



FOXTEL MANAGEMENT PTY LIMITED

Supplementary Submission to Australian Competition
& Consumer Commission
FOXTEL Special Access Undertaking

February 2007

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1. Introduction

On 1 December 2006, FOXTEL Management Pty Ltd and FOXTEL Cable Television Pty Ltd (together, **FOXTEL**) lodged a Special Access Undertaking (the **Undertaking**) with the Australian Competition and Consumer Commission (the **Commission**) under s152CBA of the *Trade Practices Act 1974* (the **Act**) in relation to the Digital Set Top Unit Service. The Undertaking was accompanied by a supporting submission.

On 15 December 2006, the Commission released a Discussion Paper in relation to the Undertaking in which it expressed its preliminary view that the revised Undertaking can be accepted, subject to public consultation.

The only submission the Commission received in response to the Discussion Paper was a submission from Freehills on behalf of Seven Network (**Seven**). While Seven relies on its previous submissions, it has raised only one issue in its recent submission: whether the 'tying clause' satisfies the SAOs in s152AR. Seven contends that the Undertaking is not consistent with the SAOs because:

- in clause 4.1(c)(i)(A) of the Digital Access Agreement, FOXTEL imposes a "limitation" on the Undertaking so that it is only obliged to provide the Digital Set Top Unit Service to FOXTEL homes; and
- s152AR(3)(a) requires FOXTEL to supply the Digital Set Top Unit Service to any and all locations requested by an access seeker.

In response, FOXTEL relies on its previous submissions in relation to this matter but also wishes to make a few further observations concerning Seven's contention.

2. Consistency with the SAOs

FOXTEL's Undertaking is given in respect of the Digital Set Top Unit Service.

In its Undertaking, FOXTEL agrees to be bound by the obligations referred to in s152AR to the extent those obligations would apply to FOXTEL in relation to the Digital Set Top Unit Service if the Digital Set Top Unit Service were treated as an active declared service (clause 2.1) and undertakes to supply the Digital Set Top Unit Service on the terms and conditions specified in the Digital Access Agreement (clause 2.2).

FOXTEL submits that the Undertaking clearly complies with s152AR(3)(a) ie FOXTEL has undertaken to supply the service to service providers such as Seven so that they can provide carriage and/or content services.

Clause 4.1(c)(i)(A) of the Digital Access Agreement is one of the terms and conditions on which FOXTEL undertakes to provide access to the Digital Set Top Unit Service. Section 152CBA(3)(b) expressly contemplates that an undertaking will specify detailed terms and conditions, as does s152AY. The specification of terms and conditions of supply is commercially necessary given the nature of the services that are subject to regulation under Part XIC. Clause 4.1(c)(i)(A) of the Digital Access Agreement specifies the location of supply of the Digital Set Top Unit Service.

Section 152CBA draws a clear distinction between terms and conditions of supply of the relevant service (referred to in s152CBA(3)(b)) and "limitations" to which the undertaking is subject (s152CBA(5)). If an undertaking is subject to limitations, the service supplied is a declared service only to the extent to which the service falls within the scope of the limitations (s152AL(7)). It is

apparent that "limitations" concern the nature or description of the service to be supplied; and not the terms and conditions of supply such as term, price, technological requirements, location of supply and the like. If the contrary were the case (and all terms and conditions of supply were regarded as "limitations"), a service that was the subject of an undertaking given under s152CBA would be declared by reference to, and to the extent of, the terms and conditions of supply. This would have the result that the identical service could be declared in so far as it was supplied on different terms and conditions. This would be an absurd outcome.

The Commission is therefore correct in its view that clause 4.1(c)(i)(A) of the Digital Access Agreement is a term or condition of supply rather than a "limitation" within the meaning of s152CBA(5), and that the Undertaking given by FOXTEL is consistent with the SAOs.

For completeness, we note that FOXTEL also maintains its view that as it does not supply the Digital Set Top Unit Service in non-FOXTEL homes, such a service is not an active declared service within the meaning of s152AR.

3. Reasonableness

As FOXTEL has submitted, and the Commission accepted, the question whether clause 4.1(c)(i)(A) of the Digital Access Agreement should be accepted by the Commission is then a question of *reasonableness* (s152CBD(2)(b)).

Seven does not refer to this second limb or address this requirement at all in its submission. If the Commission was of the view that clause 4.1(c)(i)(A) was not reasonable, in the LTIE or consistent with the objects of Part XIC, it could reject the term for being unreasonable.

Seven asserts that consistency with the SAOs should not be interpreted in a way which:

- gives an access provider a de facto exemption from the SAOs in relation to the deemed declared service so that the Commission cannot later determine terms and conditions of access in locations to which the service is not provided (par 21); and
- the result contradicts and potentially defeats the objective of promoting competition for digital pay television services under s152AB(2)(c) (par 21).

Both of these matters referred to by Seven are more appropriately dealt with by the Commission in assessing the 'reasonableness' criteria rather than in assessing consistency with the SAOs. In fact, s152AB(2)(c) referred to by Seven is one of the criterion of the LTIE which is itself an express criterion under the reasonableness test in s152AH.

In this case, the Commission has considered these matters carefully and at length before determining that the term in question is reasonable.