the date of the Commission's decisions, Foxtel pointed to numerous submissions it had made to the Commission. Essentially, the submissions contained various arguments to support the proposition that, in order to justify the investment, Foxtel required certainty about the terms and conditions of access to the services, particularly in relation to price. These supporting arguments may be summarised as follows:

- The $600 million cost of digitising was very significant in the light of Foxtel's historically poor financial performance and would not be expended absent such certainty.
- Digitisation would require substantial changes to Foxtel's business, including its managerial structure, operations and

resourcing.

- Most of the investment in digitisation related to the purchase and installation of digital STUs that could be delayed easily (suggesting that neither the Commission, nor the Tribunal, could draw any conclusions from the progress towards digitisation prior to the final decision).
- Foxtel had already delayed the investment in the absence of certainty.
- Foxtel was under no obligation to digitise absent an exemption order.

181. The need for certainty was asserted in Foxtel's initial application to the Commission, and reiterated in its supporting submission, the briefing to the Commission by Mr Williams, various supplementary submissions as well submissions and meetings with the relevant Commonwealth Minister and Department, and a board resolution of 5 August 2003. For example, in a response to a request for information by the Commission, it was stated:

> "FOXTEL can only make a sound commercial decision as to whether to invest in a digital subscription television service if it has the certainty about the terms and conditions on which it may be required to provide service.
>
> ... Lack of investment certainty has been one of the key reasons for the reluctance of FOXTEL's shareholders to invest in the digital subscription television service."

A particular concern raised by Foxtel was the prospect that "access seekers could get access on a marginal cost basis ... or on a basis that is significantly different to an appropriate cost recovery model" (summary of presentation by Foxtel CEO, Kim Williams, to Mr Ed Willett, on 22 July 2003).

182. Further evidence of Foxtel's intention to proceed only on the basis of a Final Order was submitted in the form of a board resolution of the Foxtel Partners on 5 August 2003 in the following terms:

> "The Partners of the FOXTEL Partnership approve the commencement of FOXTEL's Commercial retail digital cable Subscription Television Service and Commercial retail digital satellite Subscription Television Services be postponed until FOXTEL and Telstra Multimedia Pty Limited obtained Final Orders pursuant to clause 5.1 of the section 87B undertaking provided by FOXTEL to the Australia Competition and Consumer Commission on 21 November 2002."

The background paper to the resolution noted that the steps for digitisation taken by Foxtel to that time had been on the assumption that the Commission would grant the exemption (although the fact that this did not constitute a Final Order was not raised).

183. The resolution and background paper were provided to the Commission in response to a letter dated 28 July 2003, in which the Commission had noted a Foxtel statement that its shareholders had indicated that, in the absence of exemption, a launch of digital services would likely be "delayed substantially or cancelled for the foreseeable future". The Commission accordingly requested "further information that substantiates or is relevant to [this] statement by Foxtel, such as board minutes of discussions on this issue". Other than the resolution passed one week after this information request, no board minutes were provided by Foxtel. Foxtel instead reiterated the numerous occasions on which (by way of submission or meeting) it had argued to the

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Commission and the Minister that certainty was an essential prerequisite to investment.

184. Foxtel emphasised that any investment made prior to the Commission's decision was both necessary (in order to meet the timetable imposed by the undertakings) and able to be delayed. Accordingly, on several occasions Foxtel claimed that there was "a real risk" that any planning or steps taken to date would be slowed down or cease altogether. (See, for example, Foxtel's response of 26 May 2003 to the Commission's information request and the summary of the presentation by Kim Williams to Ed Willett on 22 July 2003.) Such steps were alternatively described as a sign of Foxtel's good faith or necessary given the tight timetable facing Foxtel.

185. On one occasion, this timetable was expressed in terms of Foxtel's commercial objectives. In the written summary of the briefing of Mr Willett by Mr Williams, for example, Foxtel's then understanding of the likely decision milestones was said to mean that:

> "FOXTEL can expect a draft this month [July 2003] and a final decision in September. Even on this timetable with the potential for an appeal to the Tribunal this makes it very tight for us to launch the digital service in the first half of next year which is our objective."

186. On another occasion, however, the timetable was said to be constrained in the light of the requirements of the Foxtel undertaking. For example, in May 2003, Foxtel noted that, assuming an appeal from the Commission's decision, it had 23 months to comply with its obligation to digitise, which was "not a lot of lead time in which to commence the service. FOXTEL has therefore had to commence planning for the service now in order to be able to meet this time frame once it receives a digital exemption" (Foxtel's response of 26 May 2003 to the Commission's information request). The reference to 23 months presumes a launch date of April 2005.

187. Telstra's evidence and submissions to the Commission on the prospect of digitisation were not as extensive, although they largely went to the same issues. In a submission to the Tribunal dated 10 June 2003, Telstra's solicitors said:

> "Telstra has sought the Exemption Application to seek certainty prior to investing in its infrastructure."

The Commission sought further information from Telstra substantiating, or which was relevant to, this issue "such as board minutes of discussions on this issue". Telstra's response, dated 11 August 2003, to the Commission's information request of 28 July 2003, provides a useful summary of its position concerning the likelihood of digitisation:

> "Telstra has made it clear to the Commission and the Federal Government that a commitment to digitise its HFC network would be too risky without the regulatory certainty of an exemption and the attendant knowledge of the basis on which it would be required to supply digital subscription television carriage services to access seekers. Telstra's position has remained constant in relation to the need for an exemption, and is substantiated by the following evidence:
>
> • [Confidential: the submission by Telstra to the Department of Communications, Information Technology and the Arts dated 22 February 2002 on the Productivity Commission Report on Telecommunications Competition Regulation, in which Telstra indicated that it would be unlikely to invest in digitising its subscription television network until a mechanism for providing greater certainty as to how its investment would be regulated was in place];
>
> • the meeting of 25 February 2002 between Telstra and representatives of the Department of Communications, Information Technology and the Arts on the Productivity Commission Review of Telecommunications Competition Regulation [Confidential: at which Telstra's submission dated 22 February 2002 was discussed];
>
> • the analyst briefing held by Telstra on 5 March 2002, at which Ziggy Switkowski stated that Telstra is contemplating going digital in FOXTEL,
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>
> subject to the Federal Government putting their investment safe harbour in place, and that Telstra's intention to implement the digitisation is subject to agreement on the digital safe harbour legislation. Bruce Akhurst also stated that the first hurdle to digital rollout is obtaining certainty in terms of the regulatory regime that will apply once the investment is made, so that Telstra is not made to 'give it away' below cost or at some subsidised price;
>
> • the submissions by Telstra to the Department of Communications, Information Technology and the Arts dated 5 June 2002 in relation to Telstra's proposed digital subscription television carriage service undertaking and subsequent briefing;
>
> • Telstra's presentation of its proposed section 87B undertakings in the context of the Commission's assessment of the FOXTEL/Optus Content Supply Agreement on 5 July 2002, at which Telstra emphasised to the Commission the extent of the investment required, and the commercial and regulatory certainty required by Telstra to supply carriage services to digital subscription television operators by means of the HFC network;
>
> • various other written and oral representations made by Telstra to the Commission between July 2002 and November 2002 (when the Commission accepted the Telstra's [sic] Section 87B Undertakings) about Telstra's need for certainty before committing to digitisation;
>
> • the fact that Telstra has insisted at all times that its commitment to the digitisation of the HFC network was conditional on it receiving an exemption (on the basis of the digital access undertakings in its Section 87B Undertaking) and that ultimately this was accepted by the Commission; and
>
> • Telstra's statement in its publicly available supporting submission to the Commission (dated 24 December 2002, paragraph 8.2) that Telstra considers that, in the absence of an exemption order, an investment in digitisation is sufficiently risky that the potential of declaration would render the investment uneconomic.
>
> As can be inferred from the evidence outlined above, it has always been critical to Telstra to obtain the level of certainty that an exemption order would provide Telstra. To that end, it has maintained that Telstra required regulatory certainty by an exemption order before committing to digitise its HFC network and therefore ensure access would be provided to digital carriage services.
>
> [Confidential: Telstra also notes FOXTEL's formal resolution of 5 August 2003 to defer digitisation until the digital exemption sought by FOXTEL and Telstra are granted. From a contractual perspective, Telstra is under no obligation to supply digital subscription television carriage services to FOXTEL until and unless FOXTEL commences to supply a digital service. Therefore, the practical effect of FOXTEL's resolution is to remove (until such time as the exemptions are granted) the only contractual obligation on Telstra to launch a digital subscription television carriage service.] Accordingly, the Commission should conclude that there would be no launching by Telstra of a digital subscription television carriage service without the exemptions being granted."

(We note that the sections over which confidentiality was originally claimed were read or substantially paraphrased in open

session before the Tribunal.)

188. Once Foxtel decided to digitise, Telstra was obliged to do so as well in order to provide the carriage of Foxtel's services. In cl 6.4 of Telstra's s 87B undertaking, Telstra undertook to supply a digital subscription television carriage service in accordance with its access agreement once it commenced supplying a digital television carriage service other than as a test or trial service. The commencement of Telstra's supply of such a service was tied to Foxtel's commencement of supplying a digital service with its Set Top Units. This contractual obligation is to be found in section 7 of the Broadband System Deed entered into between

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Foxtel and Telstra in 1997. Clause 7.10 of that Deed provided:

> "FOXTEL must commence providing its Service offerings by means of Digital Channels to BSS Subscribers on or before 1 July 2001."

Clause 7.11 was in the following terms:

"Telstra Multimedia must provide FOXTEL from 1 July 2001 (or from such earlier date as FOXTEL commences providing its Service offerings by means of Digital Channels pursuant to clause 7.9) until 30 June 2006, that number of Digital Channels contemplated by AML's business plans from time to time up to a maximum of 104 Digital Channels each of 4 megabits per second."

Clause 7.12 was in the following terms:

> "From 1 July 2006, Telstra Multimedia must provide FOXTEL that number of Digital Channels contemplated by AML's business plans from time to time up to a maximum of 250 Digital Channels each of 4 megabits per second."

189. The Broadband System Deed was one of the documents that was initially controversial in respect of its admissibility before the Tribunal. There was no evidence before the Tribunal as to whether the terms of that Deed had been varied.

190. Initially objection was taken to Seven Network's reliance upon this Deed on the ground that the Deed was not a document that was produced to the Commission in connection with the making of its decision. Seven Network had submitted that:

> "Foxtel was contractually bound to commence its digital pay TV service, pursuant to clause 7.10 of the Broadband System Deed ..."

Seven Network relied upon the fact that the Deed was contained in a footnote to one of Seven Network's submissions to the Commission in relation to Telstra's exemption application. Initially the relevant footnote could not be found and the admissibility of the Deed before the Tribunal was put in abeyance.

191. In fact, cl 7.12 of the Deed had been referred to in footnote 51 in Seven Network's submission to the Commission in respect of Telstra's s 152ATA Application dated 28 February 2003.

192. In final submissions Telstra sought to rely upon the terms of the Deed in relation to the nature of the Telstra−Foxtel relationship. Senior Counsel for Telstra invited us to look at the whole of the Broadband System Deed. In support of its submission in relation to that Deed, Telstra submitted a written argument that set out a number of clauses in section 7 of the Deed, particularly cll 7.10, 7.11, 7.12 and 7.13.

193. We are satisfied that the manner in which, and the extent to which, Telstra relied upon the Broadband System Deed was such that it was proceeding on the basis that the whole of the document had been before the Commission.

194. In short, what Telstra put before the Tribunal was Telstra's obligation to make available a digital carriage service to Foxtel once Foxtel decided to "digitise" and supply a digital subscription television service.

195. As at 11 December 2003 Foxtel and Telstra were intending to go digital on 8 March 2004, on the basis that they might not get the exemption order until some time after 11 December 2003. The work that needed to be done and the expense that needed to be incurred in order to go digital suggests that substantial expenses had been incurred and substantial work had been carried out before the date of the notice on 11 December 2003. By the date of the notice Foxtel and Telstra would have incurred substantial costs.

