

**FOXTEL SPECIAL ACCESS UNDERTAKING IN RELATION TO THE
DIGITAL SET TOP UNIT SERVICE**

**Submission by Ten Network Holdings Limited to the Australian Competition &
Consumer Commission**

21 February 2006

Executive Summary

1. Ten Network Holdings Limited (**Ten**) welcomes the opportunity to provide a written submission to the Australian Competition & Consumer Commission (the **Commission**) in relation to the special access undertaking given by Foxtel Management Pty Ltd and Foxtel Cable Television Pty Ltd (collectively **Foxtel**) under section 152CBA of Part XIC of the *Trade Practices Act 1974* (Cth) (the **Act**). The undertaking sets out the terms and conditions upon which Foxtel will provide access to its Digital Set Top Unit Service (**Undertaking**).
2. In Ten's view the regime established by the Undertaking effectively limits any opportunity for access seekers to develop new pay TV channels.
3. Ten submits that the Commission should reject the Undertaking in its current form because it does not meet the requirements set out in Part XIC of the Act. For the reasons elaborated on below certain elements of the Undertaking and the Digital Access Agreement (or **DAA**), which sets out Foxtel's terms and conditions of access to the Digital Set Top Unit Service, are not reasonable and not in the "long term interests of end users" (**LTIE**) because:
 - (a) they do not promote competition in markets for listed services (particularly digital subscription television services or digital television services in general); and
 - (b) they do not encourage the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

Legislative Criteria

4. The Commission cannot accept a special access undertaking unless the criteria in section 152CBD of the Act are satisfied. These criteria include:
 - (a) The Commission must be satisfied the terms and conditions proposed in the undertaking are consistent with the standard access obligations (or **SAOs**) set out in section 152AR of the Act.

- (b) The Commission must be satisfied the terms and conditions are "reasonable". When determining what is "reasonable" the Commission must have regard to a range of factors set out in section 152AH(1) of the Act, including whether the terms and conditions promote the LTIE.
5. In considering whether the terms of an access undertaking promote the LTIE, the Commission must consider the objectives in s.152AB(2) of the Act, which relevantly include:
- (a) promoting competition in markets for listed services; and
- (b) encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

Tied Access to Digital Set Top Unit Service

6. The DAA is drafted such that Foxtel is only obliged to supply the Digital Set Top Unit Service in respect of households that are already Foxtel subscribers. It is not obliged to continue supplying the Service if a person ceases to be a Foxtel subscriber¹. As the Commission acknowledged in its Discussion Paper, this means:

"Given that Foxtel subscribers must take Foxtel's basic package to gain access to the Foxtel service and be provided with an STU, access seekers are only able to supply their services as a tiered channel to Foxtel's basic package."

7. Ten submits that the proposed tie of Digital Set Top Service access with Foxtel's basic package and its associated limitations are not reasonable and not in the LTIE, particularly because these arrangements do not promote competition in any relevant market.
8. The Australian Competition Tribunal ("**Tribunal**") expressed significant misgivings when considering very similar arrangements under Foxtel's previous DAA. It noted:

"... an access seeker's channels can only serve as a complement to the Basic Package, and never as a substitute for it. Potential access seekers will be competing for that subset of subscribers who choose to purchase premium tiers in addition to Foxtel's Basic Package. It also means that Foxtel's Basic Package would not be threatened by the prospective entry of an access seeker".²

¹ See clauses 4.1(c) and 11 of the DAA

² *Seven Network Limited (No 4)* [2004] ACompT 11 at [294]

9. After considering a range of competing factors, the Tribunal concluded as follows:³
- "In light of these factors, we consider the tie of the Basic Package to access to Foxtel's services as contained in the digital access agreement is a significant deterrent to entry. This is exacerbated by what we regard as the unnecessary prevention of an access seeker using Foxtel's infrastructure and services, other than STUs, to deliver subscription television services. In our view, potential access seekers are likely to be deterred from commencing supplying subscription television services in competition with Foxtel for so long as access is tied in this manner."*
10. The Tribunal's misgivings remain relevant in respect of the current Undertaking. It submits that tied access of the type proposed by Foxtel will stymie the development of competition in digital subscription television services for reasons which include the following:
- (a) As the Tribunal identified, tied access will increase barriers to entry for competing subscription television services. This occurs because access seekers will necessarily be limited to competing for the sub-set of customers who contemplate acquiring premium content in addition to the Foxtel basic package.
 - (b) Tied access also means Foxtel is insulated from competition in respect of the basic package offering itself. Access seekers are effectively unable to offer their services as a substitute for the Foxtel offering. This means Foxtel will have little incentive to innovate, develop new offerings or generally engage in the type of conduct a competitive market encourages.
 - (c) Foxtel has the ability to foreclose competition by manipulating the content of the basic package to match certain offerings from access seekers, who can only operate at premium tiers.

