

1 Key points

- 1 The Commission cannot be satisfied that Foxtel's revised undertaking (the **Undertaking**) is consistent with the Standard Access Obligations (**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 they will only be obliged to provide the Digital STU Service (the **STU Service**) to those 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).
- 2 The Commission's attempt 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 relevant statutory requirement is wrong because it does not accord with the words actually used in Part XIC, does not accord with the structure of Part XIC and does not promote the object of Part XIC.
- 3 If the Commission determines that it is satisfied that the Undertaking is consistent with the SAOs, the Commission will make an error of law by misinterpreting the requirement in s152CBD(2)(a) of Part XIC.

2 The statutory context

- 4 Part XIC of the *Trade Practices Act 1974* provides an access regime for telecommunications carriage services and services that facilitate the supply of such carriage services.

2.1 Object of Part XIC

- 5 The express object of Part XIC is '*to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.*': s152AB(1).
- 6 In determining whether the long-term interests of end-users are promoted, regard must be had, and only had, to three objectives:
 - (a) promoting competition in markets for listed services;

- (b) achieving any-to any connectivity¹ in relation to carriage services that involve communication between end-users; and
- (c) encouraging the economically efficient use of, and the economically efficient investment in the infrastructure by which listed services are supplied and by which listed services are, or are likely to become, capable of being supplied: s152AB(2), (3).

7 The Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Act 1997*, which inserted Part XIC into the TPA, states that Part XIC's 'industry-specific' access regime reflects particular policy interests in:

- (a) promoting any-to any connectivity;
- (b) promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and
- (c) ensuring access to carriage services is established on reasonable terms and conditions.²

2.2 Structure of Part XIC

8 Part XIC enables access seekers to obtain access to telecommunications carriage services, and services that facilitate the supply of such carriage services (together **relevant service**), on terms and conditions that can be set in three main ways:

- (a) by agreement;
- (b) through declaration; or
- (c) under a special access undertaking (**SAU**).

These methods are described in the table below.

Method	Commentary	Section
1 Agreement	Access seekers can agree the terms and conditions of access with the person who supplies the relevant service.	N/A
2 Declaration	<p>The Australian Competition and Consumer Commission (Commission) may declare a relevant service if that will promote the long-term interests of end-users.</p> <ul style="list-style-type: none"> • Suppliers of declared services must comply with SAOs, obliging them to provide access seekers with access to "active declared services" on request.³ • Access seekers obtain access to the declared service on the terms and conditions specified in an ordinary access undertaking accepted by the Commission. The Commission cannot accept such an undertaking unless, among other things, it is consistent with the SAOs. • If there is no ordinary access undertaking in place, access seekers can obtain access on terms and conditions determined through arbitration by the Commission. 	<p>s152AL(3)</p> <p>s152AR</p> <p>s152BU: s152BV(2)(b)</p> <p>s152CP</p>

¹ Under s152AB(8), 'any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service...'

² Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Act 1997* at 38.

³ An "active declared service" is a declared service that the access provider supplies either to itself or to other persons: s152AR(2).

3	Special access undertaking	<p>Access seekers can obtain access on the terms and conditions specified in a SAU.</p> <p>SAUs can be given by persons who supply, or expect to supply, a relevant service, so long as the service is not an active declared service.</p> <p>The Commission must either accept or reject a SAU, but must not accept a SAU unless the criteria in s152CDD(2) are met, including among other things, that the Commission is satisfied that the terms and conditions in the SAU are 'consistent with' the SAOs.</p> <p>A special access undertaking may be with or without limitations.</p> <p>If the Commission accepts a SAU, the service is deemed to be a declared service to the extent of any limitations specified in the SAU. Although the Commission can subsequently declare the service covered by the SAU, the Commission cannot make an access determination through arbitration that is inconsistent with the SAU.</p>	<p>s152CBA(1)</p> <p>s152CBC(2); s152CBD(2)</p> <p>s152CBA(5)</p> <p>s152AL(7); s152AL(8); s152CQ(5)</p>
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- 9 Persons who provide active declared services, or services that may become active declared services, can seek exemption from some or all of the SAOs in relation to that service by making an application for exemption to the Commission: ss152AT and 152ATA. The Commission must not make an exemption order unless it is satisfied that the order will provide the long-term interests of end-users.