Finding: commencement of digitisation

196. In the light of the information, documentation and evidence before the Commission at the time of its decisions on 12 December 2003, we are satisfied that as at that date it could and should be concluded or inferred that digitisation by Foxtel and Telstra was going to occur by the end of March 2004 at the earliest and by October 2005 at the latest, regardless of whether an exemption (in the form of a Final Order as defined in the s 87B undertakings) was granted to each of Foxtel and Telstra. We reach this decision for a number of reasons:

- the commercial imperative to provide interactive services, as demonstrated by the experience with interactivity overseas;

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the increasing difficulties associated with providing an analogue service;

- Foxtel's announced intention to digitise prior to any Final Order (as defined in its s 87B undertaking) having been granted, including as indicated in its notice to the Commission of 11 December 2003;
- evidence of keeping the door open if an exemption order was not granted.

197. The evidence and submissions to which we have referred earlier make it apparent that Foxtel had appreciated and accepted that there was a commercial imperative to provide interactive services as soon as possible as part of a digital service in order to attract and keep those categories of viewers or customers who had been demonstrated would be responsive to interactive services. The view of Mr Williams, Foxtel's CEO, referred to earlier in pars [162] and [166] make it clear that there was an inevitability about the introduction of digital television services.

198. It is also clear that by the time the Commission handed down its decision on 12 December 2003 there was an increasing number of difficulties in relation to the analogue service which demonstrated that it had a finite life.

199. Further, by 12 December 2003 it was abundantly clear that Foxtel had already expended a substantial amount of money and time in preparing for a digital launch. It was true that it was seeking what it and Telstra called "certainty" in relation to access and pricing conditions for their carriage and subscription digital services but, nevertheless, it was clear that there was coming a time when Foxtel (who would carry with it Telstra) was not prepared to wait any longer to digitise notwithstanding the loss of an element of certainty.

200. The most telling piece of documentation, information or evidence (whatever it may be) was Foxtel's letter and notice of 11 December 2003 to the Commission to which we have already referred.

201. The consequential effect of Foxtel's letter of 11 December 2003 to the Commission and the attached notice is as follows:

- By the time the Commission handed down its decision or determination, namely on 12 December 2003, it knew that Foxtel was intending to go digital on 8 March 2004, and that Telstra was contractually obliged to do the same.
- Foxtel's letter was self executing and unconditional in relation to its intention to digitise in the sense that it had told the Commission that if the Commission granted it an exemption order then Foxtel was intending to digitise notwithstanding the fact that the Commission's decision was not a "Final Order" within the definition of that expression in the s 87B undertaking. Rather Foxtel was saying it would digitise notwithstanding the fact that the Commission's determination may be subject to appeal or review so long as any conditions attached to the order did not have a material adverse effect as described in cl 5 of Foxtel's s 87B undertaking.
- The letter shows that Foxtel was in the state of preparation whereby within three months it was prepared to start a digital service. This carried Telstra along with it.

An alternative proposition can be put, namely that even though one could not say with absolute certainty that Foxtel would commence its digital service on 8 March 2004 because something unforeseen might happen in the future, the effect of Foxtel's letter and notice was to say that it was proceeding on the basis that it would be ready to commence a digital service within just under three months after the date of the letter. Put another way, Foxtel was gearing up to provide a digital service within a very short timeframe after 11 December 2003.

202. The end result is that at its highest the information available to the Commission as at 11 December 2003 was that digital television was most likely to commence around 8 March 2004. At its lowest, digital television was most likely to commence within a relatively short time and probably within a year after the letter of 11 December 2003.

203. Notwithstanding the extensive documentation and evidence that demonstrated that Foxtel and Telstra sought certainty in relation to the terms of access that would be offered to access seekers in relation to price and non−price matters, we are satisfied that Foxtel was prepared to abandon the need for certainty

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beyond the level of the Commission (that is, disregard any review or appeal) in exchange for an immediate (that is, within the first three months of 2004) and timely entry into the digital market.

204. The notice given on 11 December 2003 is a clear indication of what Foxtel was saying at the time were its future intentions. Once it obtained an exemption order through the Commission it was prepared to take its chances on any review or appeal.

205. We have no reason to believe that, if Foxtel were to digitise within the timeframe indicated, then Telstra would have not done likewise. Indeed, we are satisfied that Telstra would have done so. It was obliged to do so in accordance with the provisions of Broadband System Deed.

206. The experience of subscription television providers of overseas programs was that there was a strong commercial imperative to provide an interactive service (thus requiring digitisation). We note that an initially small "market" − £93 million − doubled in the space of 12 months to June 2003 to £186 million. Such revenue (and the growth) would likely be extremely attractive to a company with Foxtel's prominent position in providing subscription television services in Australia. Furthermore, the benefits achieved by BSkyB in four years of interactive services (as at the date of the Commission's decisions) − partly

owned by Foxtel's part owner − are very compelling. These benefits included increased audiences as well as numerous opportunities for revenue growth through voting, betting and game services, as well as tailored advertising.

207. In its submissions to the Commission, Foxtel emphasised the low penetration of subscription television services in Australia, relative to other markets. In the summary of Mr Williams' presentation to the Commission in July 2003, it was reported that penetration in Australia was "only 22%", compared with 85% in the United States and in excess of 40% in the United Kingdom and New Zealand. The summary continued at p 10:

> "To date, $8 billion has been invested in the industry and none of the subscription television operators have reached profitability. All operators (FOXTEL, Optus and Austar) have made, and continue to make, substantial losses. FOXTEL, for example, has made an aggregate loss of approximately $1 billion, including approximately $100 million last financial year ..."

208. In our view, it seems unlikely that, in an industry characterised by low penetration and poor returns, Foxtel would not seek to provide services which have, in overseas markets, lifted audience ratings and revenue significantly. This is particularly the case as, in Foxtel's words, Australia lags behind "all other industrialised countries" in (not having moved to) digitisation. The role of interactivity in developing audience, and presumably therefore lifting penetration, is acknowledged by the comments of Mr Florsheim from Sky Interactive:

> "If there [are] any channel controllers out there who still think interactivity is a superfluous gadget, my advice is to look at MTV Hits. Its audience increased by 30% after the launch of the 'Your Chart' voting service."

The commercial imperative to provide interactivity is also reflected in Foxtel's public statements, such as Mr Williams' claim (par [166]) that interactivity would increase subscriber growth and subscriber revenue opportunities.

209. We also have difficulty accepting Foxtel's explanations as to why analogue services would continue to be viable in the medium term. We do not understand why Foxtel would pay premium prices for analogue STUs when digital STUs − noting that, while they were more expensive in 2001, the price gap was said be closing − provide superior functionality and the opportunity to build its subscriber base and to generate revenue. Furthermore, it was not explained why the lack of analogue scramblers had required Foxtel and Telstra to devise a "work−around" but would not be a problem for Foxtel in the future. If analogue were, however, to become redundant within the medium term, then it would be expected that digital would be phased in over the short term (as indeed contemplated in the undertaking by way of the "Simulcast Period"

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as referred in the access agreement schedule to Telstra's s 87B undertaking).

210. We also place considerable weight upon Foxtel's notice of 11 December 2003, by which it indicated that it was not proceeding on the basis of its earlier partnership resolution postponing the commencement of its digital service until Foxtel and Telstra obtained Final Orders pursuant to cl 5.1 of Foxtel's s 87B undertaking. That is, Foxtel was notifying the Commission of its intention to launch digital services the following March regardless of whether a Final Order not subject to review or appeal was granted. While at that point, in the light of the draft decision and negotiations with the Commission concerning the form of a final order, Foxtel may have been extremely confident that the Commission would grant an exemption, this would not constitute a Final Order as defined. The Final Order, as defined by the Foxtel undertaking, expressly contemplated the appeal or review of any decision by the Commission (by defining the Final Order to be the Commission's decision following the expiry of any appeal period or, in the event of an appeal, final resolution of that appeal). As noted on numerous occasions, there was a history, particularly as between the parties to these proceedings, of disputation before the Commission, so any appeal or review would not have been unexpected.

211. Furthermore, it is notable that Foxtel had expressed concern with the timeframe of the Commission's decision−making process. In its response dated 26 May 2003 to the Commission's information request dated 8 May 2003, this appeared to be driven by a concern that, if there was no appeal, Foxtel would need to digitise within a short timeframe. This concern is unconvincing. First, if Foxtel was concerned that this timetable was too short, then it would not have been pressing for a quick decision − any postponement would have been welcome. Second, in July 2003, Foxtel revealed that its real concern was to have obtained an exemption prior to digitising in accordance with its commercial objectives. Assuming a final (Commission) decision by September 2003, Foxtel submitted, "Even on this timetable with the potential for an appeal to the Tribunal this makes it very tight for us to launch the digital service in the first half of next year which is our objective" (presentation by Mr Williams to Mr Willett, 22 July 2003). Under the terms of the undertaking, however, such a timetable would have only required digitisation by April 2005.

212. Accordingly, we do not accept that we should consider any steps towards digitisation taken by Foxtel prior to the Commission's decision (which did not − it needs to be emphasised − constitute a Final Order as defined in the s 87B undertaking) as necessary to meet the commitment to digitise within the terms of the undertaking. Such steps were clearly intended to permit digitisation in accordance with Foxtel's commercial objectives (including in respect of timing), and were in no way dependent upon a Final Order as defined in the s 87B undertaking.

213. Little evidence was provided by Foxtel and Telstra to the Commission concerning the prospect of digitisation. What they

provided to the Commission consisted almost entirely of submissions and assertions. It may have been difficult for them to provide hard evidence, but the Commission requested each party to provide it with information to "substantiate" its submissions, "such as board minutes of discussions on this issue" (letters to each of Telstra and Foxtel, 28 July 2003). No such substantiating information was provided by Telstra. In Foxtel's case, meanwhile, the only information provided was a board resolution and background paper that post−dated the request for information. In the absence of evidence from those involved, we would not go so far as to accept the submission by Seven Network that the resolution and paper were "self serving". Nevertheless, the weight to be given to them must necessarily be lessened in the circumstances.

214. It is significant that neither Foxtel nor Telstra produced to the Commission board minutes or papers pre−dating the information request. If the investment in digitisation was as substantial as Foxtel repeatedly advised the Commission and Tribunal, it is highly improbable that it was not the subject of board discussions.

215. Furthermore, while Foxtel and Telstra both claimed that they required "certainty" before proceeding, such certainty over terms of

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access did not appear to go to the business case of digitisation. For example, it does not appear that Foxtel required prior knowledge of a likely income stream from access in order to justify the investment (notwithstanding, as Foxtel repeatedly submitted, that the $600 million required was substantial for a company such as Foxtel, particularly in the light of its financial history).

216. Accordingly, we are asked to accept the private statements given to the Commission, while disregarding Foxtel's public statements, the overwhelming commercial imperative to digitise (and thereby to provide interactive services), not to say increasing difficulties with sourcing the equipment necessary to provide an analogue service − all evidence that was before the Commission at the time of its final decisions. The Tribunal, however, finds that such evidence leads to the conclusion that Foxtel, and consequently Telstra, would have digitised within the same or similar timeframe whether or not exemption orders were granted.

The consequences of the finding in relation to digitisation

217. While the commitment to digitise was conditional upon receiving Final Orders (cl 6 and 5 of the Telstra and Foxtel undertakings respectively), the digital access undertaking was not. The relevant clause (cl 4.1) of the Foxtel undertaking provided:

> "Subject to this Clause 4, FOXTEL undertakes to supply Digital Set Top Unit Services in accordance with the terms in Schedule 2 to these undertakings **from the date it commences supplying** Commercial retail digital cable Subscription Television Services ..." [emphasis added]

The relevant clause (cl 6.4) of the Telstra undertaking provided:

> "Telstra Multimedia undertakes to supply a Digital Subscription Television Carriage Service in accordance with the terms in Schedule 2 to this undertaking if it commences supplying a Digital Subscription Television Carriage Service, other than a test or trial service."

218. There is nothing in the remainder of cl 4 to permit the withdrawal of the undertaking in cl 4.1 if a Final Order is not granted, nor does cl 15 (which addresses the duration, extension and termination of the undertaking) or any other provision in Foxtel's s 87B undertaking permit the withdrawal in circumstances where a Final Order is not granted.

219. The Telstra undertaking is similarly structured, with the access undertaking contained in cl 6.4 triggered upon the date upon which the services in question are supplied (other than for testing or trialling purposes). Again, there is no scope for the access undertaking to be withdrawn in the absence of a Final Order.