Access to Interactive Services

11. In 2004 the Tribunal noted that *"interactive services are likely to be an integral element of subscription television services within the short-to-medium term. An inability to provide interactivity will result in a much inferior product offering compared to the suite of services able to be offered by Foxtel."*⁴ In so doing it defined "interactive services" as encompassing:

³ Ibid. at [301].

⁴ Ibid. at [259] and [283].

- (a) the delivery of content via a "forward path" to a specific user. This is a 'point-to-point' service, which may be distinguished from a 'point-to-multipoint' service, whereby content is delivered to multiple end-users; and
 - (b) "return path" services, whereby an end-user is able to send, as distinct from merely receive, content.
12. The Tribunal concluded that: "... access to digital subscription services without interactivity is likely to deter new entry".⁵
13. Ten acknowledges that in the DAA Foxtel has expanded its definition of the Digital Set Top Service to include access to modems which facilitates interactive services. Foxtel asserts these services, captured by term "Modem Services", "*permit the delivery of point-to-point services that use a return path and allow subscribers to participate in interactive activities such as shopping, voting, gambling and video-on-demand*".⁶
14. However, certain critical limitations are placed on the delivery of Modem Services which include the following:
- (a) Foxtel is under no obligation to provide an access seeker with a return path service.⁷ Though Foxtel may arrange for the return path to be connected, it will not be responsible for providing or maintaining carriage services in relation to that return path.⁸
 - (b) Not all Digital Set Top Units with a Modem supplied by Foxtel will have a "return path connection" and Foxtel has no obligation to complete any such installation.⁹
 - (c) Foxtel is not obliged to install a Modem, or to amend, develop or upgrade its Set Top Units or Modem specifications to provide interoperability with an access seeker's modem content.¹⁰

These limitations have been included despite Ten's understanding that all of Foxtel's Digital Set Top Units have a Modem installed and Foxtel requires all customer subscribers to connect the Modem to a return path as part of its Service Agreement.

⁵ Ibid. at [275]

⁶ Foxtel's Submission at p.20

⁷ Clause 6.3(b) of the DAA

⁸ Clause 6.1(c)(i) and clause 6.3(a) of the DAA

⁹ Clause 6.1(c)(iii) and clause 6.1(c)(iv) of the DAA

¹⁰ Clause 6.1(c)(iv) of the DAA

15. Ten has identified a number of problems with Foxtel's attempt to capture "interactive services" in the DAA terms and conditions under the heading of "Modem Services". These include:

- (a) By excluding return path services from the definition of Modem Services, there is clearly scope for the Tribunal's concern regarding "multiple parallel access regimes" to be realised, in circumstances where the return path service is subject to an application for declaration in the future.¹¹ Ten submits this is not in the LTIE in that it does not encourage the economically efficient use of the relevant infrastructure. Instead, Ten supports the Tribunal recommendation that "... *access terms and conditions should be considered jointly and determined in respect of the whole of digital subscription television services*"¹², which properly includes return path functionality.
- (b) By not properly defining point-to-point interactivity and point-to-multipoint interactivity which do not use Modem Services or a return path, there is ambiguity as to whether these types of services are captured by the DAA. In its submission to the Commission, Foxtel categorises such services as "enhanced services", even though they often allow the user to "interact" with the content (eg Sky News Active). Foxtel asserts in its submission that these services were already available to access seekers as "Related Services" under the previous DAA, though the Tribunal may not have appreciated that fact.¹³

To prevent further ambiguity, Ten recommends that the definition of Related Services in the DAA be expanded to clarify that these "enhanced services" are captured by the definition and that they allow interactivity (albeit without the use of Modem Services). Given it will be extremely difficult for access seekers to launch interactive offerings based on the Modem Services offered under the current DAA, it is critical that the term Related Services is better defined to encompass "enhanced services" as this is likely to be the only form interactivity access seekers can realistically provide.

- (c) Foxtel notes that it has no obligation "to amend, develop or upgrade its Digital Set Top Unit specifications or Modem Specifications to provide interoperability with or meet the requirements of, the Access Seeker Modem Content"¹⁴. However, Ten submits that Foxtel should at least be obliged

¹¹ For example, if cable STUs are introduced by Foxtel, which have access to a faster, superior return path and this cannot be easily replicated or accessed by an access seeker.

¹² See note 2 at [282]

¹³ See p. 21, section 5.1(a) of Foxtel's Submission.

¹⁴ Clause 6.1(c)(iv) of the DAA

under the DAA to provide "acceptance testing services" to access seekers on fair and reasonable terms. This would allow an access seeker to be certain that its modem content and content associated with Related Services is compatible with Foxtel's Digital Set Top Unit.