3 The Commission's view of the revised Undertaking

3.1 The Commission accepts that the Undertaking is not limited by location

- 10 The Undertaking is given in respect of Foxtel's bundled STU Service⁴, but not the unbundled component services that comprise the STU Service.⁵
- 11 The Undertaking obliges Foxtel to supply the STU Service only in locations where the digital set top unit to which the STU Service is to be supplied 'is actually in use by a Subscriber for reception of Foxtel's digital Subscription Television Services'.⁶ Thus, pursuant to the Undertaking, Foxtel is obliged to grant access to the STU Service only in locations where the subscriber is also acquiring Foxtel pay TV content. This effectively ties access to the STU Service to Foxtel's basic digital pay TV package (the **tying clause**).
- 12 Foxtel says, and the Commission accepts in its Discussion Paper, that the tying clause is not a limitation within the meaning of s152CBA(5) on the service the subject of the undertaking. This means that the Undertaking purports to cover the STU Service in *all* locations, including locations where it potentially could be provided.⁷

3.2 The Commission is satisfied that the Undertaking is consistent with the SAOs

- 13 The Commission says that if it accepts the Undertaking (which will have the effect of deeming the STU Service a declared service), then once Foxtel is supplying the STU Service, the STU service is an 'active declared service' in all locations (and potential

⁴ See Appendix 1 to Foxtel's revised undertaking for a definition of the STU Service.

⁵ Clause 2.7 of the Undertaking

⁶ Clause 4.1(c)(i)(A) of the Digital Access Agreement annexed to the Undertaking.

⁷ Foxtel submission at 26. ACCC, *Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service*, Discussion Paper, December 2006 at 19-20

locations) that the Undertaking covers.⁸ That is, if Foxtel's view of the scope of its Undertaking is accepted, the active declared service covers locations where Foxtel content is *not* being supplied.

- 14 The Commission says that the requirement in s152CBD(2) of '*consistency with the standard access obligations to supply the declared service imposes only a basic requirement to supply a declared service*'.⁹ The Commission also acknowledges that '*at some point of course, a clause limiting supply can be so extreme as to effectively amount to a constructive refusal to supply and hence not be consistent with the SAOs*'.¹⁰
- 15 Notwithstanding that acknowledgement, the Commission says in its Discussion Paper that it is satisfied that the Undertaking meets this '*basic requirement*' to supply the deemed declared STU Service, because the Undertaking obliges Foxtel to supply the bundled STU Service, albeit only to Foxtel homes.

4 Error of law

4.1 Legal error in relation to the scope of Foxtel's undertaking

- 16 A SAU may be subject to '*such limitations as are specified in the undertaking*': s152CBA(5). If a SAU is subject to limitations, the service supplied by the person is a deemed declared service only to the extent to which the service falls within the scope of the limitations: s152AL(7). Therefore, any limitations within the meaning of s152CBA(5) are limitations on the *service* covered by the SAU, and are to be discovered from the SAU itself.
- 17 The tying clause that is contained in the Digital Access Agreement (annexed to the Undertaking) restricts the access that Foxtel is obliged to grant to the STU Service. That follows because, of the two forms of active declared service that Foxtel could give an undertaking in relation to (namely the STU Service in locations receiving Foxtel content and the STU Service in locations that are not receiving Foxtel content¹¹), the Undertaking grants access only to the first form of active declared service. Accordingly the service that the Undertaking covers, on its face, is plainly limited to the STU Service that is supplied only in locations receiving Foxtel content.
- 18 The Commission, however, in its Discussion Paper, has read the Undertaking in the light of Foxtel's submission, which states that the Undertaking is not limited in this respect.¹² There is no power in s152CBA(5) to define limitations by reference to material extrinsic to the Undertaking. Therefore, if the Commission continues to read the Undertaking in this

⁸ ACCC, *Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service*, Discussion Paper, December 2006 at 20. The Commission refers to p146-148 of the its Draft Determination on Foxtel's original undertaking.