220. When we turn to consider the future with, and the future without, the exemption orders, our finding concerning the commencement of digitisation within the same or a similar timeframe has the consequence that both the "future with and the future without" the exemption orders include access to Telstra's carriage service and Foxtel's subscription digital services. However the access offered would not be identical to that resulting from the decisions of the Commission, as the Commission's conditions for amendments to the access undertakings and accompanying agreements would no longer apply. This conclusion is consistent with the views of the Trade Practices Tribunal in *Re Queensland Independent Wholesalers Limited* (1995) ATPR ¶41−438; (1995) 132 ALR 225, in which the Tribunal considered that certain undertakings given to the Commission in that matter (at ATPR p 40,929; ALR p 237):

> "... were given ... in association with and as part of [the party's application for authorisation], notwithstanding that the determination of the Commission does not state in terms that the authorisation was granted by the Commission on the basis of the undertakings having been given ...
>
> ...
>
> The undertakings have no existence independently of the application to the Commission for authorisation and of the

authorisation subsequently granted by the Commission."

221. This approach clearly applies to the variations to their respective undertakings provided by each of Telstra and Foxtel,

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particularly as such variations reflected the conditions imposed by the Commission in its decisions. Accordingly, in assessing the "future without" exemption, it is the undertakings as originally given to the Commission that would have effect and thus be relevant to our deliberation.

222. The key question to address then is whether it is in the long−term interests of end−users to make an exemption order given that access is available to access seekers within the timeframe to which we have referred. This requires a degree of affirmative satisfaction. The answer to the question depends upon a comparison with the answer to the question whether it is in the long−term interests of end−users that Foxtel and Telstra not be given an exemption order in circumstances where access is available even if the exemption orders are not granted.

The future with and without exemption orders

The future with exemption orders

223. The future with the exemption orders would mean:

- access would be available to access seekers on the terms offered by Telstra and Foxtel, as amended by the Commission's conditions (which conditions were accepted by each of Telstra and Foxtel, notwithstanding initial resistance by Foxtel to the asset beta imposed by the Commission); and
- exemption for Telstra and Foxtel from the standard access obligations contained in s 152AR of the Act.

224. Access would be available immediately subject to satisfaction by any access seeker of a number of conditions and requirements such as are found in cl 4.3 of the Foxtel digital access agreement and cl 1.18 of Telstra's digital services module. However, any access seeker would find that the terms of access included terms involving the tie to the Foxtel Basic Package, the exclusion of interactive services and uncertainty over the duration for which such terms of access would be available. As will be explained later in these reasons, these are all matters of concern to us in our assessment of the terms of access provided for by the undertakings. Furthermore, the application of any future ministerial pricing order made pursuant to s 152CH would not be available. Neither would any of the rights including arbitration, enforcement and remedial rights which are activated in cases where any or all of the standard access obligations apply. In this respect, we draw attention to ss 152AY, 152AYA, 152AZ, 152BB, 152BBA, 152BBB, 152BBC, 152CM, 152CO−152EB, 152EF and 152EG. All these terms of access and exclusion of rights would be locked in for the full period of the exemption order.

225. It is important to note that while Pt XIC would not preclude declaration of the services the subject of the exemption orders (given the terms of s 152ATA(1)), such declaration would be nugatory, as the rights and obligations set out in Pt XIC are generally activated by the application of the standard access obligations, not by the fact of declaration itself.

226. The future with exemption orders therefore would have the following consequences for an access seeker:

- Any subscriber to a service provided by an access seeker such as Seven Network would be required to subscribe and pay for Foxtel's Basic Package whether it wanted it or not.
- Any access seeker would be potentially locked into the Foxtel's and Telstra's terms and conditions at least until 2007 and at Foxtel's and Telstra's option until 2015.
- Access would not be given to the interactivity features of the Foxtel service.

The conditions imposed by the Commission on Foxtel

227. The conditions imposed by the Commission included certain amendments to the original s 87B undertaking and the scheduled access agreement offered by Foxtel. The "future with" exemption would include these conditions as they were accepted by the parties.

228. We consider the most significant of these conditions to be:

- changes to the term such that it is calculated from the date of access, not the date of entering the agreement; and

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changes to the WACC parameters, notably the change to the asset beta.

229. In considering the difference in term under the undertakings as originally offered, as against the undertakings amended in the light of the Commission's conditions, we have reviewed the conditions precedent that must be met before service is be provided (as the time it would take to satisfy these conditions effectively reduces the term available to an access seeker when compared with the term that would be offered under the amended undertaking). The conditions precedent are set out in cl 4.3(a)

of the digital access agreement, and essentially entail:

- the completion of any necessary network enhancements;
- testing for compliance of the access seeker's broadcast signals with the relevant specifications being completed successfully;
- the STU to which the Digital Set Top Unit Services are to be supplied "[being] actually in use by a Subscriber for reception of Foxtel's Commercial Retail digital cable Subscription Television Service" (ie the household subscribes to the Basic Package via a *digital* service); and
- the access seeker meeting all of the specified operational requirements and having provided Foxtel with all information necessary to enable Foxtel to provide the Digital Set Top Unit Services.

230. In our view, assuming Foxtel were to act in good faith, the Tribunal does not consider that an access seeker would take more than six months, at the most, to satisfy these conditions. The Commission was given no substantive reason to assume that Foxtel would not act in good faith (and, were we to be persuaded that Foxtel would be unlikely to act in good faith in granting access under the terms of its undertakings, it would not grant the exemption in any case). Accordingly, we are satisfied that any reduction to a five year access term (as calculated under the original terms of access) would be minimal.

231. In regard to the WACC parameters, we were not provided with guidance to allow us to assess the significance of the changes required by the Commission. Accordingly, it was not clear on the information put to us whether the Commission's changes to the WACC parameters would result in a significant difference when compared with those originally put forward by Foxtel. It should be noted that, in the absence of an exemption, if the relevant services become declared, the terms and conditions, including the possibility of varying the WACC parameters, would become matters for further regulatory processes.

The conditions imposed by the Commission on Telstra

232. As with the Foxtel decision, in reaching its decision in relation to the Telstra exemption application, the Commission imposed certain conditions requiring amendments to the original undertakings and the scheduled access agreements offered by Telstra. Of these, we considered the only significant condition imposed by the Commission to be changes to the term such that it is calculated from the date of access, not the date of entering into the agreement.

233. Only the term of access will be considered material to a prospective access seeker (who cannot be in a position to know whether the access undertaking will be extended such that the other amendments would become relevant). Again, we have considered the time it would take to satisfy the conditions precedent. As set out in cl 1.18 of the Digital Services Module, before supply of the services will begin, Telstra must obtain any necessary third party consent, any necessary enhancements and extensions need to be completed and the access seeker must have paid the applicable charge and all critical technical and operational issues relating to the supply of the Digital Services must have been resolved to the reasonable satisfaction of Telstra.

234. Again, assuming Telstra were to act in good faith, we do not consider that an efficient access seeker would take more than six months, at the most, to satisfy these conditions. The Commission was given no substantive reason to assume that Telstra would not indeed act in good faith (and, were we to be persuaded that Telstra would be unlikely to act in good faith in granting access under the terms of its undertakings, we would not grant the exemption in any case). Accordingly, we are

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satisfied that any reduction to a five year access term (as calculated under the original terms of access) would be minimal.

The future without exemption orders

235. The future without the exemption orders would mean:

- Access would be available to access seekers on the terms offered by Foxtel and Telstra but without the Commission's amended conditions; together with
- the opportunity to seek declaration of the Foxtel and Telstra services by the Commission pursuant to s 152AL. If the services were declared then the standard access obligations would apply.

236. Compared to the "future with" exemption orders, the "future without" the exemption orders offers a greater range of opportunities for access seekers and thereby for end−users in respect of the terms on which access to Foxtel's and Telstra's digital service may be obtained. Without exemption orders access is available on the terms originally offered by Telstra and Foxtel because of:

- the finding that as at 12 December 2003 Telstra and Foxtel proposed to digitise their services in March 2004 or alternatively that such digitisation would probably occur in the near future and no later than 2005; and
- the obligation on Telstra and Foxtel under their s 87B undertakings, to provide access once they had started to provide digital services.

There is also the opportunity available to seek a declaration by the Commission pursuant to s 152AL, there being no exemption orders in operation. The standard access obligations contained in s 152AR of the Act would apply if Telstra's and Foxtel's services were declared in accordance with s 152AL.

237. Declaration by the Commission would also mean that ministerial pricing orders could be made and the additional rights contained in Pt XIC would also apply.

238. Access seekers could thus either take advantage of the access conditions upon which Foxtel and Telstra had set out the basis of access before the Commission; or they could rely upon the opportunities potentially available through declaration pursuant to s 152AL. The advantage to an access seeker of the Commission making a declaration under s 152AL is that not only would the standard access obligations apply but also, in the absence of agreement as to the terms of access, it would be open to the access seeker to reject Telstra and Foxtel's proposals and seek to have both price and non−price terms and conditions of access settled by the Commission in an arbitration under subdiv 152C of Div 8 of Pt XIC.

Finding: exemption orders and the LTIE

239. We must reach a conclusion as to whether the making of an exemption order under s 152ATA(3)(a) will promote the long−term interests of end−users of relevant services. The Act directs the answer to that question to take into account the matters to which regard must be had in s 152AB(2), (4) and (6) of the Act, in particular:

- the objective of promoting competition in markets for listed services; and
- the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

240. Is the granting of the exemption order likely to result in the achievement of the objective of promoting competition in markets for listed services? In circumstances where access is already available, having regard to the finding that we have made as to the commencement of digitisation in the near future, competition in markets for listed services is promoted more in circumstances where there are a greater range of options available to access seekers and therefore, derivatively, to end−users of listed services. In the "future without" situation where digitisation has either occurred or is imminent, it is open to access seekers to move the Commission to have the Foxtel and Telstra services declared under s 152AL of the Act.

241. The granting of the exemption order will do less to achieve the objective of promoting competition in markets for listed services, as there will be fewer opportunities available for access seekers to obtain access on satisfactory terms compared to the circumstances that will prevail in the absence of

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exemption orders. Nor will the granting of the exemption order remove obstacles to end−users of listed services gaining access to listed services. Absent the exemption order, access seekers will have the opportunity to obtain access on terms which will enable them to be more competitive not only generally but also in particular in relation to Foxtel.

242. The other gateway through which the long−term interests of end−users must be considered is whether the granting of the exemption order is likely to result in the achievement of the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied. Our finding as to digitisation has the consequence that in the particular circumstances of this case, granting the exemption order will not achieve that objective or any certainty of investment as (looking at the matter as at 12 December 2003) a commitment to the use of the infrastructure had been made and a decision had been made to commence such use even if there was an appeal or review in respect of the exemption order. In such circumstances the investment in the infrastructure would have been made, notwithstanding any appeal or review in relation to the granting of the exemption order.

243. We have considered the possibility that refusing to make the exemption order on the grounds that digitisation is going to occur in any case may deter future investors. We have concluded that it will not. Section 152ATA is intended to provide exemption from the standard access obligations in *anticipation* of future investment. As explained in the Explanatory Memorandum it is designed to facilitate investment that would otherwise be delayed or in fact may not occur at all. But that is not the situation here where digitisation is certain to occur anyway within the same or a similar timeframe. Accordingly, prospective investors should not consider a failure to grant an exemption in these circumstances as altering their prospects of gaining an exemption order. Furthermore, in the event that investors follow a similar course to Telstra and Foxtel in providing terms of access to the Commission prior to making an exemption application (although, given that the legislation providing for this option is now in place, it is difficult to imagine the circumstances in which this might occur), it is open to such investors to ensure that any access granted is conditional on the fact of exemption and not on the making of the investment.

244. It must not be forgotten that these applications arose in fairly unusual circumstances with the access undertakings required in order to offset concerns that other arrangements may be anti−competitive. It would not be reasonable, therefore, to consider this decision as undermining any certainty that future investors may consider is offered by the prospect of an exemption application under s 152ATA.

245. It is the case, however, that granting the exemption orders would provide Telstra and Foxtel with certainty concerning the terms and conditions on which they would be required to provide access. Neither Foxtel nor Telstra sought to justify the exemption applications on the basis that the standard access obligations should not apply to them. Indeed, they submitted that their terms of access essentially replicated the standard access obligations. For example, counsel for Foxtel stated: "all of the standard access obligations in [section] 152AR are in fact addressed properly in the digital access agreement".

