

FOXTEL Further Supplementary Submission

1. Introduction

This is a further supplementary submission by FOXTEL Management Pty Ltd (**FOXTEL**) to the Australian Competition & Consumer Commission (the **Commission**) in relation to FOXTEL's special access undertaking (**SAU**) addressing submissions made by Two Way TV Australia Limited (**TWTV**) in its submission of 17 February 2006. This submission is made in addition to the previous submissions FOXTEL has made to the Commission.

TWTV has opposed the SAU on the basis that the SAU does not allow one of FOXTEL's existing channel providers, who wishes to add return-path interactive features to its channel (but who cannot reach agreement with FOXTEL), to use the SAU to acquire only "modem services" from FOXTEL (that is, to acquire a service that would enable the channel provider to augment their channel with return-path interactivity and transmit that augmented channel as part of FOXTEL's subscription television service).

FOXTEL submits that TWTV's proposal is entirely misconceived and cannot, in a practical sense, affect the Commission's consideration of the SAU.

2. Background to this supplementary submission

In FOXTEL's Supplementary Submission of 29 March 2006 (and the Supplementary Technical Report attached to that submission) FOXTEL set out the commercial and technical impediments to accommodating TWTV's proposal.

FOXTEL relies on the Technical Report in so far as it explains why carriage capacity for use by a return-path interactive application over an existing FOXTEL channel must be taken from FOXTEL's own contracted capacity from Telstra and Optus. In summary, this is because FOXTEL's standard STUs contain only one tuner which is capable of tuning to only one multiple program transport stream (**MPTS**) at a time. This means that when a FOXTEL STU is "looking" at one section of the broadcast space it cannot "see" any other space at the same time. If a return-path interactive application is to be "overlaid" onto an existing channel, the capacity needed for that interactive overlay must be sourced from the same MPTS. FOXTEL has the contractual right to use all the capacity within its own MPTSs.

Whether at any point in time there is capacity within a particular MPTS "available" for an existing channel provider to add return-path interactive features to its channel would need to be assessed on a case-by-case basis and requires a detailed investigation of each channel and application. FOXTEL adheres to its submission that there may be serious technical and capacity issues if FOXTEL were to "give up" some of its contracted capacity for this purpose.

On 31 May 2006, the Commission requested FOXTEL to provide extensive technical information concerning FOXTEL's current allocation of each MPTS. The information was sought by the Commission to assess further the technical difficulties that would be faced by

FOXTEL if FOXTEL was required to give up capacity within an MPTS to accommodate a channel provider that wished to add return-path interactive features to its channel.

FOXTEL submits that the Commission's technical enquiries are unnecessary and misdirected. This is because there are overwhelming legal and commercial impediments to TWTV's proposal, which are described below. The effect of those impediments is that even if a "modem service" was declared, TWTV's proposal could not be implemented.

Responding to the Commission's information request is difficult and time consuming. As FOXTEL believes that the enquiries are unnecessary, FOXTEL does not propose to respond to the Commission's request, and asks the Commission to consider the SAU in the absence of that information. FOXTEL understands that the Commission may choose to place little weight on, or even disregard, the technical difficulties that are explained in the Technical Report.

Therefore, in responding to TWTV's submission, FOXTEL relies on the matters discussed in the following section of this supplementary submission.

3. Reasonableness and consistency with SAOs

The issue raised by TWTV is a matter to be considered by the Commission in assessing whether FOXTEL's SAU is reasonable¹ and is consistent with the standard access obligations (**SAOs**)².

Consistency with the SAOs is not relevant in this context. The only service to which consistency with the SAOs is assessed is the service the subject of the SAU (as that service is 'deemed' to be declared): s152CBA(3). As the service sought by TWTV is not a service offered under the SAU, the fact that it is not supplied cannot be inconsistent with the SAOs.

There are a number of factors the Commission must take into account in assessing whether the terms and conditions of FOXTEL's SAU are reasonable, including:

- (a) whether the terms and conditions promote the LTIE of the service;
- (b) the legitimate business interests of the carriage service provider and its investment in the facilities used to supply the service;
- (c) the interests of persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the operational and technical requirements necessary for the safe and reliable operation of the service or facility; and
- (f) the economically efficient operation of the service or facility.³

¹ Section 152CBD(2)(b)

² Section 152CBD(2)(a)

³ Section 152AH(1)

Section 152AB(2) sets out the factors that the Commission must have regard to in assessing the LTIE of the service. FOXTEL set these out and discussed them in some detail in its primary submission dated 6 October 2005⁴ and its supplementary submission of 29 March 2006⁵. Suffice it to say that they essentially involve a balancing of the objectives of promoting competition and encouraging investment in infrastructure.

In assessing the reasonableness of the SAU, and in particular assessing the LTIE, the Commission must apply a "future with and without" test; that is, a comparison of the future situation with the SAU and the future situation without the SAU. It then asks the question: which situation is in the LTIE?⁶ This entails determining the most likely "counterfactual" in the absence of the SAU and determining whether that counterfactual is more likely to be in the LTIE than the SAU.

