



## **Two Way TV Australia Limited**

Submission to  
Australian Competition & Consumer Commission  
Foxtel Special Access Undertaking

*Public Version*

# Submission to Australian Competition & Consumer Commission

## Foxtel Special Access Undertaking

### Table of Contents

---

Executive Summary.....	3
A. Background.....	4
Introduction.....	4
Background on Two Way .....	4
Current Status of the Interactive TV Market in Australia.....	5
Prospects for a commercial agreement with a pay TV carrier [Confidential].....	8
B. Reasons why the undertaking should not be accepted.....	8
Interactive services should not be tied to new channels.....	8
Foxtel's undertaking would require inefficient duplication.....	11
C. Changes to be made to the undertaking for clarity.....	12
Lack of clarity around the terms on which interactive services can be provided .....	12
Problems with Foxtel's Digital Access Agreement.....	13
D. Conclusion .....	17
Attachment 1           [Confidential] .....	19
Attachment 2.....	20

## Executive Summary

Two Way submits that Foxtel's undertaking is not in the long term interests of end users in its current form, for the following reasons:

1. Foxtel's undertaking does not allow existing channel providers to add interactive features to existing channels, and it does not allow access seekers to supply stand-alone interactive services. Rather, anyone wishing to supply interactive services must acquire capacity from Foxtel (and carriage from Telstra and Optus) for an entirely new pay TV channel, which can then have interactive features added to it. Accordingly, declaration will be required in order for access seekers to supply new interactive services that either stand alone, or are bundled with existing channels, as distinct from only supplying interactive services that are bundled with new channels. If the Commission accepts Foxtel's undertaking, it will be more difficult to obtain a declaration, and even if declaration is obtained, there will be multiple access regimes applicable to interactive services. It is therefore not in the long-term interests of end-users for the Commission to accept the undertaking as it stands.
2. Accepting the undertaking will mean that access seekers who want to offer interactive services will incur significant costs in setting up and running their own pay TV business. This does not achieve the objective of encouraging the economically efficient use of, and economically efficient investment in, interactive infrastructure. Accordingly, for this reason too, Foxtel's undertaking is not in the long-term interests of end-users.

Accordingly, the Commission should reject the undertaking as it stands.

Further, the undertaking appears premature. Foxtel has omitted key documents necessary to determine the scope of the undertaking and its feasibility. These include the Operational Procedures and the Modem Services Protocol, which have not yet been provided, and could be structured in such a way as to undermine any access that the undertaking would otherwise provide. The Commission cannot assess the reasonableness of the undertaking without these documents. As such, Foxtel's undertaking is premature and the Commission should not accept it.

If the Commission nonetheless decides that the undertaking should be accepted, there is a lack of clarity around the basis on which interactive services can be supplied using the undertaking, and Foxtel should be required to submit additional materials for the Commission to review in order to resolve this uncertainty. Further, there are a number of amendments that should be made to the proposed Digital Access Agreement in order to ensure that it is consistent with the undertaking, and to ensure that it is reasonable.

Two Way submits that it would not be in the long-term interests of end users to accept the undertaking unless a revised version, which addresses the problems set out above, is submitted.

## A. Background

### Introduction

Two Way TV Australia Limited (**Two Way**) welcomes the opportunity to make a submission on the special access undertaking given by FOXTEL Management Pty Ltd and FOXTEL Cable Television Pty Ltd (**Foxtel**) in relation to the proposed Digital Set Top Unit Service.

The undertaking must be carefully assessed to ensure that access to the Foxtel digital pay TV platform is available on reasonable terms, so that a competitive market can develop for the provision of advanced television services (including interactive services) in Australia. This will ultimately lead to greater consumer choice, and better services at lower prices, than the current situation, where Foxtel controls the interactive television gateway to Australian homes.

Two Way is a potential access seeker, and is particularly concerned about a number of aspects of the undertaking which relate to interactive television services. Two Way has substantial expertise in interactive services, and wishes to expand the range of interactive television services that is currently available to Australian consumers. For the reasons set out below, this is unlikely to be possible under the proposed terms of Foxtel's undertaking.