246. The main basis of certainty proffered by Foxtel and Telstra if exemption orders were made was immediate access to access seekers and the prospect of avoiding potentially lengthy arbitration proceedings, if declaration were to occur, together with the lengthy declaration process itself.

247. Such certainty of access was achievable even if the exemption orders were not made. This follows from our conclusions regarding digitisation, namely that, as at 12 December 2003 access was going to occur within no longer a timeframe than if the exemption were granted. We observe also that any evidence of uncertainty in respect of declaration processes and consequences is not enough to outweigh the detriment to the LTIE posed by precluding the prospect of the standard access obligations (and those sections of Pt XIC that are triggered by their application) applying until possibly the

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end of 2015. If, at any time during the life of the access undertakings, a declaration question comes before the Commission, such declaration may only be made if "the Commission is satisfied that the making of the declaration (and thereby the triggering of the standard access obligations and all that that involves) will promote the long−term interests of end−users" (s 152AL(3)(d)). Accordingly, if *at that time,* declaration − in the words of the Commission's Declaration Guidelines − "is unlikely to lead to any significant changes in quantity, price and other terms and conditions of the supply of the eligible service", then it is unlikely to meet this test. As the 1996 Explanatory Memorandum noted, "It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services" (under discussion of "Proposed section 152AB − Object of this Part"). In our view, however, it would not be in the LTIE to preclude this possibility until potentially the end of 2015.

248. Finally, while it may be the case that, under an exemption scenario, Telstra and/or Foxtel are more likely to extend the term of access until 2015 or, in Foxtel's case, roll out digital STUs more quickly than would otherwise be the case, we were given no information upon which to reach such a view. We are bound to consider the future with and without on the basis of the information available, such as the obligations imposed under the access undertakings. We are not in a position to engage in speculation as to what the parties' intention might be in a few years' time.

249. It follows from this analysis that we are not satisfied in the case of each of Foxtel and Telstra that the making of the exemption order sought will promote the long−term interests of end−users or that the exemption would be likely to achieve the objectives of:

(a) promoting competition in markets for listed service having regard to the extent to which the making of the exemption orders will remove obstacles to end−users of listed services gaining access to listed services; and

(b) encouraging the economically efficient investment and use of the digital infrastructure.

Concerns with the terms and conditions of access

250. The analysis to this point has concentrated on the long−term interests of end−users in circumstances where access to Foxtel and Telstra's digital facilities has been triggered by Foxtel's decision as at 12 December 2003 to digitise. If the exemption orders are not granted there is left open the prospect that terms and conditions that better promote competition and the efficient use of, and investment in, infrastructure may eventuate in a declaration scenario. In our view, it is not necessary to consider the likelihood of declaration or the imposition of better terms and conditions other than that they are possible options if the Commission initiates the declaration process in s 152AL of the Act. Any prospect of declaration is in the long−term interests of end−users, when the future without an exemption order provides for the opportunity for access in any case.

251. If digitisation had not loomed large on the horizon as it did as at 12 December 2003, however, it would have been necessary to consider whether the exemption orders would promote the LTIE in circumstances where digitisation was not likely to occur for a number of years. In such a scenario the terms and conditions contained in Foxtel's and Telstra's s 87B undertakings and access agreements would bear upon whether we were satisfied that the making of the exemption orders would promote the LTIE in the sense required by s 152AB(2), (4) and (6). There are a number of terms and conditions in Foxtel and Telstra's s 87B undertakings and access agreements in respect of which we have concerns in this context. As they were the subject of full argument it is appropriate that we express our views on these particular provisions.

252. We have concerns about:

- the exclusion of interactivity from the digital services offered by Foxtel (although we consider that this is more of an issue in the case of Foxtel than it is in the case of Telstra);
- the tie of access to the Basic Package under Foxtel's terms and conditions;

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the period of the undertakings and the length of the exemption period which may, at Foxtel's or Telstra's option, extend until the end of 2015.

We also have reservations concerning the pricing methodologies underlying the Telstra and Foxtel access price.

253. The conclusion we have reached is that these provisions place substantial limitations on the commercial prospects of any access seekers to the Telstra/Foxtel digital network, to the point where it is doubtful whether they provide for meaningful and effective access.

254. We have formed opinions on whether these provisions, standing alone, are in the long−term interests of end−users. We recognise that an opinion on particular provisions does not address the question or issue posed by s 152ATA. That is answered by an overall assessment of all relevant matters based on a future with and without an exemption order analysis addressed to the requirements of s 152ATA(6) and s 152AB(2), (4) and (6).

255. In the absence of our finding as to the imminence of digitisation and our conclusions as to the consequences of that finding, whether this assessment would ultimately lead to the conclusion that it is not in the LTIE to grant exemptions would depend upon a full "future with and without" analysis, which we have not conducted. In that analysis the "future with" exemption orders would necessarily hypothesise that digitisation would not occur for some considerable time, i.e. not until well after the time we have found on the evidence that it would have occurred.

256. Nevertheless, were the task carried out, the unsatisfactory nature of the access that we have determined would eventuate under the access agreements, which would clearly not be in the LTIE, would need to be weighed against the hypothesised fact that digitisation would be significantly postponed, which would also not be in the LTIE.

257. Whether the analysis would ultimately lead to the conclusion that the agreements in which the provisions are found are such that it is not in the long−term interests of end−users for an exemption order to be granted because the agreements are in place must depend upon an overall consideration of all the provisions of the access agreements including the provisions in respect of which we have expressed some concern.

Exclusion of interactivity

258. As noted above at par [63], cl 4.2(a)(vi) of the Foxtel Digital Access Agreement scheduled to Foxtel's s 87B undertaking excludes "return path or interactivity functionality" from the Digital Set Top Unit Services provided by Foxtel.

259. Interactivity functionality, in general terms, falls into two categories:

- the delivery of content via a "forward path" to a specific user. This is a "point−to−point" service, which may be distinguished from a "point−to−multipoint" service, whereby content is delivered to multiple end−users; and
- "return path" services, whereby an end−user is able to send, as distinct from merely receive, content.

260. Such services permit a pay television service provider to provide services enabling its subscribers to vote, to participate in quizzes and games, to shop, and to select videos on demand. It also permits advertisers to engage in targeted advertising.

261. Both point−to−point and return path services can be simulated to varying degrees by non−interactive services. For example, true interactivity permits subscribers to order videos on demand. It is possible to simulate this service with a point−to−multipoint service by multi−channelling whereby a single video is shown over numerous channels with staggered starting times. Similarly, viewers may vote on a particular issue by sending an SMS message using their mobile telephones. This form of interactivity is already available for both free−to−air and subscriber television in Australia. As at 12 December 2003, however, Foxtel and Telstra did not provide true interactivity.

262. There was considerable debate about whether the interactive services the subject of submissions could be defined with certainty. This debate arose in part, in the context of Foxtel's submission that consideration of the future "with and without" the exemption order required examination of the likelihood that the

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services the subject of the exemption application would be declared under s 152AL. Foxtel contended that interactive services were unlikely ever to be declared so that the fact that no access was provided to such services was immaterial.

263. Both Telstra and Foxtel submitted that there was insufficient certainty about interactive services for the Tribunal or, in the course of a declaration process, the Commission, to define them in any meaningful way. Telstra stressed that its HFC was configured at present to include only 60 MHz of return path (as against 675 MHz of forward path), and that the return path was not currently configured, or in use, for truly interactive services. Foxtel emphasised that the term "interactivity" was broad and did not necessarily encompass return path or point−to−multipoint services, submitting that no such services were presently offered or available. The Commission did not include interactive services in its exemption order in relation to Foxtel and Telstra "due to the lack of clear terms and conditions of access" to such services.

264. Seven Network submitted that the services were able to be defined. It pointed to the availability of the services overseas,

the fact that such services had been defined by the United Kingdom telecommunications regulator OFTEL on a number of occasions, and the ability of the Commission to define such services sufficiently well in drafting the exemption orders. The reference to OFTEL's definition is to be found in documents, the admissibility of which was contested. However those documents were covered by an earlier ruling of the Tribunal in accordance with the opinion of the Presiding Member.

265. We note that the Commission took great care to ensure that the exemption orders granted to Telstra and Foxtel were expressly limited by reference to "Interactive Services" and "Point−to−Point Carriage Services". It did so having regard to claims by the Seven Network that the services the subject of the exemption applications exceeded in scope the services to which access was provided. The Commission addressed this alleged disconformity by specifically excluding the following services from the Telstra exemption order:

> " **'Interactive Services'** − 'Carriage Services which carry signals from a subscriber's digital set top unit to the subscription television provider or another person, the critical features of which are that:
>
> (i) the signals are sent from the subscriber's premises; and
>
> (ii) the signals are sent using the digital set top unit'; and
>
> **'Point−to−Point Carriage Services'** − 'Carriage Services that only carry signals from a headend of the HFC Network to the termination point of the HFC Network associated with a particular end user connected to the HFC Network (and no other termination point).' "

266. Similarly, in the Foxtel exemption order, the following services were specifically excluded:

> " **'Interactive Service'** − 'a carriage service and services provided by the modem and associated software in the subscriber's digital set top unit, which carry or facilitate the carriage of digital signals from a subscriber's digital set top unit to the subscription television provider or another person the critical features of which are that:
>
> i) the signals are sent from the subscriber's premises; and
>
> ii) the signals are sent using the digital set top unit'; and
>
> **'Point−to−Point Carriage Services'** − 'services for the carriage of digital signals used for the purposes of transmitting content by any means including a hybrid fibre co−axial cable network, satellite, PSTN or ADSL that only carries signals between the service provider and a particular end user (and no other end user).' "

267. We recognise that defining services for the purposes of excluding them from an access arrangement is a different exercise from defining them for inclusion in an access regime, but we are not satisfied that any concerns about the subject−matter covered by the inclusion of interactive services in the service to be declared

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or exempted should preclude their definition in clear terms. In this respect the Tribunal is mindful of the 1996 Explanatory Memorandum to the Bill which introduced Pt XIC (including the declaration provisions), into the Act (under the heading "Proposed section 152AL − Declared services"):

> "In making a declaration of an eligible service, the ACCC will have a high level of flexibility to describe the service, whether it be in functional or any other terms. This will enable, where appropriate, the ACCC to target the access obligations (which are triggered by a declaration) to specific areas of bottleneck market power by describing the service in some detail, or to more broadly describe a service which is generally important (such as services necessary for any−to−any connectivity)."

268. We are not convinced that interactive services as provided by Foxtel would be difficult to define appropriately, or with certainty although this is more likely to be the case for those services provided by Telstra. In any case, we consider that as s 152ATA was specifically designed to be available in respect of "services not yet in existence or not yet being supplied"; (the Explanatory Memorandum to the 2002 Bill at 66), the difficulties of defining as yet unavailable services should not be insurmountable.

269. It is not necessary for us to undertake the exercise of defining interactive services. Any difficulties of definition would only impact upon our ability to impose, as a condition of exemption, a positive obligation to provide access to interactive services. That is not a present consideration as, although the Act clearly provides the Commission (and thus the Tribunal) with an ability to impose conditions under s 152ATA(4), the Commission or Tribunal should not use conditions as a means of fundamentally redrafting an application. The issue that should be addressed at this stage is whether it is in the LTIE (as applied by s 152AB(2), (4) and (6)) for interactive services to be physically and technically separated from Foxtel's digital pay television services.

270. There were numerous submissions put before both the Commission and the Tribunal concerning the likely future role of interactive services in the provision of digital subscription television (as already discussed in these reasons). In particular, there was considerable evidence concerning the success of interactive services in overseas markets, notably the United Kingdom at pars [163]−[166].

271. Seven Network submitted that 'true' interactivity would be essential to the delivery of any future subscription television service. It relied upon an excerpt from a speech by Kim Williams, Foxtel's chief executive office (at par [162]), in which he emphasised the importance of interactivity as "the essence of digital".

272. While Foxtel submitted that broader interactive services, such as "near" video on demand and multiple camera angle viewing would be available to an access seeker under the digital access undertakings, we consider that the experience of overseas subscription television providers, such as BSkyB, indicates that true interactivity is likely to become an essential element of a subscription television service in the short−to−medium term. Accordingly, we accept that this form of interactivity is likely to become a major subscription driver and revenue earner for subscription television providers. Without interactivity, one potential important form of competitive entry is precluded.