⁹ ACCC, *Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service*, Discussion Paper, December 2006 at 20.

¹⁰ ACCC, *Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service*, Discussion Paper, December 2006 at 20.

¹¹ In *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 555, the Full Court said that Foxtel was both a content service provider and a carriage service provider. In the Full Court's view, Foxtel's contractual obligations with its subscribers to maintain the STU equipment and to provide content obliged Foxtel to deliver content, therefore making it a carriage service provider. In the same way, if an access seeker were to have such contractual obligations to a subscriber, it no doubt also would be a carriage service provider. Further, if the access seeker were to use Foxtel's STU Service to comply with its obligations to its subscriber, Foxtel, in that case, would supply a service that facilitates the supply of a carriage service. Such a service is one for which Foxtel can give an SAU: s152CBA(1)(b).

¹² See Foxtel submission at 26. The Commission refers to Foxtel's submission (at 19) and then says its preliminary view is that '*the tying clause is not properly characterised as a limitation by which the declared service should be defined*': ACCC, *Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service*, Discussion Paper, December 2006 at 20

manner and ultimately accepts that the Undertaking is not subject to such a limitation, the Commission has misinterpreted s152CBA(5).

4.2 Legal error in respect of the meaning of the words ‘consistent with’

19 If the Commission maintains that the tying clause is not a limitation within the meaning of s152CBA(5), the SAOs require Foxtel, upon request, to give access seekers access to the active declared service covered by the Undertaking (i.e. the STU Service in any location). The Undertaking, however, obliges Foxtel to give that access only in some locations, namely those where Foxtel content is being supplied. The tying clause therefore is not merely a condition on supply of the service, it is a restriction of access that allows Foxtel not always to grant access to the active declared service on request.

20 There are three reasons why the Commission, if it maintains that it is satisfied that the Undertaking meets ‘a basic requirement to supply a declared service’ and therefore is consistent with the SAOs, has not properly construed the requirement in s152CBD(2)(a) that the Undertaking must be ‘consistent with’ the SAOs.

- (a) First, the Commission’s construction does not accord with words actually used in s152CBD(2)(a).¹³
- (b) Secondly, the Commission has not construed the phrase ‘consistent with’ in accordance with the structure of Part XIC
- (c) Thirdly, the Commission’s construction does not properly promote the object of Part XIC.¹⁴

21 Each of these reasons is more fully explained in the table below.

Reasons why Commission’s construction is wrong	Commentary
It does not accord with the words used in s152CBD(2)(a)	<p>Even on the most favourable construction of the phrase ‘consistent with’ for Foxtel, that phrase must mean at least ‘not inconsistent with’.¹⁵</p> <p>The Undertaking is inconsistent with the SAOs because, contrary to the first of the SAOs in s152AR(3)(a), the Undertaking imposes no obligation upon Foxtel to grant access to the active declared service¹⁶ on request by an access seeker. On the Commission’s own finding of the scope of the service (that is, that it is not limited), the Commission cannot be satisfied of consistency with the SAOs.</p> <p>Further, the Commission’s view that ‘consistent with’ is to be equated with ‘a basic requirement to supply a declared service’ is not the natural and ordinary meaning of the words, because the ‘basic requirement’ test does not appear in the TPA. They are just added words. The proper comparison is of the obligation under the SAOs and those in the Undertaking. It is not a comparison of the obligations in the Undertaking with ‘basic requirement’ to supply the service.</p>

¹³ A proper construction of the requirement in s152CBD(2)(a) that the Undertaking be ‘consistent with’ the SAOs ‘must begin by examining the context in which the definition appears and giving the words ‘presumptively the most natural and ordinary meaning which is appropriate in the circumstances’’: *BHP Billiton Ire Ore Pty Limited v the National Competition Councils* [2006] FCA 1764 (18 December 2006) at [88], quoting *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389 at 398.