The interactive services now included in Foxtel's undertaking have not previously been considered by the Australian Competition and Consumer Commission (the **Commission**) in the long history of unsuccessful attempts by third parties to gain access to the Foxtel platform. This history dates back at least to the declaration of analogue subscription television services in September 1999. Access to interactive services was only included in the undertaking by Foxtel as a result of the decision of the Australian Competition Tribunal (the **Tribunal**) in September 2004.

Accordingly, Two Way submits that the nature of interactive television services, and the current status of the interactive television market in Australia, should be carefully considered by the Commission.

### Background on Two Way

Two Way is an interactive media applications company. It provides services in the emerging Australian interactive television market.

Two Way is a public company which was founded in 1990 and listed on the Australian Stock Exchange in December 2004. The foundation for the majority of Two Way's applications and services is an exclusive and perpetual licence agreement from Two Way Media Limited (**TWM**), a longstanding participant in the interactive television market in the UK. Through its research and development efforts over the past ten years, TWM has developed a complete end-to-end system for creating, implementing and distributing an interactive television service. The licence gives Two Way automatic access to possibly the world's largest library of interactive applications for existing television programs, as well as to the technology to deploy these applications for broadcasters within very rapid timeframes.

Two Way currently creates and operates an interactive TV games service under the brand "MindGames", which is available on the digital TV platforms operated by Foxtel and Austar. The technical architecture for this service is outlined in Appendix A (which is confidential). Appendix A indicates that the provision of stand-alone interactive services of this kind requires substantial expertise on the part of the service provider, and also requires the co-operation of the pay TV platform operator.

Two Way also provides interactive enhancements for existing channels broadcast (and in some cases, part-owned) by Foxtel and Austar, under commercial arrangements with the channel providers. Such arrangements also require the agreement of the platform operators (Foxtel and Austar) in each case, otherwise such interactive services cannot be added to existing channels.

Two Way is also developing other interactive television applications for the Australian market. In particular, Two Way has a contractual relationship with Tab Limited (now owned by Tabcorp Holdings Limited) to create an interactive racing service, which would allow viewers of the Sky Racing channel to place bets with Tabcorp through their television set using the remote control. Implementation of this system requires technical integration with Tabcorp's systems (which is currently in progress), and an agreement with a pay TV operator to carry the service.

### **Current Status of the Interactive TV Market in Australia**

Interactive television is very new to Australia, and is a specialist market. True interactive television involves the provision of a personalised television experience for an individual viewer, who can react to and control the content appearing on his or her own screen, without affecting the television experience of any other viewer. For example, a viewer could interact with the television by playing along with the live broadcast of a game show, using an enhanced TV application which is synchronised to the live broadcast. Or a viewer could choose to respond to an advertisement, and send information to the advertiser. Other viewers of the same game show or advertisement, who choose not to use the interactive application, will not experience what is happening on the interactive user's screen.

True interactive television requires a digital TV platform – it cannot be provided on an analogue platform. For most interactive services, it is also necessary for the platform to have full return path infrastructure, such as a modem in the set-top unit (**STU**) which can dial in to a return path network.

Occasionally, TV programs which encourage viewers to use their telephones to send messages to a TV broadcaster, such as mobile text (SMS) messages, are described as "interactive" television. For example, Foxtel states in its submission (section 5.1):

*"The ability to supply interactive services using telephones and mobile SMS is already available and, in FOXTEL's opinion, is as competitive as using the remote control linked to the STU."*

This is an extremely superficial analysis. For example, viewers are able to use mobile telephones to send in text messages commenting on the program. While such services involve a viewer "interacting", in a very crude sense, with the televised content, this is essentially the same as a viewer calling up the switchboard of the television station and passing on his or her views on the program. This is not considered to be "interactive" television – particularly in those countries around the world where true interactive television is available. Any link which might be provided between the viewer's action (the telephone message) and the broadcast program is arbitrarily controlled by the broadcaster.

The same applies even if the viewer is able to change the broadcast content in some way – for example, where a text message is broadcast onscreen, or alters the result of an onscreen poll. This is essentially the same as a viewer calling the station, and the telephone call being broadcast live to air – a technique which has been possible ever since television was invented. Such services do not change the viewing experience of an individual viewer, because the same broadcast content goes out to all viewers.