273. The effect of the conditions imposed by the Commission in its exemption orders, and the acceptance by Telstra and Foxtel of those conditions, is that the exemption order would not extend to interactive services. It follows that granting an exemption on the terms put by Telstra and Foxtel to this Tribunal would not preclude any future declaration of interactive services during the period of exemption. Although the separation of interactive services from general digital carriage services removed any disconformity between the access offered under the s 87B undertakings and the scope of the exemption, it created further issues that were not in the long−term interests of end−users. These issues arise from:

- the unattractiveness of access to digital subscription television services without access to interactive services;
- a concern that consideration of interactive services on a stand−alone basis, rather than in conjunction with other digital [42753] subscription television services, may give rise to, or exacerbate, difficulties associated with obtaining declaration in relation to interactive services; and
- Assuming declaration could be obtained, the inappropriateness of having a "piecemeal" approach to access.

274. Such concerns are amplified in the case of the Foxtel terms and conditions of access, which, by excluding interactive services from the scope of its terms and conditions of access, also preclude an access seeker from electing to obtain interactive services from Telstra by means other than the HFC, such as the public switched telephone networks ("PSTN") (access to which is already declared). It is notable that subsequent written submissions from Telstra emphasised that Telstra and Foxtel considered the PSTN, rather than the HFC, the most efficient means by which to carry interactive services.

Access without interactive services

275. Seven Network submitted that the access offered under Foxtel and Telstra's respective access agreements is likely to be of no real value to many potential entrants as such entrants would be likely to want all of the services offered by digital television technology before committing to substantial investment. For the reasons given above, we agree that access to digital subscription television services without interactivity is likely to deter new entry. At the least such access will not be competitive with those organisations that do have access in respect of their digital service. We consider that, with interactivity services likely to be available from Foxtel in the short−to−medium term, a typical potential entrant would not enter the industry without first obtaining access to interactive services. Potential investors are likely to wait until such time as interactive services become available, and then to seek access to such services along with the more general digital subscription television services available under the Foxtel and Telstra access agreements.

276. In the absence of being able to negotiate access to interactive services on a commercial basis with Foxtel and Telstra (a proposition that is unlikely), a prospective access seeker would need to seek declaration of interactive services under s 152AL of the Act. Such a requirement would apply, of course, regardless of whether an exemption order was granted to each of Telstra and Foxtel. If exemptions were granted, however, an access seeker would be required to seek declaration of interactive services on a stand−alone basis.

277. The access seeker would have to satisfy the Commission that the interactive services in question were "eligible services" and that their declaration was in the "long−term interests of end−users of carriage services or of services provided by means of carriage services" (s 152AL(3)). Point−to−point and return path services appear to fall within the definition of "eligible services". They are listed carriage services within the terms of ss 7 and 16 of the *Telecommunications Act* 1997, that is, they are services for carrying communications by means of guided and/or unguided electromagnetic energy between a point in Australia and one or more other points in Australia.

278. We do not consider it necessary to undertake a hypothetical declaration exercise to determine whether interactive services warrant, and would be likely to be the subject of, separate declaration. Nonetheless, as a matter of principle, we accept that separating interactive services from more general digital subscription television services may make it more difficult to satisfy the LTIE test required under s 152AL than if those services were to be considered jointly.

279. Assuming, however, that declaration is possible in relation to interactive services on a stand−alone basis, such declaration in conjunction with the exemptions for Telstra and Foxtel would result in multiple parallel access regimes, which regimes would

commence and end at different times. Thus, the terms and conditions of access (including price) for general digital subscription television services would be those established by Telstra's and Foxtel's s 87B undertakings. In relation to interactive services, however, the terms and conditions would be devised within the declaration framework (including, for example, by way of arbitration). Accordingly, there would be inefficiencies for both access providers and, more particularly, access

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seekers, in managing a business within the framework of multiple access regimes.

280. In addition, the existence of terms and conditions for general digital subscription television services may result in difficulties when determining appropriate terms and conditions of access for interactive services. For example, it seems clear that developing a pricing regime for the use of a return path would require consideration of the likely use of, and payment terms for, the forward path. Indeed, the two pricing regimes would be intimately related and would need to be integrated.

281. If a potential access seeker sought to use the PSTN to provide interactive services, there would also be a multiple access regime, but this would not give rise to the same degree of fragmentation as contemplated under a scenario by which an access seeker must avail itself of two access arrangements (one with each of Telstra and Foxtel) and two declarations (one for the type of services provided by each of Telstra and Foxtel respectively). For example, the billing issue mentioned above would not prove as complicated, as there is no "return path" in the context of the PSTN. Interactive services via the PSTN would, as we understand, be treated in a like manner to making a telephone call.

282. In the light of these issues, we consider that access terms and conditions should be considered jointly and determined in respect of the whole of digital subscription television services provided by each of Foxtel and Telstra, rather than by way of a piecemeal approach. Given the availability of the PSTN, we are particularly concerned that the Foxtel terms of access preclude opportunities to use the PSTN that may otherwise be available to a prospective access seeker. Conversely, we are less concerned with the fragmentation of the services in question provided by Telstra.

283. It is our opinion that interactive services are likely to be an integral element of subscription television services within the short−to−medium term. An inability to provide interactivity will result in a much inferior product offering compared to the suite of services able to be offered by Foxtel. We note the position of the Commission (par [77]), that, "[I]f it occurs that access to interactive services is important in its own right, or as a supporting service to subscription television, then this is a matter the Commission will need to consider in the future." In our view, however, and for the reasons already given, interactivity is imminent and will be a feature we expect providers of digital subscription television services will consider intrinsic to the development and promotion of an attractive and competitive product.

284. Interactivity was carved out of the exemption orders granted by the Commission, but requiring potential entrants to obtain access under multiple parallel regimes would, in the Tribunal's view, place them at an unjustified competitive disadvantage, and may discourage entry. More particularly is this so if Foxtel has implemented its digital channels with interactivity immediately available. We do not consider it appropriate to exempt some of such services, thereby removing them from the statutory framework for access for the period of that exemption, and leave other closely related services to be considered, and potentially to operate, within that framework. We are of the view that the long−term interests of end−users would be best served if (both price and non−price) terms of access for the whole of pay television's services are considered together at the same time.

Foxtel: tying access to the basic package

285. Under cl 4.1(c)(i) of Foxtel's digital access agreement, Foxtel is only obliged to supply and to continue supplying Digital Set Top Unit Services to an access seeker where the STU to which the Digital Set Top Unit Services are to be supplied "is actually in use by a Subscriber for reception of FOXTEL's digital Subscription Television Services". Similarly, cl 4.3(a)(iii) provides that Foxtel has no obligation to supply the Digital Set Top Unit Services to an access seeker unless "the Digital Subscriber Equipment to which the Digital Set Top Unit Services are to be supplied is actually in use by a Subscriber for reception of FOXTEL's Commercial retail digital cable Subscription Television Service". The emphasis on "actually in use" was taken to mean by Foxtel, the Commission and the Seven Network that a potential entrant would not be able to acquire Digital Set Top Unit Services from Foxtel

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except in relation to households currently subscribing at a minimum for Foxtel's "Basic Package".

286. Under the terms of the Foxtel undertaking, the Basic Package is defined as "the programming tier offered by FOXTEL from time to time to all subscribers which has the highest number of subscribers of any programming tier offered by FOXTEL at that time". As is clear from this definition, the number and type of channels that constitute the Basic Package are entirely for Foxtel to determine as and when it chooses. Pursuant to cl 13 of the undertaking, the price of the Basic Package is set for a period of three years. Clause 13 effectively provides that the price, in real terms, will not exceed $47.95 per month (with the September quarter 2002 being the base for calculating inflation) for that period. The combination of the digital access agreement and the terms of the undertaking therefore means that an access seeker can only compete by way of offering "tiers" on Foxtel's Basic Package where approximately the first $600 of annual household expenditure on subscription television is dedicated to Foxtel.

287. In its final decision, the Commission considered the implications of this tie largely in the context of pricing (in view of the

expert reports put forward by Seven Network which claimed that the tie meant a departure from TSLRIC−based pricing would be appropriate). Nonetheless, Seven Network also contended before the Tribunal (as it had before the Commission) that the tie rendered the terms of access offered under the digital access agreement unreasonable and unattractive, claiming that the tie:

- insulated Foxtel's Basic Package from competition;
- allowed access seekers to compete only for the discretionary spend that remained after consumers subscribed to the Basic Package, forcing the access seeker to compete "higher on the demand curve"; and
- exposed access seekers to manipulation of the Basic Package by Foxtel.

288. Seven Network submitted that access on these terms was not in the LTIE as it would lead to allocative inefficiency, create a dynamic disincentive for alternative subscription television providers and lead to a variety of market inefficiencies. Seven Network drew particular attention to the Commission's interim decision (there being no final decision) in the analogue access arbitration between Foxtel and C7, where it stated:

> "... the Commission considers that C7 should have the opportunity to market their content to premises passed by the Telstra cable but that do not have a current Foxtel subscription.
>
> Given that the purpose of the legislation is to allow access seekers to use the declared service and necessary ancillary services to deliver a pay television service to its customers, the Commission considers it is also appropriate to require the use of Foxtel's STUs in the premises of C7 customers who are not also Foxtel subscribers. Indeed, the Commission considers that s152AR operates so as to impose such an obligation."

289. Foxtel claimed that the tie to the Basic Package was designed to avoid situations where Foxtel would be required to provide STUs to households that do not subscribe to its service. Such an outcome, submitted Foxtel, would enable an access seeker to require an access provider to alter fundamentally the nature and scope of the services supplied by the access provider in its current business. It would require Foxtel, as a provider of subscription television services, to engage in the business of supplying STUs and associated services to third parties while not concurrently supplying pay TV services to those subscribers. At its broadest this would comprehend households that had subscribed to Foxtel but had ceased to do so (or intended ceasing to do so) on taking the access seeker's service, and also households that had never subscribed to Foxtel (or had ceased to do so some time previously). The first category of households would still retain the Foxtel STU while the second category would never have had a Foxtel STU or, in accordance with Foxtel's normal practice, would have surrendered the STU to Foxtel for re−use by new subscribers.

290. Foxtel claimed that the STU services which it provides are delivered by way of various "facilities" (primarily STUs, but also

fly cables and the remote control), and that Pt XIC of the Act did not provide any basis for requiring an access provider to extend the size or scope of its facilities. Indeed ss 152AR(2), (3), (8) and 152AH(1)(b), according to Foxtel, implied the reverse (in contrast to, say, s 44V(2)(d) in Pt IIIA to which, Foxtel noted, there is no Pt XIC equivalent). Accordingly, under a Pt XIC declaration process, an access seeker would be entitled to receive STU services in the locations in which those services were already supplied by the access provider, and would have no right to insist on receiving them elsewhere.

291. Foxtel relied upon the decision of the Full Federal Court in *FOXTEL Management Pty Ltd* v *Seven Cable Television Pty Ltd and Others* [2000] 102 FCR 555 in support of its submission that it was not obliged to supply a Foxtel STU to households that had never subscribed to Foxtel or had ceased to do so. Foxtel submitted that the decision stood for the proposition that Foxtel was a carriage service provider and that the service provided by Foxtel was, in effect, the entire commercial subscription digital television service that reached the customer and not some artificial dissection of it. Having regard to our primary decision in this matter, it is not necessary to determine whether the Full Federal Court's reasoning supports Foxtel's submission. For present purposes, the relevant issue is the tie of access to the Basic Package.

292. In response to concerns regarding Foxtel's ability to manipulate the content of the Basic Package as a means of foreclosing competition, Foxtel submitted that it would be commercially disadvantageous for it to remove programs from premium tiers and to offer them as part of its Basic Package. If Foxtel were to do so, it would undermine its current efficient pricing structure, resulting in revenue losses for the premium tiers. This would in turn adversely affect its business model.