¹⁴ The Court must prefer a construction that promotes the purpose or object of the Act to a construction that would not promote the purpose or object: *Acts Interpretation Act 1901* (Cth), s15AA.

¹⁵ The ‘natural and ordinary’ meaning of ‘consistent with’ is defined by the *Macquarie Dictionary* as ‘agreeing with’, ‘accordant with’ or ‘compatible with’. Although there is ‘a certain elasticity about the expression ‘consistent with’’: *Flannigan v Australian Prudential Regulation Authority and Anor* (2004) 138 FCR 286 at [46], the words ‘consistent with’ must mean, at the very least, that the Commission cannot be satisfied that an undertaking is consistent with the SAOs if the terms and conditions are not compatible or inconsistent with the SAOs.

¹⁶ The ‘active declared service’ as found by the Commission – see para 10 above.

It does not accord with the structure of Part XIC	<p>Part XIC provides an express mechanism through which Foxtel can seek an exemption from the SAOs, which the Commission may grant if satisfied that it is in the long-term interests of end-users. Accordingly, the requirement that an undertaking be 'consistent with' the SAOs should not be interpreted in a way that allows a person like Foxtel to obtain de facto exemption from the SAOs without having to make an application under s152ATA.</p> <p>The Commission's construction of 'consistent with', however, does allow Foxtel to obtain de facto exemption from the SAOs in relation to the deemed declared STU service in locations where Foxtel content is not supplied. That follows because if the Undertaking is accepted, although the Commission could later declare the STU service in locations where Foxtel content is not being supplied, the Commission would not be able to determine the terms and conditions of access in these locations through arbitration in a way that is inconsistent with the Undertaking. (In practice this means the Commission could not oblige Foxtel to grant access to the STU service in those locations.)</p>
It does not promote the object of Part XIC	<p>Part XIC seeks to promote the long-term interests of end-users by creating an access regime for certain telecommunication services. The long term interests of end-users, according to the Explanatory Memorandum and s152AB(2), include promoting diversity and competition in the supply of carriage services and content services.¹⁷ Undertakings therefore are not intended to be used to circumvent a supplier's statutory obligation to provide access to services. Accordingly, the requirement of consistency with the SAOs should not be construed in a way that would defeat these objectives.</p> <p>The Commission's 'basic requirement' test, in the way the Commission applies it, means that access seekers cannot obtain under the Undertaking access to Foxtel's STU Service in every potential location that is covered by the Undertaking. That result contradicts and potentially defeats the objective of promoting competition for digital pay television services (s152AB(2)(c)), because access is tied to Foxtel's basic package, which effectively forces access seekers to compete only at the 'tier' level, as opposed to the 'basic content' level.</p>

5 Practical consequences of accepting the undertaking

- 22 The practical consequences that will follow from the Commission accepting the Undertaking are:
- (a) Foxtel benefits from certainty in relation to the terms and conditions on which it must give access to its digital STU Service at locations that subscribe to Foxtel content;
 - (b) The Commission can not later compel Foxtel to give access to its digital STU Service at locations that do not subscribe to Foxtel content, because although the Commission could declare such services, it cannot make an access determination that is inconsistent with the undertaking;
 - (c) Access seekers can provide content to locations that subscribe to Foxtel only as part of a 'tier' to Foxtel's basic package; and
 - (d) Access seekers can not provide content to locations that do not subscribe to Foxtel content in a manner that is compatible with Foxtel's digital STU Service.
- 23 Each of these consequences emphasises the inconsistency of the Undertaking with the general obligations imposed by Part XIC.

¹⁷ Part XIC's context can be discovered both from the TPA itself, and from extrinsic materials such as Explanatory Memoranda and reports of Law Reform bodies: *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) 218 CLR 273 at 280; *CIC Insurance Limited v the Bankstown Football Club Limited* (1997) 187 CLR 384 at 408.