In order for a viewer to enjoy the interactive television services which are most popular and useful in overseas markets, such as games, wagering, video on demand, interactive advertising, and playing along with quiz and sports programs, it is necessary to have access to the STUs of a digital television platform. Foxtel itself refers to "the services used to deliver true interactive services" as "Modem Services", which confirms that true interactive services use the modem in the STU (Foxtel submission, section 5.1(a)).

In overseas markets, there are numerous companies providing true interactive services. In the UK, BSkyB operates the sole satellite pay TV platform, and has over 8 million subscriber

homes. BSkyB carries a range of interactive services, which use a dial-up return path via a modem in the STU.

Third party access is available to the BSkyB platform, and there is a thriving industry of third party access seekers. Some of these offer stand-alone interactive services, while others offer more traditional pay TV channels, and some offer channels with interactive enhancements. Existing channel providers are also able to add interactive features to their channels. All of these models are possible under the regulated access regime applicable to BSkyB. Further detail on the UK access regime is set out in sections B and C and in Attachment 2 of this submission.

Interactive services are also available in the UK on the cable pay TV platforms operated by NTL and Telewest, who have access to a total of around 3.3 million subscriber homes. These operators use a cable return path, which offers higher bandwidth than a dial-up modem, and thus faster and more efficient interactive services.

In the US, there are numerous cable companies providing true interactive TV services. These platforms compete with a satellite operator (DirecTV).

In contrast, Foxtel owns and operates the dominant interactive television platform in Australia. While there are other providers of digital television, they are not able to compete with Foxtel in the provision of interactive services. The reasons are as follows.

The free-to-air (FTA) broadcasters currently broadcast digital television signals. However, they do not broadcast interactive services. This is because there are virtually no STUs currently available to Australian viewers which can handle interactive FTA signals. The reasons for this are succinctly explained in Foxtel's engineering report (Attachment 5 to Foxtel's submission), which states at section 6.1.3:

*"Some FTA operators have attempted to provide interactive services that can be utilised by the open market set top box population. However, for one operator, only one model of set top box can run the application, but only after the viewer manually downloads an update from the set top box manufacturer's site and connects the set top box to a PC to perform the upgrade. There is no universal method to update the total existing population of open market set top boxes to enable them to work with any operators efforts to provide enhanced digital television services. In many cases, the only option available to the customer is to buy a new set top box that support the enhanced services of the day."*

This material from Foxtel explains why the FTA broadcasters cannot compete with Foxtel in offering interactive television services, and do not attempt to do so. An additional reason is that the FTA broadcasters do not have any return path infrastructure, because it is not feasible to create it using the "open market set top box population" (that is, FTA STUs).

The other major pay TV carriers, Optus and Austar, also broadcast digital TV services. Optus only commenced supplying its digital TV service in December 2005. Two Way understands that Optus has very few pay TV subscribers (approximately 160,000), with only around 25,000 of them currently taking digital services (and thus able to experience interactivity).

The terms of the relationship between Foxtel and Optus are well understood by the Commission. In general terms, Optus does not compete with Foxtel, and instead engages in the resale of Foxtel content. Indeed, it has been reported in the *Sydney Morning Herald* that Foxtel's Chief Executive, Mr Kim Williams, "conceded after lengthy cross-examination that Foxtel had not regarded Optus as a 'serious business rival' since the two companies agreed to share content in November 2002" (article titled "I slammed AFL to cut price, says Williams", 9 February 2006).

In relation to interactive services specifically, Two Way understands that Optus has very little discretion to create and operate interactive services which are not sourced from Foxtel, and

the terms on which Optus might do so would render such services commercially unviable. Optus does not in fact provide any television services which are not supplied by Foxtel, other than those few (non-interactive) programs which Optus is required to continue to produce under its express undertakings to the Commission.

Optus uses exactly the same brands and types of STUs as Foxtel, which include a telephone modem for a dial-up return path. While it is necessary for satellite STUs to use a dial-up return path, both the Foxtel and Optus cable platforms are able to provide a cable return path. If STUs with a cable modem were deployed, this would provide a more enjoyable and useful interactive experience for the viewer. Indeed, during the Optus interactive TV trial which commenced in 2001 and concluded in February 2003, the cable return path was successfully used, showing that it is technically feasible to do so on the Optus and Foxtel systems. Two Way was a leading participant in this Optus interactive TV trial, using the cable return path.