293. Finally, Foxtel noted that an access seeker could source its own carriage from Telstra under the Telstra access agreement (or from another carriage provider) and install its own digital STUs in non−Foxtel homes (or install its own digital STUs in all homes if it chooses to do so). Foxtel noted that the terms of the Telstra access agreement were not tied to the use of Foxtel STUs and stated it had undertaken to the Commission to consent to an access seeker connecting to, adapting or altering the Foxtel equipment installation in order for the access seeker to install its own STU and associated equipment in Foxtel homes on certain conditions (cl 23.3 of the Foxtel undertaking).

294. The structure of the Foxtel digital access agreement means that an access seeker's channel(s) can only serve as a complement to the Basic Package, and never as a substitute for it. Potential access seekers will be competing for only that subset

of subscribers who choose to purchase premium tiers in addition to Foxtel's Basic Package. It also means that Foxtel's Basic Package would not be threatened by the prospective entry of an access seeker.

295. We agree that in a typical access scenario it would be unusual to insulate an access provider from competition in such a manner. Nonetheless, we are uncomfortable with the proposition that Foxtel should be required to provide equipment at the behest of an access seeker, whilst receiving no immediate benefit itself (other than access fees), even if, as submitted by Seven Network, it was possible to ensure there was appropriate compensation. This notion also appears to depart from standard situations in which access is required.

296. However, we note that this issue arises, or is made less tractable to deal with, because of the inseparability of the various forms of Digital Set Top Unit Services. These services are defined in the Foxtel undertaking as follows:

> "(a) use of digital Set Top Units and customer cabling ... controlled and used by FOXTEL, for the purpose of provision of a Subscription Television Service or Related Services; and
>
> (b) the provision of Conditional Access Services; and
>
> (c) the provision of Service Information Services; and
>
> (d) the provision of smartcard authorisation verification information reasonably necessary for the access seeker to invoice its customers but limited to that information
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> [42757]
>
> that can reasonably be produced by the Conditional Access system.
>
> For the avoidance of doubt, (a), (b), (c) and (d) must be taken together."

The proposition that an access seeker was required to obtain all services, and was not permitted to select particular services, was specifically emphasised by counsel for Foxtel.

297. The terms of access offered by Foxtel foreclose the possibility that an access seeker could expand its potential market beyond current Foxtel subscribers by providing its own STUs to non−Foxtel subscribers, whilst still obtaining from Foxtel the Conditional Access Services, the Service Information Services and, perhaps, the smartcard authorisation verification information as described in par (d) above.

298. While we did not receive submissions on this point, the ability of an access seeker to provide subscription television services using its own STUs but without having completely to duplicate Foxtel's delivery infrastructure would appear to be a potentially attractive and valuable option. Accordingly, we would not wish to foreclose any scope which may exist for Conditional Access ("CA") and Service Information ("SI") services to be supplied separately from STUs. On such a view, the tying of the Basic Package does not appear necessary or appropriate. Whilst this does not overcome the issue of how to address the tying of the Basic Package in circumstances where Foxtel STUs *are* being used by an access seeker, in our view such an issue more appropriately falls for consideration in the course of a declaration process.

299. We are also concerned that a prospective access seeker is vulnerable to potential manipulation by Foxtel of the Basic Package to prevent or to preclude competitive conduct. While we consider it unlikely that Foxtel would manipulate the pricing of the Basic Package for such effect (upon expiry of the three year period during which the pricing is set), we are concerned at the prospect of Foxtel being able to adjust the contents of the Basic Package in response to competitive conduct by an access seeker.

300. If we were considering granting an exemption, we would not feel that imposing a condition (for example, requiring the content of the Basic Package to be fixed for a period or permitting it to be amended only upon certain conditions) was a suitable remedy (let alone imposing a condition that the tie be removed). It may be an entirely appropriate competitive response for Foxtel to adjust the formulation of the Basic Package over time, particularly following evidence that the "formula" of a given channel is successful. To prevent Foxtel from doing so for the duration of the exemption would impose an inappropriate handicap on its ability to conduct its business. As the digital access agreement stands, however, it will be difficult to discern whether any change to the Basic Package is a normal competitive response or is in fact undertaken for anti−competitive purposes (or a combination of the two). Accordingly, in our view, an ability to resort to the prohibitions against anti−competitive conduct contained in either Pt IV or Pt XIB of the Act is unlikely to be sufficient to reassure a prospective access seeker that its ability to compete for market share cannot be undermined by potential manipulation of the Basic Package by Foxtel.

301. In the light of these factors, we consider that the tie of the Basic Package to access to Foxtel's services as contained in the digital access agreement is a significant deterrent to entry. This is exacerbated by what we regard as an unnecessary prevention of an access seeker using Foxtel's infrastructure and services, other than its STUs, to deliver subscription television services. In our view, potential access seekers are likely to be deterred from commencing supplying subscription television services in competition with Foxtel for so long as access is tied in this manner.

302. Finally, we consider that Foxtel's submissions that an access seeker could provide subscription television services using Telstra's carriage service but the access seeker's own digital STUs and ancillary services undermine the access undertaking that

it provided in the first place. To suggest that an access seeker may be better off under an alternative of not seeking access to Foxtel's service calls into question the seriousness with which access was

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offered. The undertaking to provide access, however, was offered to the Commission in order to address perceived issues with Foxtel's market power. While we were not provided with a detailed explanation of the background to the undertakings, we note with interest the Commission's assessment as set out in its report to the Communications Minister, Senator Alston, in June 2003:

> "The Commission's view was that the pay TV agreements [between Foxtel, Telstra and Optus] would, to some extent, enhance Foxtel's power in the market for the acquisition of pay TV content, and placement of content on both the Optus and Foxtel pay TV services. This is because the pay TV agreements weaken Optus' incentive to buy pay TV content, allow Optus to access all of Foxtel's content, and require Optus to supply any movie or sports rights that it acquires in future to Foxtel (if Foxtel has not already acquired those rights). This requirement also applies to any content produced by Optus.
>
> As such, a reduction of competitive tension between Foxtel and Optus in the market for the acquisition of pay TV content is likely to adversely affect the bargaining position of channel suppliers, as they will lose the benefits associated with the competitive tension and competition between Optus and Foxtel. A reduction in the bargaining power of channel suppliers may make it difficult for pay TV channel suppliers to secure adequate distribution for their content.
>
> The issue may be particularly problematic where Foxtel affiliated and non−affiliated channels compete for subscribers (if on a tier) and advertisers. There is scope for Foxtel, as a vertically integrated pay TV provider, to provide favourable terms and conditions of access (such as tiering, pricing or EPG placement) to its platform for affiliated pay TV content. Where Foxtel affiliated channels directly compete against non−affiliated channels, any favourable supply treatment can have implications for the upstream acquisition of content, as the supply advantage means it is better placed in any competition to acquire content (*Emerging market structures in the communications sector* (June 2003), paragraph 7.3.1)."

303. As these concerns appear to have prompted (at least in part) the provision of the digital access undertaking in the first place, we would be reluctant, were we in the position of deciding the matter, to grant an exemption that effectively endorsed access terms and conditions which entrenched Foxtel's market position.

The term and duration of access

304. Under cl 1.2 of the digital access agreement as originally scheduled to the Foxtel undertaking, the term of access continues for five years from the date of execution (unless earlier terminated). Supply of the services, however, commences on the "Service Date" which occurs upon notification to the access seeker that all the conditions precedent (as set out in cl 4.3(a) of the agreement) have been satisfied. These conditions precedent are summarised as follows:

- The completion of any necessary network enhancements.
- Testing for compliance of the access seeker's broadcast signals with the relevant specifications has been completed successfully.
- The STU to which the Digital Set Top Unit Services are to be supplied "is actually in use by a Subscriber for reception of FOXTEL's Commercial Retail digital cable Subscription Television Service" (ie the household subscribes to the Basic Package via a *digital* service).
- The access seeker has met all of the specified operational requirements and provided Foxtel with all information necessary to enable Foxtel to provide the Digital Set Top Unit Services.

305. The impact of cl 4.6 of the undertaking is also relevant. Clause 4.6 provides:

> "FOXTEL is under no obligation to supply Digital Set Top Unit Services ... to an access seeker unless and until either FOXTEL has deployed a minimum of 100,000 cable Digital STUs to Subscribers for use by them in receiving the FOXTEL digital Subscription Television Service or the expiry of 6 months from the date that
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> FOXTEL commences supplying a Commercial retail digital cable Subscription Television Service, whichever is earlier. However, an access seeker can commence to negotiate an agreement with FOXTEL relating to the supply of Digital Set Top Unit Services even though that threshold has not yet been met, provided the access seeker has met the requirements of Clause 4.2."

306. Clause 4.2 provides that Foxtel has no obligation to negotiate the supply of Digital Set Top Unit Services with an access seeker unless:

- the access seeker has arranged for the carriage of its digital Subscription Television Services or has applied to Telstra for such carriage (and provided a supporting bank guarantee); and

- the access seeker has provided:
  - − a confidentiality agreement to Foxtel in the specified form;
  - − a bank guarantee to Foxtel on the terms required pursuant to Sch 2; and
  - − a $50,000 deposit (to be applied towards the access seeker's fees once supply of the Digital Set Top Unit Services commences).

307. The access agreement originally offered by Telstra sets out a similar time frame to that of Foxtel's, with the "Digital Module Term" continuing for five years from the Commencement Date (being the date on which Telstra accepts an access seeker's application for access), unless the access agreement as a whole or the Digital Services Module in particular is terminated earlier (or the access agreement expires). Clause 1.18 of the Digital Services Module also sets out a number of conditions precedent to supply of the services, including:

- Telstra obtaining any necessary consents for the use of third party intellectual property required for the supply of the Digital Services (and the access seeker reimbursing Telstra for any licence fees or other amounts payable to such third parties);
- Any necessary enhancements and extensions being completed and the access seeker having paid the applicable charges; and
- All critical technical and operational issues relating to the supply of the Digital Services having been resolved to the reasonable satisfaction of Telstra.

308. Seven Network objected both to the access holiday granted to Foxtel (by reason of cl 4.6 of the undertaking), and the duration of access an access seeker was likely to get under the terms of the Foxtel and Telstra undertakings and access agreements. It contended that an access seeker would not in fact obtain five years of access as it must wait for the conditions precedent to be satisfied.

309. The Commission accepted that there "may be some time between the commencement date of the agreement and the date upon which digital services are available for an access seeker to use" and it required a variation to both the Foxtel and Telstra access agreements, such that the five−year period of access commenced from the date of service delivery.

310. Seven Network submitted before us that a five year access period is too short for access seekers contemplating entering the market, as there may be insufficient time for a new venture to start to achieve a positive return on its investment. It was also said to be a significant disincentive for the access seeker in terms of bidding for key content, which, it was submitted, is often for fixed year terms and subject to mandatory broadcast obligations. In particular, it was noted that Foxtel had entered into a 25 year movie content agreement (as reported by PricewaterhouseCoopers in its report, "Equity capital return analysis in connection with FOXTEL's Access Pricing submission to ACCC" (7 September 2001)). In examining the period prior to the launch of the Foxtel service, PricewaterhouseCoopers noted (at p 17):

> "In the period prior to launch FOXTEL entered into a number of programming content agreements. News [Corporation] tried to source content for the joint venture. Each of Optus ... and Australis ... had entered into exclusive programming agreements with the Hollywood studios. As a result, FOXTEL had very few options to secure content and consequently entered into a 25 year movie content agreement with
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> Australis and the XYZ joint venture (owned 50% by FOXTEL, 25% by Austar United Communications Limited and 25% by East Coast Television) for the supply of XYZ's children's, music, documentary and general entertainment channels."

311. Telstra and Foxtel submitted that there was no evidence to support the contention that the term of the digital access agreements was insufficient to permit an access seeker to enter the market with any certainty of being able to achieve a suitable return on its investment. In addition, Foxtel contended that a five year term was commercially reasonable while Telstra noted that an access seeker has the option of negotiating with Telstra to vary the term of access.

312. We consider that limited evidence was placed before us to assess whether a five year period was insufficient to permit reasonable prospects of entry. Nonetheless, we are concerned by the evidence contained in the PricewaterhouseCoopers report, which suggests that in order to assemble a sufficiently attractive offering, Foxtel was required to enter into a 25 year content agreement. Whilst this almost certainly reflects (at least in part) requirements for assembling a "basic" package, it does suggest that, in order to provide a competitive product, even only on a tier basis, it may be necessary to enter into a content agreement for a period exceeding five years. In our view, the claimed "flexibility" to negotiate a longer term is inadequate to address this issue.

