



**Australian  
Competition &  
Consumer  
Commission**

GPO Box 520  
Melbourne VIC 3001

Level 35 The Tower  
360 Elizabeth Street  
Melbourne VIC 3000

ph (03) 9290 1800  
fax (03) 9663 3699

[www.accc.gov.au](http://www.accc.gov.au)

Our Ref: M2005/347  
Contact Officer: Arek Gulbenkogu  
Contact Phone: (03) 9290 1892

4 July 2006

Mr Michael Ball  
Partner  
Allens Arthur Robinson  
GPO Box 50  
SYDNEY NSW 2000

By email: [Michael.Ball@aar.com.au](mailto:Michael.Ball@aar.com.au)

cc.

Ms Jacqueline Downes  
Senior Associate  
Allens Arthur Robinson

By email: [Jacqueline.Downes@aar.com.au](mailto:Jacqueline.Downes@aar.com.au)

Dear Mr Ball

**Foxtel's further submission regarding its digital set-top unit service (DSTUS) special access undertaking (SAU)**

I refer to correspondence from Foxtel and its legal representative, in which it was argued that the issue of technical impediments to Foxtel's provision of modem services is not relevant to the Commission's assessment of Foxtel's SAU. In particular, I refer to:

- Allens Arthur Robinson's email to the Australian Competition and Consumer Commission (Commission) of 31 May 2006;
- Allens Arthur Robinson's email to the Commission of 14 June 2006; and
- Foxtel's supplementary submission to the Commission of 27 June 2006, provided in response to a letter from the Commission, sent to Allens Arthur Robinson on Foxtel's behalf on 31 May 2006, requesting further information from Foxtel about Foxtel's special access undertaking (the Undertaking) pursuant to s. 152CBB of the *Trade Practices Act (1974)* (the Act).



In particular, I note Foxtel's argument in its further supplementary submission that:

... the Commission's technical enquiries are unnecessary and misdirected. This is because there are overwhelming legal and commercial impediments...the effect of those impediments is that even if a "modem service" was declared, TWTV's proposal could not be implemented.<sup>1</sup>

### **Submissions from Foxtel regarding legal and commercial constraints**

The Commission considers that it has been provided with ample submissions from Foxtel and its legal representatives about the interrelation between the technical information sought by the Commission, and other legal and commercial issues that might bear upon the relevance of such information. The Commission will take these submissions into account when assessing the Undertaking pursuant to Part XIC of the Act.

However, the Commission wishes to note that any additional costs to Foxtel arising from the provision of interactive services could be readily identified, quantified and recovered from the channel supplier or suppliers on whose behalf the additional costs were incurred.

This would be likely to lessen or eliminate the impact of the commercial constraints claimed by Foxtel.

### **Submissions from Foxtel regarding technical constraints**

As you would be aware, the Commission's request for information concerns its assessment of whether there are technical constraints that would prevent Foxtel from allowing its existing channel suppliers to enhance their current offerings with interactive features.

The Commission remains concerned about inconsistencies in Foxtel's submissions regarding the nature of the technical constraints alluded to by Foxtel.

The Commission notes that in its submission of 29 March 2006 entitled *Supplementary report prepared for Special Access undertaking Application by Foxtel*, Foxtel indicated that providing interactive services to existing channel users would cause "significant technical problems" for Foxtel. However, in a meeting with the Commission on 15 June 2006, Foxtel indicated orally that these technical constraints could in fact be better described as commercial constraints, and that it would be technically possible for existing users to add interactive applications to their offerings.

In its further supplementary submission of 27 June 2006, Foxtel appears to be articulating a third position in relation to these claimed "technical difficulties".

---

<sup>1</sup> Foxtel, *Foxtel further supplementary submission*, 27 June 2006, p. 2.

Specifically, Foxtel states:

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.<sup>2</sup>

However, Foxtel also states in the same letter:

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.<sup>3</sup>

The Commission would like Foxtel to clarify the inconsistencies that have arisen from these statements. However, the Commission notes that the issue of technical constraints has arisen in the context of a claim originally raised by Foxtel – that, for technical reasons, modem services could not be extended to Foxtel's existing channel suppliers.

The Commission has requested information from Foxtel that the Commission believes would support Foxtel's claims, and Foxtel has refused to provide this information. Accordingly, the Commission will proceed on the basis that there are no meaningful technical constraints that would prevent Foxtel from making modem services available to its existing channel suppliers.

#### **Resumption of statutory time period**

For the avoidance of doubt, the Commission considers the statutory time limit for its assessment of the Undertaking recommences from the date on which the Commission received Foxtel's most recent submission in relation to this issue – that is, 27 June 2006.

Yours sincerely



Richard Home  
Senior Manager  
Communications Group

---

<sup>2</sup> Foxtel, op. cit., p. 1.

<sup>3</sup> Foxtel, op. cit., p. 2.