The reason why Optus does not use the cable return path now, but instead uses the same STUs as Foxtel (with a dial-up modem), appears to be explained by the fact that Optus wishes to make its digital television service as identical to the Foxtel service as is possible. It seems clear that Optus does not wish to invest in creating independent television services.

Accordingly, the commercial and technical relationships between Foxtel and Optus make it unviable to attempt to provide interactive services on the Optus platform, unless they are supplied to Optus by Foxtel. Optus is therefore not an option for third parties seeking to supply interactive TV services in Australia.

Austar also broadcasts digital TV via satellite, and the Austar service is available to around two million of the seven million TV households in Australia. In general terms, of course, Austar does not compete with Foxtel, since they each have mutually exclusive licence areas (other than the Gold Coast, where both services are available).

Specifically, in relation to interactive TV services, Austar does not provide an alternative to Foxtel, because the Austar platform does not support an adequate return path. Very few Austar STUs have a modem which is connected to a telephone line, and Two Way understands that the cost of connecting those other STUs which do have a modem would be substantial. Two Way also understands that Austar has not invested in the back-end infrastructure which is required to deliver true interactive services. Such infrastructure includes a modem bank, servers and other computer equipment. Therefore, sophisticated interactive services such as Two Way's racing service currently cannot be provided on the Austar platform.

There are a few other providers of pay TV services in Australia, but they are all small operators with very limited coverage. TransACT operates a fully interactive, high-speed digital TV platform, but currently has only around 13,000 subscribing homes in the ACT and Queenbeyan, and is not available outside those areas.

Other small pay TV operators include Neighbourhood Cable, which has only around 12,000 subscribers (as at June 2004) from approximately 90,000 homes passed in Geelong, Mildura and Ballarat. UBI and SelecTV are both small satellite operators, carrying mainly foreign language programming, who market their services primarily to non-English speaking households. None of these operators have interactive STUs or return path infrastructure, and none of them provide interactive TV services.

Accordingly, the analysis of Foxtel's competitive position by Dr Phillip Williams (Attachment 6 to Foxtel's submission) completely fails to address Foxtel's overwhelmingly dominant position in interactive television services. Foxtel's argument that it competes with FTA operators in respect of television, even if true, is irrelevant, because the FTA operators cannot compete with Foxtel in offering interactive services.

Therefore, for those entities wishing to provide true interactive television services in Australia, the only realistic potential supplier is Foxtel.

## **Prospects for a commercial agreement with a pay TV carrier [Confidential]**

*[Two Way wishes to claim confidentiality over this part of its submission, on the basis that it includes commercially sensitive information]*

### **B. Reasons why the undertaking should not be accepted**

#### **Interactive services should not be tied to new channels**

The Foxtel undertaking is designed to restrict access to entities seeking to operate a new pay TV business. That is, potential access seekers must create a subscription TV service (a pay TV channel), and must buy capacity for that channel. Access seekers then would also be able to use the modem within the set-top box, which means that interactive applications such as Two Way's racing service can then be provided on the new channel.

However, it is not possible for existing channels to use the undertaking to simply add interactive features to their current content. Appendix 1 to the undertaking defines the Digital Set Top Unit Service as comprising "services for the reception and decryption of signals for a digital Subscription Television Service and a Related Service". "Subscription Television Service" is defined in Schedule 10 of the proposed Digital Access Agreement (**DAA**) as "a service that delivers television programs", being a subscription broadcasting or narrowcasting service – in other words, a pay TV channel. The Digital Set Top Unit Service also includes "Modem Services", but these are not available separately. Clause 4.1(c)(ii) of the DAA states that Foxtel is only obliged to supply the Digital Set Top Unit Service "as a total package and not as one or more component parts". Section 5.1(c) of Foxtel's supporting submission makes it clear that "Modem Services" are bundled with the other services supplied under the DAA. Finally, clause 6.5(a) of the DAA adds "For the avoidance of doubt, Access Seeker Modem Content must not be linked to any channels or programming other than the Access Seeker's digital Subscription Television Service."