313. We have reservations about what a prospective access seeker should be entitled to expect under a "reasonable" access agreement. Seven Network described what would be necessary for an access seeker to achieve during the initial access period in a number of ways:

- a "positive return on its investment";
- recoupment of an access seeker's "significant" start up costs or investment costs;
- profitability; and
- competitive entry.

314. We do not consider that "reasonable" access terms require profitable entry by a given access seeker. As discussed the reasonableness of an access price should be assessed on the basis of the cost of providing the asset(s) underpinning the services in question and not, for example, the projected revenue of the access seeker. Operating within these pricing parameters discussed above, we accept that the duration of access should, in this case, not prevent the sustainable entry of a subscription television provider providing a product that is competitive with (and substitutable for) the access provider's product (in this case, at least a tier package). This would require an efficient entrant to recover its sunk costs and to receive a reasonable return on the investment assets that underpins the product offered.

315. It is nonetheless important to acknowledge that any such assessment should not assume a single business model. Accordingly, it may be that C7 could not enter on such terms, but an alternative access seeker could. Ultimately, however, insufficient information was put before us to allow us to assess whether an efficient access seeker, regardless of its business model, could recoup its sunk costs (and make a reasonable return) over a period of five years. The main information concerning the cost of entry of which we are aware is the quantum of the access fees themselves. These fees, however, are annual fees that are in fact variable (varying with the number of channels offered, the number of years for which those channels are offered and, in the case of Foxtel, the ratings or revenue achieved by the channels). As such, they could not truly be considered fixed or sunk costs. As noted above, there is evidence to suggest that content agreements that would permit a competitive offering may run for a longer period than five years or, if held to a five year term, may come at a high cost.

The pricing methodologies

316. During the course of the hearing, there were extensive submissions put before the Tribunal concerning the pricing contained in the access agreements of each of Foxtel and Telstra. In respect of Foxtel, the Seven Network's primary concerns related to the inclusion of the IBAC, as well as the means by which shared costs were to be allocated across users. In respect of Telstra, the main issue concerned the existence, relevance and quantification, of the "telephony defence",

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being the benefit to Telstra's telephony business derived from its HFC network.

Foxtel

Basic methodology

317. Seven Network submitted that the tie of the Basic Package required a departure from TSLRIC pricing. For the reasons already given, we consider that this tie is not in the long−term interests of end−users and accordingly, we do not consider it necessary to investigate whether a departure from TSLRIC pricing could be justified on this ground.

IBAC

318. Seven Network put forward a number of concerns with the IBAC which formed the base of the Foxtel pricing methodology. These concerns included:

- the lack of evidence of such costs and the fact that they were unrecovered;
- as a matter of economic analysis, it was inappropriate to include the IBAC cost in the cost base for providing digital STU services; and
- it was inappropriate to include marketing costs, or at least branded marketing costs, in the IBAC and that there was no evidence that the marketing costs sought to be included by Foxtel were confined to non−branded generic marketing costs.

319. In response, Foxtel submitted that the IBAC was consistent with efficient pricing principles and should be accepted. It noted the observation in the report of NECG submitted to the Commission by Foxtel (and Telstra) that the most valuable asset base (for both Foxtel and access seekers) that the digital business will inherit from the analogue business is the installed base of Foxtel subscribers. Expenditure on the assets represents a shared cost between the analogue and digital business, as the costs incurred to derive the benefits from the asset will be recovered from the digital businesses in so far as they have not been (and, indeed, cannot be) recovered from the analogue business. With the shutting down of the analogue business, an appropriate analogy was the sale of the analogue customer base to a new entrant digital service provider. On the basis of such an analogy, the IBAC was appropriately included in the Foxtel cost base, effectively being the cost of establishing the market which future access seekers would be seeking to exploit.

Cost allocation

320. Seven Network also criticised the cost allocation mechanism − using imputed revenue and a minimum ratings figure. Under this mechanism, an access seekers' revenue share for a particular channel is the higher of its actual revenue and its imputed revenue. The imputed revenue is based on the ratio of the rating achieved by its channel to Foxtel's total ratings. The access seeker's minimum rating figure is deemed to be 0.25%.

321. The use of imputed revenue, according to the Seven Network, meant that Foxtel would receive a high revenue from its Basic Package (which access seekers would not), which would inflate access seekers' imputed revenue. Seven Network further submitted that the use of imputed revenue was one−sided as only access seekers' revenue shares would be the subject of a formula for the greater of the imputed revenue and actual revenue. In particular, it was noted that Foxtel's share of costs would not be allocated on the basis of the higher of its actual revenue and imputed revenue for channels not in the Basic Package. This, alleged Seven Network, would permit Foxtel to add additional tier channels to compete with an access seeker's channels but at a significantly lower cost base.

322. The use of the minimum ratings figure also came in for criticism. Seven Network noted that the minimum ratings figure, as used for cost allocation, applies only to calculating the access seeker's ratings and revenue, and not to Foxtel's ratings or revenue. Consequently, Foxtel's channels on a tier would be treated on a different basis from access seekers' channels. Accordingly, Seven Network submitted that Foxtel would have a lower cost base if it wished to provide a competing niche channel on a tier.

323. Foxtel submitted that the revenue/ratings approach reflected the fact that not all access seekers would necessarily be seeking to garner revenue from each individual channel offering. Some access seekers, such as religious, education or shopping channels, are likely to have low direct revenues, and may not even seek to charge a subscription fee. A corresponding problem does not arise in dealing

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with Foxtel's revenue under the mechanism, as Foxtel's total revenue across all of its channels enters into the formula. Accordingly, Foxtel considered it was appropriate to have a method whereby revenue could be imputed. Foxtel also rejected the contention that it receives higher revenue from the Basic Package compared with access seekers (thereby inflating an access seeker's imputed revenue). Foxtel submitted that there was no evidence to suggest that Foxtel's revenue per rating point for its Basic Package is higher than for premium channels.

324. In response to the alleged asymmetry in the application of the revenue/ratings approach, Foxtel submitted that as Foxtel bears all of the costs of the STU business that are not allocated to access seekers, Foxtel's average revenue per rating point is an appropriate base against which to allocate costs. Such an approach, submitted counsel for Foxtel, allowed for the efficient use of the resources in question.

Cost of capital

325. Seven Network submitted that the cost of capital submitted by Foxtel was excessive and that the Tribunal should accept the evidence of its expert economist, Professor Robert Officer, concerning the appropriate asset beta. It was also submitted that we should adopt a ten−year life for STUs for depreciation purposes. In response, Foxtel submitted that there was no good or compelling reason why we should reject the Commission's assessment of these issues.

Conclusions on Foxtel's pricing methodology

326. For the reasons already given, it is not necessary for us to decide the various issues underlying the Foxtel pricing methodology. We are generally satisfied with the pricing methodology (including cost allocation) adopted by Foxtel, as modified by the Commission. In relation to IBAC, in particular, we accept as a matter of principle that such costs should be included in the cost base, although we consider it important to ensure that the IBAC does not include Foxtel−specific marketing costs. While accepting the methodology, we consider that more rigorous verification of the inputs (including the IBAC costs, and any recovery thereof) would be appropriate. While Foxtel submitted that it would be amenable to an independent review of the calculation of the IBAC, we note that there is a considerable distinction between reviewing a particular calculation and verifying that the inputs to that calculation are accurate. To this end, we would have been more comfortable if the IBAC costs had been supported by audited accounts. We also accept in principle the method of imputing revenue, but consider that the deemed minimum rating of 0.25% should be reviewed if more finely granulated ratings data become available.

Telstra

Telephony defence

327. While there were various submissions concerning the methodology that underlies the access price to be charged by Telstra, the most significant of these concerned the existence, relevance and quantification, of the "telephony defence". Seven Network submitted that the HFC network was not built, and never would have been built, on the expectation of recovering the cost of investment (or even a substantial part of this cost) from pay television revenues or services that could be delivered over the

network. Specifically, it was contended that Telstra built the network to defend the telephony revenues that it earned on its copper−wire network. By building the HFC network, Telstra was trying to ensure that fewer people connected to Optus' local loop. If people subscribed to Optus' subscription television services, they would also be able to receive telephony products over Optus' cable and bypass Telstra's network. Telstra stood to lose the local loop and long distance revenue from those telephony customers who churned to Optus.

328. Seven Network submitted that the appropriate asset valuation should not exceed the economically recoverable value of the HFC network, which, according to Telstra's 1997 Annual Report, appeared to have a carrying value of $210 million.

329. According to Seven Network, the telephony defence meant that there was an economic benefit to Telstra in building the HFC network other than the revenue which could be generated by way of direct use of the network (eg pay TV). Consequently, full cost recovery was an inappropriate premise upon which to derive an access price, as such recovery was not

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contemplated at the time the network was constructed. Accordingly, the value of the economic benefit due to the telephony defence expected to be derived by Telstra at the time of the network's construction should be deducted from the cost base. A related way of approaching the issue was to proceed on the basis that the costs incurred in building the HFC network were "economically efficient" within the meaning of s 152AB(2)(e) of the Act.

330. That the telephony defence existed was not disputed by Telstra. For example, in its Statement of Facts, Issues and Contentions, Telstra "admits that one of the reasons why Telstra constructed a HFC Network included the perceived need to offer a full range of services (including subscription television) in order to prevent the loss of telephony revenues to competitors who did offer such a range". In relation to submissions by Seven Network that attempted to quantify the value of the telephony defence, arguing that the cost base should be adjusted accordingly, Telstra stated that such submissions were "merely postulations of the applicants which were only put before the Commission as assumptions provided to the applicants' experts". In so saying, Telstra appears to have disregarded the requirements of s 152ATA(6), which make it clear that it is for Telstra to satisfy the Commission, and subsequently the Tribunal, as to the merit of its application.

331. In addressing the issue, the Commission stated (at 48) that:

> "C7's concerns regarding the strategic reasons underlying Telstra's investment in its HFC network are seen as potentially relevant in terms of the way common costs should be allocated to the different services provided on the HFC cable network. The Commission's discussion on this is in the section on cost allocation below."

Turning then to the cost allocation section of its decision, the Commission rejected Telstra's 90 per cent allocation of the common costs of the HFC network to subscription television, reducing it to 70 per cent with provision for resets (in October 2006 and October 2010) whereby the "proportion of total revenues represented by subscription television revenues will then be determined" (at p 52). The Commission, however, did not articulate whether and to what extent this reduction was attributable to the telephony defence. While it is clear that the reduction is due (at least in part) to assessments of the efficient use of the HFC network, this is not quite the same issue. Further, the effect of the resets may be to erode any discount attributable to inefficient use of the network and the telephony defence. Accordingly, it is by no means clear that the telephony defence was adequately addressed in the Commission's decision.

332. Having examined the evidence presented to the Commission, we consider that there was limited information upon which to reach a view. On the one hand, there were suggestions that the quantum of the telephony defence was substantial and the cost base should be reduced accordingly. Most significantly, in its audited financial statements for the year ended 30 June 1997, Telstra assessed that the present value of the estimated future net cash−flow before income tax of the HFC network was $210 million, compared to an investment cost of $1.891 billion and, as a result, effectively wrote down the value of the HFC network. That assessment, according to the Seven Network's submissions, has been confirmed in each set of annual accounts since 1997.

333. Further evidence of the inefficient nature of Telstra's investment was the extent of the "overbuild" as between the Telstra and Optus HFC network, being 80% as compared with just 1% cable overbuilt in the United States. Further, as noted in a C7 submission to the Commission during the course of the analogue proceedings, Telstra announced its intention to scale back the rollout of the network only after Optus had announced its intention to do the same.

334. On the other hand, it is not clear to us that the mere fact that the value of the network has been written down implies that the investment was inefficient at the time it was made. In the absence of explanation for that write−down, we are unable to conclude why it occurred. Further, there appears to us to be a number of reasons that suggest that the value of the telephony defence to Telstra may not have been significant. As submitted by the Seven

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Network, the objective was to prevent the loss of custom from those "people [who] subscribed to Optus' pay TV services [who] would also be able to receive telephony products over Optus' cable and bypass Telstra's loop". If this were the case, then the customer base that Telstra appears to have been trying to protect must be potential subscription television subscribers who would be attracted by a bundled telephony/pay television service. The Tribunal was given no means by which this pool of customers could be quantified, but it would not seem extensive.

