

**Date** 31 May 2006

ABN 47 702 595 758

**From** Michael Ball / Jacqueline Downes

The Chifley Tower  
2 Chifley Square  
Sydney NSW 2000  
Australia  
Tel 61 2 9230 4000  
Fax 61 2 9230 5333

**To** **Mr Michael Cosgrave**, General Manager,  
Communications Group, Australian Competition and  
Consumer Commission

**Email** michael.cosgrave@acc.gov.au

*Correspondence*  
GPO Box 50  
Sydney NSW 2001  
Australia  
DX 105 Sydney

**Copy To** **Mr Arek Gulbenkogl**, Assistant Director -  
Convergence, Communications Group, Australian  
Competition and Consumer Commission, Melbourne

[www.aar.com.au](http://www.aar.com.au)

**Email** arek.gulbenkogl@acc.gov.au

Confidential Email

Dear Mr Cosgrave

### **FOXTEL Digital Set Top Unit Service Special Access Undertaking**

We refer to the Terms of Reference provided by the Commission to Mr Greg Flavel, Managing Director, Convergent Consulting Pty Ltd in relation to the FOXTEL Special Access Undertaking (SAU).

The questions addressed to Mr Flavel are directed to whether (and how) FOXTEL could provide some of its own contracted satellite and cable capacity for the use of access seekers for the provision of interactive overlays on existing channels within the FOXTEL Service.

In particular, the Commission has asked Mr Flavel questions relating to FOXTEL's costs of providing such a service and its contractual ability to do so. FOXTEL submits that it should not be required to provide this information to Mr Flavel. That would impose a significant burden on FOXTEL (particularly in relation to the appropriate charge for such a service, which FOXTEL has not considered) in circumstances where, FOXTEL submits, the information is not relevant to the Commission's assessment of the SAU for the reasons outlined below.

FOXTEL's voluntary SAU and the attached Digital Access Agreement (DAA) only provide for access to the FOXTEL Set Top Unit Services which include:

1. Set Top Unit Services;
2. Conditional Access Services;
3. EPG Services; and
4. Modem Services.

**Our Ref** JUAS:000000

Jods A0107142591v2 000000 30.5.2006

This email (including all attachments) may contain personal information and is intended solely for the named addressee. It is confidential and may be subject to legal or other professional privilege. Any confidentiality or privilege is not waived or lost because this email has been sent to you by mistake. If you have received it in error, please let us know by reply email, delete it from your system and destroy any copies. This email is also subject to copyright. No part of it should be reproduced, adapted or communicated without the written consent of the copyright owner. Any personal information in this email must be handled in accordance with the Privacy Act 1988 (Cth). We may collect personal information about you in the course of our dealings with you. Our privacy statement ([www.aar.com.au/general/privacy.htm](http://www.aar.com.au/general/privacy.htm)) tells you how we usually collect and use your personal information and how you can access it. Emails may be interfered with, may contain computer viruses or other defects and may not be successfully replicated on other systems. We give no warranties in relation to these matters. If you have any doubts about the authenticity of an email purportedly sent by us, please contact us immediately. Allens Arthur Robinson online: <http://www.aar.com.au>

Sydney  
Melbourne  
Brisbane  
Perth  
Bangkok  
Beijing  
Hong Kong  
Jakarta  
Phnom Penh  
Port Moresby  
Shanghai  
Singapore


None of these services involve the provision by FOXTEL of broadcast capacity to an access seeker and FOXTEL cannot be compelled as part of the SAU process to supply carriage services of that type. The issue can only be relevant to whether FOXTEL's SAU is "reasonable" (including whether it is in the "long-term interest of end-users") because it does not offer to supply such a service. The Commission must be satisfied that the SAU is not reasonable and reject it on that basis.

FOXTEL submits that it is clearly not in the long term interests of end users for the SAU to be rejected on the basis that it does not supply access to these carriage services. First, the Commission cannot be certain whether or not the services in question are capable of being declared. Second, even if they are, the Commission cannot be certain that FOXTEL would be required to grant access to them (keeping in mind the provisions of section 152AR(4)). Third, the number of access seekers which may seek access to this service would be very small. As FOXTEL has previously stated, it is also prepared to negotiate commercially with such service providers. Finally, it still remains open to the Commission to hold an inquiry into declaration of the services (if it sees fit) even if the SAU is accepted.

FOXTEL submits that, given the above, the Commission could not find that rejection of the SAU on this basis was in the long term interests of end users. It should therefore withdraw its retainer of Mr Flavel or limit the retainer so that FOXTEL is not required to provide information relating to its costs or contractual obligations.

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

Yours sincerely



**Michael Ball**  
Partner  
Michael.Ball@aar.com.au  
Tel 61 2 9230 4973

**Jacqueline Downes**  
Senior Associate  
Jacqueline.Downes@aar.com.au  
Tel 61 2 9230 4850