Electronic Programming Guide Services

16. Ten acknowledges that Foxtel has expanded its definition of the Digital Set Top Unit Services to specifically incorporate "electronic programming guide services" (**EPG Services**). The elements of Foxtel's EPG Services are outlined in the definition of Digital Set Top Unit Services and clause 5 of the DAA.
17. Ten submits that for this service offering to be reasonable and in the LTIE, the current definition of EPG services must at least be expanded to cover new functionality that is directly linked to EPG services such as "series link" and "real-time" functionality. For example, it is unclear whether "series link" functionality, a service available through the Foxtel iQ personal video recorder which is activated through the EPG and allows viewers to automatically record an entire series of a program, is covered by the definition of an EPG service, or is an Excluded Service under clause 4.2(a)(v) of the DAA.¹⁵
18. Ten is also concerned that the EPG services being offered by Foxtel under the DAA do not allow access seekers to reserve channel numbers or guarantee contiguous numbering. Instead, Foxtel may allocate channel numbers at its discretion, though it will seek to be "fair and reasonable" in that allocation.
19. Channel location can potentially affect the ability of access seekers to compete against each other and against Foxtel. In particular, Ten notes Foxtel has the ability to reserve channel numbers to itself, whilst access seekers cannot reserve channel numbers.¹⁶ In effect, this may mean that for any genre category Foxtel could reserve the leading numbers in that category and force an access seeker's channels to appear on the second page of the category, making the access seeker's channels less visible to subscribers and harder to select.
20. Ten is also concerned that an access seeker's channel listing (and related program schedule information) will only be visible to subscribers to the access seeker's Channel. Currently all Foxtel channel listings are visible to all Foxtel digital subscribers, even if they don't subscribe to particular channels or tiered packages.

¹⁵ Clause 4.2(a)(v) of the DAA excludes from the Digital Set Top Unit Service any Digital Set Top Unit functionality (other than decryption of the Access Seeker's digital Subscription Television Services and Related Services and the provision of Modem Services), including return path functionality.

¹⁶ Clauses 10(c) and (d) of the DAA

This visibility can act as a promotional tool for tiered services. The proposed restriction deprives an access seeker of the ability to promote its channel to potential subscribers through the EPG. This restriction is not reasonable and will not be in the LTIE as it restricts access to new and compelling content offered by competitors to Foxtel.

Pricing

21. The pricing methodology proposed by Foxtel in relation to the Digital Set Top Unit Service is unnecessarily complicated and lacking in transparency. Application of this pricing methodology as provided for in the DAA will mean the costs for an access seeker will be difficult to ascertain with certainty and are likely to be prohibitive.
22. **[CONFIDENTIAL – CONTAINS COMMERCIALY SENSITIVE INFORMATION]**
23. Ultimately, Foxtel's approach to its pricing methodology remains unreasonable and represents a significant barrier to entry for access seekers.

Other Matters – Second or Subsequent Tuners

24. Clause 4.2 of the DAA lists a range of services that are specifically excluded from the Digital Set Top Unit Service supplied by Foxtel. Ten notes that relative to Foxtel's previous DAA a particular exclusion has been removed, namely the provision by Foxtel of "... dedicated access to any second or subsequent tuner and/or hard drive in the Digital Set Top Unit."
25. In order to avoid ambiguity Foxtel should clarify whether this amendment means access to second or subsequent tuners, to the extent they are introduced into Foxtel Digital Set Top Units, will form part of the Digital Set Top Unit Service. By way of background, Ten notes that in 2003 it submitted to the Federal Government¹⁷ that all new satellite Set Top Units should include a terrestrial tuner and that terrestrial or dual tuners should be considered for cable Set Top Units if and when Foxtel moves to a cable platform without sufficient capacity for retransmission of free to air (FTA) services. Since that time regional pay TV provider, Austar, has announced that it will include terrestrial tuners in the PVR Set Top Units that it is currently rolling out.
26. The benefits associated with dual tuners in Set Top Units include, but are not limited to, the following:

¹⁷ Submission by Network Ten to the Government in response to Report on Pay TV Competition by the Australian Competition and Consumer Commission, 23 July 2003.

- (a) End users would have the choice of receiving services offered via digital FTA and pay TV transmission methods, increasing the range of services available to end users.
- (b) All pay TV subscribers will be able to obtain digital FTA services on a single Set Top Unit and will not have to pay to purchase a separate Set Top Unit to receive digital FTA services.

Conclusion

- 27. Ten submits that Foxtel possesses substantial power in the provision of pay television services in Australia. The Undertaking being offered by Foxtel in relation to its Digital Set Top Units and related services is both prohibitive and overly complex. It is also unlike any other access regime adopted in comparable markets overseas such as the United Kingdom or the United States.
- 28. The Commission should reject the Undertaking in its current form because it does not meet the relevant statutory criteria. In particular, it is not reasonable and not in the "long term interests of end users".