335. Indeed, we have been given no means by which to assess the value of the telephony defence. Accordingly, Telstra has not satisfied us that the access price is reasonable. It seems likely that Telstra has within its possession documents that would help in assessing the value of the telephony defence − including board minutes and papers, as well as documents prepared in support of the business case to spend $1.8 billion on the network. As with Foxtel, we consider that it was open to the Commission to impose a greater degree of rigour upon Telstra in making out its claims as to the original cost, and actual value (in an economic sense), of the HFC network, by calling for the production of such documentation. We are, however, constrained by the terms of s 152AW(4), and can only note that supporting documentation not available to the Commission was neither proffered by Telstra, nor requested by the Commission.

The duration of the undertakings and the exemptions

336. Clause 15 of the Foxtel undertaking sets out the duration of its Digital Access Undertaking. Clause 15.2 provides that the Digital Access Undertaking continues until 31 December 2007, subject to cl 15.4, which permits the withdrawal of the undertaking if the Foxtel Final Order is varied ("and such variation has a material adverse effect on the FOXTEL business"), revoked or abrogated. The undertaking may also be withdrawn under cl 15.4 if (as a consequence of Telstra's Final Order being varied, revoked or abrogated), Telstra withdraws its Digital Access Undertaking.

337. Under cl 15.3, however, Foxtel's Digital Access Undertaking may be extended. Clause 15.3 of the undertaking provides:

> "Notwithstanding Clause 15.2 and subject to Clause 15.4, at any time between October 2006 and 31 December 2006 FOXTEL may give a notice that it intends to continue its Digital Access Undertaking as it relates to a satellite service and/or as it relates to a cable service past 31 December 2007 until 31 December 2015. If FOXTEL gives that notice the relevant Digital Access Undertaking continues on its then terms after 31 December 2007 until 31 December 2015 unless it is terminated before 31 December 2015 by FOXTEL giving 12 months' notice to the Commission of its intention to terminate the Digital Access Undertaking either as it relates to a satellite service and/or as it relates to a cable service."

338. Clause 7 of Telstra's original undertaking sets out the duration of the undertaking and an extension option in substantially identical terms. The Commission, however, required cl 7.3 (the equivalent to cl 15.3 of the Foxtel undertaking) to be varied to ensure that the life of certain ancillary undertakings was tied to the digital access undertakings in cl 6.4. These ancillary undertakings were contained in par 6.7, 6.8 and 6.9 of the Telstra undertaking (addressing matters such as the provision of information or assistance by Telstra to access seekers, Telstra designing and using equipment in its network that will facilitate access by access seekers, and Telstra not entering into arrangements that will require Telstra to seek further consents).

339. The application for exemption by each party ties the length of the exemption to the life of the digital access undertakings. As such, par 2(b) of the Foxtel application states that "The order would have effect until 2015 or the date on which the Digital Access Undertaking ... ceases to be in force, whichever is the earlier". An equivalent provision is contained in par 2(b) of the Telstra exemption application.

340. Seven Network does not appear to have made specific submissions to the Commission expressing concern over the potential length of the exemption, nor the unilateral nature of its extension. Nonetheless, the Commission sent requests for information, both dated 28 July 2003, to each of Telstra and Foxtel seeking

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further detail as to the temporal structure of the undertaking. Telstra was requested to provide information addressing "why Telstra believes an exemption is required potentially until 2015". In respect of Foxtel, the Commission asked for "further information which outlines the benefits to its business plans for digitisation, of having the option to cease supply of the digital carriage service subject to the terms and conditions within its section 87B undertaking prior to 2015".

341. Foxtel responded (by letter dated 5 August 2003) as follows:

> "The benefit to FOXTEL's business plans for digitisation of having the option to cease supply of the digital carriage service prior to 2015 (but not before 21 December 2007) is that it gives FOXTEL flexibility to cease supplying the service pursuant to the digital access undertaking if market conditions so change that it becomes uneconomical for it to continue to do so ..."

342. Telstra's response was provided by letter dated 11 August 2003:

> "As a general point, Telstra notes that the Explanatory Memorandum to the *Telecommunications Competition Bill 2002* expressly stated that anticipatory exemptions are not subject to a maximum expiry time.
>
> In relation to its Exemption Application, Telstra notes that the term of the exemption order sought by Telstra matches precisely with the term of the relevant provisions of Telstra's Section 87B Undertaking ... Once Telstra has digitised its HFC network and commences supply of the digital carriage service, that obligation continues until at least 2007. However, Telstra may give notice that it intends to continue its undertaking to supply a digital subscription television carriage service until 2015. In these circumstances, it is reasonable that Telstra have an exemption for the same period.
>
> Telstra believes that a term of between 11 and 12 years (on the assumption that if the exemption is granted soon, the

network would be digitised in 2004) is reasonable in circumstances in which:

(a) Telstra must have sufficient regulatory certainty to enable it to recover the costs of its significant investment; and

(b) access seekers have certainty as to the terms and conditions on which they will be able to obtain access such that they are able to plan for the establishment and development of an entirely new business."

343. Ultimately, however, the ability of Telstra and Foxtel to extend the undertakings (and thus the exemptions) until 2015 received scant comment in the Commission's final decisions, being discussed under the heading "Flexibility". A brief comparative exercise between the undertaking as submitted and a declaration under Pt XIC was undertaken, with the Commission concluding, "the difference appears to be that declaration under Part XIC of the Act is of a much shorter duration" than the exemption applied for.

344. While the Seven Network's written submissions before the Tribunal did not raise specific concerns with the length of the exemptions, they noted that granting the exemption would effectively take each of Telstra and Foxtel outside the regulatory access regime until (the beginning of) 2016. In its oral submissions, the Seven Network queried the basis for each of Telstra and Foxtel having a unilateral right to extend from 2007 to 2015 without scrutiny by the Commission. Concerns were expressed about locking in terms of access, particularly price, for such a long period without the benefit of regulatory scrutiny. The potential length of the exemption in such a "rapidly changing technological sector" was particularly called into question. Senior Counsel for the Seven Network, Mr Young QC, stated:

"... the essence of it is that this arrangement fixes price and terms of conditions until 2015. So far as Telstra and Foxtel are concerned, they're bound to adhere to them until 2007, but thereafter Foxtel and Telstra have the option of dropping this regime if it suits them − that is to say, if this regime hasn't stifled access, or for some reason has moved so it's unsuitable to them, they can abandon it either in 2007

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or thereafter by giving 12 months' notice each and every year.

But if it's moved adversely to the public interest by 2007 − assuming there is nothing wrong with it to begin with − the Commission can't do anything about the extension from 2007 to 2015; that is at the sole discretion of Telstra and Foxtel. So ... the regulator is handing over the keys to the treasury to Telstra and Foxtel. They're given power to determine the length of this arrangement. So if we've had no effective access and these prices are far too high ... Telstra and Foxtel can then extend it until 2015 and, at the same time, the arrangement is stripped of all the statutory protections."

345. No specific justification was provided by either Telstra or Foxtel for the provisions in question in either their written or oral submissions. Accordingly, the relevant clauses stand to be considered by reference to the issue of the degree of the certainty to be provided to Foxtel and Telstra as investors.

Concerns with the duration and potential extension of the undertakings and exemptions

346. In the light of the submissions put before the Tribunal, the main issues of concern with the duration and extension provision governing the undertakings, and thus any exemption orders, appear to be as follows:

- the unilateral nature of the extension;
- the potential for rapid technological change during the potential life of the exemption; and
- the "magnifying" effect of the potential duration.

Unilateral nature of extension

347. Seven Network submitted that the access arrangement was all one−sided, if the proposed access terms do not ultimately suit Telstra or Foxtel, or if a competitive threat emerges by reason of the access allowed, Telstra or Foxtel or both may terminate access for the access seeker at the end of December 2007, or later, on giving 12 months' notice. However, if Telstra/Foxtel are satisfied with the outcome of their proposed terms, then, at their election, the exemption will continue for 12 month periods running until the end of 2015. Seven Network suggested that a satisfactory outcome that would prompt Telstra and Foxtel to extend the terms of the undertakings may be that there had been no constraining entrant or, even, that no party had sought or obtained access at all.

348. We note with concern that neither Telstra nor Foxtel sought to place before us substantive justification for the unilateral ability to extend the undertakings. In accordance with the brief submissions offered on this point to the Commission, we have considered how the extension provision in each undertaking contributes to the claimed advantages of the exemption applications, for example, certainty (in this case, certainty of terms and conditions of access). Contrary to Telstra's submission, the right to extend until 2015 provides no certainty to potential access seekers. While we accept that it offers Telstra (and Foxtel) a degree of regulatory certainty, in our view, any such certainty is inappropriately one−sided. While we may have been open to accepting that, say, a 12 year term was necessary to provide the investors with the security they needed (if appropriately justified), Telstra and Foxtel have instead sought to have "an each way bet", such that they can exit their self−constructed access regime if it does

not meet their interests or, conversely, they can elect to extend it for a further eight years.

349. We also note that the initial term and the extension period are somewhat unusually structured. It is not customary for an extension period (here, eight years) to be significantly longer than the initial term (five years), except where the arrangement in question is effectively being "trialled". In the absence of an explanation from Telstra and Foxtel, we consider this unusual feature of the undertakings supports an inference that they have been structured in such a way as to enable Telstra and Foxtel to reassess their terms of access at an early stage and then to elect to continue them only if it is in their commercial interests to do so with possible adverse consequences for competition.

Potential for rapid technological change

350. We consider that the technology the subject of the applications − digital television (including interactive services) − is in its early stages in Australia, and is likely to develop in

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unforeseen ways between now and the end of 2015, being the potential life of the undertakings and proposed exemption orders. An exemption of the length contemplated − particularly when control over the precise length of the exemptions lies within the hands of Telstra and Foxtel − strikes us as inappropriate in an industry characterised by rapid technological development. Having regard to the statutory test, we are not satisfied that it is in the LTIE that − potentially until the end of 2015 − access seekers may be precluded from seeking declaration or that access seekers and end−users alike will be unable to benefit from any ministerial pricing determination under s 152CH, regardless of whether such determination may be appropriate.

Magnifying the effect of other concerns

351. The potentially long life of the undertakings/exemptions also has the effect of "magnifying" our other concerns with the proposed access arrangements. Taking, for example, the tie of the Basic Package to access to Foxtel's services, to the extent that the tie does serve to deter prospective entry, it will have such an effect for more than a decade. Similarly, issues with pricing and the separation of interactive services from other digital subscription television services, as well as other miscellaneous concerns with the proposed terms of access, are exacerbated by the potential length of the undertaking/exemption and the fact that such length will be as determined by Telstra and Foxtel.

Conclusions on the length of undertakings and exemptions

352. In considering these matters, our concerns with the potential life of the exemption include, but also extend beyond, the issues raised by Seven Network. We are not confined, in assessing the LTIE, to considering those concerns raised by a single prospective access seeker. Accordingly, we should not fall into the trap of approaching these reviews as though they were adversarial proceedings with Seven Network's concerns taken to reflect exhaustively the interests of end−users.

353. Having regard to the statutory test posed by s 152ATA(6), we are not satisfied that it is in the LTIE that, for a timeframe largely within their control and potentially until the end of 2015, Telstra and Foxtel will be exempted from the statutory regime in respect of the services the subject of their respective applications. While we do not suggest that it should be for the Commission to determine the term of the undertaking (still less an access seeker), we may have regarded the potential duration of the exemption with considerably more favour if Telstra and Foxtel tied the life of the exemption to an undertaking that could be extended only with the consent of the Commission. We may also have been more favourably disposed if the undertaking simply ran until the end of 2015 (without any discretion to extend), although concerns would have remained as to whether such a lengthy exemption was appropriate in this industry. However, we are not comfortable with the prospect that it is for Telstra and Foxtel to assess the access regime they have created, and then, assuming it meets their commercial objectives, to determine whether (and for how long) it continues. This grants excessive discretion to parties who, by reason of a perceived absence of constraint, were required to give the undertakings in the first place.

354. We are not satisfied that the potential life of the undertakings and hence any exemption orders (and the means by which such life is determined) would be in the long−term interests of end−users.