FOXTEL submits that even if this particular service was declared (leaving aside whether declaration is in any event possible or likely), and an access seeker requested FOXTEL to supply it with the declared service, the access seeker would not be able to use the service because FOXTEL's channel suppliers either could not contractually or would not commercially incorporate interactive services into their channels without FOXTEL's consent.

FOXTEL acquires channel content for the FOXTEL subscription television service from various third party providers, joint ventures such as XYZ Entertainment Pty Ltd (FOXTEL/Austar), UKTV Pty Limited (FOXTEL/BBC/Fremantle) and Main Event (FOXTEL/Austar/Optus) and also owns and operates a number of channels itself. The nature of the channel content acquired, including whether it has an interactive component, affects both the consumer demand for that content and also the costs to FOXTEL in supplying the channel as part of its subscription television service. Also, any interactive application that forms part of a channel must be configured so that it is able to function on FOXTEL's platform. Accordingly, these factors affect the terms (including price) on which FOXTEL will acquire the channel content. For these reasons, FOXTEL's existing channel content suppliers would not seek to add interactive enhancements to an existing channel without FOXTEL's agreement on commercial terms. If the channel supplier does not obtain FOXTEL's agreement, then the interactive application may not be able to function on FOXTEL's platform.

FOXTEL has an interest, either as sole owner or joint venturer, in many of the channels on FOXTEL's platform. By virtue of its sole ownership of channels and its position on the Boards of its joint venture channels FOXTEL has control over whether interactive enhancements are suitable for a particular channel and, if so, what the content of those interactive enhancements will be. In the case of many other FOXTEL channels, the relevant 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

⁴ See Appendix A to that submission.

⁵ See section 4.

⁶ Australian Competition Tribunal Decision on FOXTEL's exemption application, para 119

channel without FOXTEL's approval. Although under certain 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. Whilst some older agreements exist that do not contain these rights and restrictions (due to the technology in existence at that time), FOXTEL incorporates these rights in all new agreements. FOXTEL attaches to this submission a Second Confidential Statement of Peter Campbell which describes the above contractual arrangements.

FOXTEL submits that most channel content suppliers understand the commercial and technical need for FOXTEL to control interactive applications forming part of the channel and readily agree with the inclusion of contractual restrictions in channel supply agreements concerning interactive applications. As the subscription television licence holder in relation to the channels it broadcasts, FOXTEL is legally responsible for and liable to the Australian Media and Communications Authority (**ACMA**) for the content in those channels, including content contained within interactive enhancements. This includes ensuring there is no breach of its licence conditions eg in relation to tobacco advertising, X-rated material and ensuring compliance relating to the conduct of competitions, as well as the various complexities of State and Federal laws governing interactive gambling. 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. As the broadcaster, 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. Access seekers seeking to utilise the SAU proffered by FOXTEL as independent retail subscription television providers will themselves be the holder of the broadcasting licence which means they have a vested interest in ensuring the content of the quality of the channels. In addition, FOXTEL is only the provider of infrastructure in relation to those channels and is not liable for the content. However, providing the service which TWTV seeks makes FOXTEL directly liable for that content as the subscription television provider in relation to the channel.

In addition, 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.

Control by a retail service provider over its own content therefore cannot and is not overridden by any of the provisions in Part XIC of the Act. Part XIC of the Act is designed to promote retail competition by granting access to services and facilities, to the extent that it is not possible to achieve retail facilities-based competition. It is not designed, nor does it have the effect of, interfering with *content* that is made available as part of a particular retailer's subscription television service, even if that retailer is also the access provider. That would be akin to not just forcing Telstra to allow its competitors access to its copper wires so that they may offer their services to end-users in competition with Telstra's (what Part XIC is designed to do) but forcing Telstra actually to offer a package of services to its customers that *included* a rival's service. That is not within the ambit of Part XIC.

FOXTEL therefore submits that even if the "modem service" were declared in the counterfactual world, and that FOXTEL were obliged to supply it under Part XIC (both of which FOXTEL doubts for the reasons outlined above), and did so in accordance with the SAOs, the access seeker could not use that service for the purpose sought by TWTV.

4. Conclusion

For the reasons set out above, FOXTEL submits that TWTV's submission cannot affect the Commission's consideration of the reasonableness of the SAU or its consistency with the SAOs.

However, even if the Commission does not accept FOXTEL's arguments about the effect of the FOXTEL's contractual and commercial arrangements with channel content suppliers, FOXTEL submits that the Commission should still not reject the SAU on this ground for the following reasons:

- FOXTEL is prepared to negotiate in good faith with channel providers or third parties to include interactive overlays onto existing channels, including TWTV;
- given this, the number of access providers that are likely to want to use the service for that purpose are extremely small; and
- it is still open to the Commission to declare the carriage service and seek supply by FOXTEL independently of acceptance of the SAU if it ultimately forms the view that would be in the LTIE. In FOXTEL's view this service could not be said to be so integral to the digital STU service that it is in the LTIE for the SAU to be rejected in its entirety so that the services could be declared together.