

Freehills

Mr Arek Gulbenkogu
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Australian Competition and Consumer
Commission
GPO Box 520
MELBOURNE VIC 3000

18 January 2007
Matter 80950530

Dear Mr Gulbenkogu

ACCC Discussion Paper on Foxtel's revised special access undertaking

We refer to the Commission's Discussion Paper on Foxtel's revised Special Access Undertaking (the **Undertaking**) in relation to the Digital Set Top Unit Service (the **STU Service**). The Commission has requested submissions in response to its Discussion Paper by 5 February 2007.

We understand from the Commission's Discussion Paper that the Commission will take into account new submissions as well as all submissions previously put forward by interested parties in the assessment of Foxtel's October 2005 Undertaking in deciding whether to accept or reject the Undertaking.

Seven confirms that it relies upon all previous submissions and material that it has put before the Commission in relation to Foxtel's October 2005 Undertaking.

Seven also relies on a further submission that is confined to whether or not the Commission can be satisfied that the Undertaking is consistent with the Standard Access Obligation (**SAOs**) set out in Part XIC of the *Trade Practices Act 1974*. Seven submits that, if the Commission adopts the preliminary view that it has taken in its Discussion Paper, the Commission will fall into legal error in its interpretation of Part XIC's requirement that the Undertaking be consistent with the SAOs.

Summary of submission

Foxtel's revised Undertaking is not consistent with the SAOs for the following reasons:

- Foxtel imposes in clause 4.1(c)(i)(A) of the Digital Access Agreement a limitation upon the Undertaking such that it will only be obliged to provide the STU Service to sites where the subscriber is acquiring Foxtel Pay TV content.
- Foxtel asserts, and the Commission agrees, that this is not a limitation upon the scope of the Undertaking. It takes the Undertaking to cover the STU Service in all locations, including locations in which it could potentially be provided.
- Despite taking the Undertaking to extend to all locations, the effect of the provision in the Digital Access Agreement is to limit the obligation of Foxtel to supply only some of the potential locations.
- That is inconsistent with the first SAO (to grant access to the active declared service).

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The Commission's error

The Commission's attempt in its Discussion Paper to reason this inconsistency away by reference to a *'basic requirement'* to supply the service is irrelevant to the relevant question of consistency. The Commission's construction of the relevant statutory requirement is wrong because:

- it does not accord with the words actually used in Part XIC;
- it does not accord with the structure of Part XIC; and
- it does not promote the object of Part XIC.

Seven's full submission on the legal error that the Commission will make if it adopts this construction is attached to this letter.

What the Commission must do

In Seven's submission, the Commission must reject the Undertaking, because if clause 4.1(c)(i)(A) of the Digital Access Agreement is not to be viewed as a limitation upon the Undertaking within the meaning of s152CBA(5) of the *Trade Practices Act*, the Undertaking cannot be consistent with the SAOs.

Yours sincerely



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