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To **Arek Gulbenkogu**, Australian Competition & Consumer
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Dear Mr Gulbenkogu

FOXTEL Digital Set Top Units Special Access Undertaking: Request for Further Information

We refer to the Commission's letter dated 31 May 2006 requesting further information from FOXTEL pursuant to section 152CBB of the Trade Practices Act 1974 (the **Act**). The Commission's letter indicates that the request for further information has arisen out of a submission by Two Way TV Australia Limited (TWTV) to the effect that the SAU does not allow one of FOXTEL's existing channel providers, who wishes to add interactive features to its channel (but who cannot reach agreement with FOXTEL), to use the undertaking to acquire only "modem services" from FOXTEL (that is, to acquire a service that would enable the channel provider to augment their channel with interactivity and transmit that augmented channel as part of FOXTEL's subscription TV service).

In FOXTEL's Supplementary Submission of 29 March 2006 (and the Supplementary Technical Report attached to that submission), FOXTEL explained the commercial reasons why the TWTV submission was misconceived, and also explained the significant technical impediments to accommodating TWTV's proposal.

It appears from the Commission's letter that the Commission is solely focussed on the technical issues that have been addressed by FOXTEL, and that the Commission has not appreciated the significance of the commercial issues that were previously explained by FOXTEL. For the reasons explained in this letter, FOXTEL believes that TWTV's proposal is entirely misconceived, and cannot, in a practical sense, affect the Commission's consideration of the reasonableness of the SAU. For that reason, FOXTEL believes that the enquiry the Commission appears to be taking in relation to TWTV's submission is misdirected.

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The simple point is that the majority of FOXTEL's channel supply agreements (being the agreements under which FOXTEL agrees with channel suppliers to broadcast the channel as part of FOXTEL's digital subscription TV service) prohibit the channel supplier from including interactive enhancements to the channel without FOXTEL's approval. Although under certain of the agreements, FOXTEL has agreed to enter into good faith discussions regarding the introduction of an interactive application, FOXTEL retains the final discretion whether to permit the enhancement. Although some older agreements exist that do not contain these rights, FOXTEL incorporates these rights in all new agreements.

FOXTEL submits that the inclusion of such restrictions in channel supply agreements is not unreasonable on legal, commercial or technical grounds. For example, many of the interactive applications that have run on the FOXTEL Digital platform to date are for competitions, which must adhere to strict guidelines imposed by legislation in various States. As these applications are being broadcast to FOXTEL subscribers, FOXTEL needs to ensure that the content of the applications adheres to all statutory guidelines and rules. Many of FOXTEL's channel suppliers are international companies that may have no presence in Australia and FOXTEL operates as the gatekeeper to the content in these circumstances. As the licence holder, a breach of legislation would result in FOXTEL being held responsible. FOXTEL also needs to ensure that the content of the interactive application is appropriate for the channel over which the application is placed. This is particularly the case for channels which are popular with, or are aimed at, children. Technically, a channel supplier would need to work with FOXTEL to ensure that the proposed application can be viewed by a subscriber, that it does not compromise the FOXTEL platform and that the placement of the button icon used to access the interactive application is not intrusive or annoying. Merely inserting an interactive application on a channel will not guarantee that the application can be viewed by subscribers. Each application undergoes a rigorous testing regime to ensure that it can be viewed successfully. Further, adding interactivity to a particular channel may cause FOXTEL excessive cost by reason of the technical difficulties to be overcome. It is vital for FOXTEL to be able to control the content available on its service in order to maintain the quality and the integrity of that service, as well as to efficiently manage the technical aspects of the broadcasting of its service.

This means that if a so-called "modem service" was declared (leaving aside whether declaration is in any event possible or likely), and an access seeker requested that FOXTEL supply it with the declared service, the access seeker would not be able to use the service because FOXTEL channel suppliers would be contractually prevented from incorporating interactive services into their channels (without FOXTEL's consent). None of the requirements of Part XIC of the *Trade Practices Act 1974* (the **Act**) override FOXTEL's contractual rights to control the nature of the content that is distributed through its own subscription TV service. Further, as a matter of policy, the access regime in Part XIC is designed to promote retail competition for subscription television services, not to interfere with content that is made available as part of a particular retailer's subscription TV service.

Having regard to the foregoing, FOXTEL submits that TWTV's submission, and the information being sought by the Commission in respect of that submission, cannot affect the Commission's consideration of the reasonableness of the SAU. There is no relevant counterfactual (whether the existing state of affairs including the section 87B undertaking or a new state of affairs in which

modem or other services were declared) that would give a channel supplier to FOXTEL the right to augment the channel that they supply to FOXTEL with interactive services.

Information requested

Given FOXTEL's comments above, FOXTEL does not propose to respond to the Commission's information request in detail. FOXTEL submits that the information requested by the Commission is irrelevant to its consideration of the SAU's reasonableness and consistency with the standard access obligations. Regardless of how much "capacity" may exist within FOXTEL's transport streams at present, FOXTEL could not be compelled under Part XIC (whether under the SAU or as part of a declaration) to agree to channel suppliers augmenting their channels supplied as part of the FOXTEL subscription TV service as they saw fit.

FOXTEL set out in some detail the technical information in relation to use of its capacity in its supplementary report. However, FOXTEL will make some general comments about FOXTEL's use of capacity within its transport streams for the Commission's benefit.

In general terms, each transport stream is equivalent to 38 Mbits and carries up to 10 digital channels made up of video, audio, CA/SI and interactive applications. The use of each transport stream varies due to the different amounts of capacity used by different genres of channel, type of audio and the number of applications eg sports channels generally uses the largest amount of capacity (due to the nature of the video), general entertainment an average amount of capacity and movies a lower amount of capacity (unless they are fast action movies). A combination of different genres is therefore needed in each program stream to balance the use of capacity to allow the statistical compression technology to operate at its maximum efficiency. For example, a transport stream that contains all sport channels will not be efficient as the instantaneous demand for bandwidth will drive the average channel bandwidth use higher – the end result is a smaller number of channels per transponder.

FOXTEL's use of these transport streams may also change from time to time depending on its needs – generally the platform is static with the majority of the video services stable in their location within the transport stream, however the interactive applications are cycled through a pre-allocated space within the transponder from time to time.

Conclusion

FOXTEL therefore submits that as the counterfactual cannot be any different to the factual (the SAU) in this regard, the Commission should either withdraw its information request or accept this response in answer to it.

FOXTEL is happy for this letter to be placed on the Commission's website.

Yours sincerely

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