Thus, an existing channel provider who wishes to add interactive features to its channel, but who cannot reach agreement with Foxtel, cannot use the undertaking to acquire only "Modem Services". The channel provider can only use Foxtel's undertaking to acquire capacity for a completely new pay TV channel, and will also have to acquire capacity from Telstra for cable distribution, and Optus (or another carrier) for satellite distribution. Two Way understands that the total cost of acquiring this capacity is at least \$2.5 million per annum, before programming costs and general business overheads, which would render acquiring a channel under this regime unviable for the vast majority of potential access seekers given the limited number of return path enabled digital pay TV STUs on the Foxtel platform.



The most efficient method of creating an interactive racing service would be to simply add Two Way's interactive service to the existing Sky Racing channel carried by Foxtel – rather than mounting a new, second channel with exactly the same content, but with the interactive service added. This would minimise the bandwidth and other resources required to be supplied by Foxtel, and would minimise the costs incurred by all parties. There is no technical reason why this could not be done, since existing channels can and do add interactive features if Foxtel is prepared to let them. No issues would arise under Foxtel's subscriber management or conditional access systems, which would continue to operate exactly as they do today.

It is difficult to see why Foxtel has not offered this possibility for access seekers, unless Foxtel is simply seeking to maintain its dominance over the provision of interactive TV services. If access to interactive services is available only on new channels, then potential access seekers must pay millions of dollars per annum to obtain channel capacity, and create and operate an entirely new pay TV business. This substantially damages the commercial prospects for new interactive services, unless they are supplied by Foxtel – or perhaps supplied by third parties, but on terms dictated by Foxtel.

As previously indicated, the architecture presently used for Two Way's interactive games service is outlined in (confidential) Attachment A. It would be possible for this entire service to be declared under Part XIC of the *Trade Practices Act* 1974 (Cth). There is clearly a bottleneck in the provision of interactive TV services, since Foxtel controls the only infrastructure platform by which they can be delivered, and it would not be economically efficient to duplicate it. Even the FTA broadcasters, who are all major publicly listed companies, have not been able to establish a competing interactive platform, even though they have invested millions of dollars in order to broadcast digital TV signals. Declaration would allow potential access seekers to provide stand-alone interactive services (as Two Way does now with its games channel) which are not tied to new channels.

Given that declaration of stand-alone interactive services is possible, the Commission, before it accepts Foxtel's undertaking, should carefully assess whether the undertaking is reasonable. In particular, the Commission must consider whether the undertaking is in the long-term interests of end users. That consideration requires a "future with and without" the undertaking approach, where the Commission compares the factual (the Commission accepts the undertaking) to the counterfactual (the Commission rejects the undertaking).

Two Way submits that given the difficulty of commercially negotiating access to Foxtel's platform, declaration will be necessary in both the factual and counterfactual before access seekers can supply new interactive services that either stand alone, or are bundled with existing channels, as distinct from supplying interactive services that are bundled with new channels. Declaration would promote competition because it allows both existing channel providers to add interactive features to their current channels, and entirely new stand-alone interactive services to be provided. Of course, the access charges for such services should be based on Foxtel's costs of supplying the bandwidth and other resources that are required; but it should not be difficult to calculate these costs, since third parties are currently able to add interactive features to existing channels, or supply stand-alone interactive TV services (such as the Two Way games channel), although only when Foxtel allows them to do so.

Accordingly, declaration would make it far more likely that a new and vibrant interactive TV industry will develop, with third parties able to compete with each other and with Foxtel to develop the best and most innovative services. Accordingly, it is in the long-term interest of end-users that declaration of interactive services should not be made more difficult.

Declaration could also provide additional benefits to end users, since the Commission in an arbitration proceeding could require that the facility in question be "enhanced or extended" under section 152CP(2)(e) of the *Trade Practices Act*. This could, for example, require Foxtel (and Telstra) to make the cable return path available for interactive services, which would enable access seekers to provide faster and more efficient interactive services. This option is not available if there is no declaration.

Although declaration is possible in both the factual and the counterfactual, Two Way submits that there are at least two reasons why the factual is not in the long-term interest of end-users. First, in the factual, the Commission accepts Foxtel's undertaking, and this means that the prospects of obtaining a declaration of interactive services in those circumstances are diminished. Second, even if such a declaration were granted in the factual, access seekers would then be faced with two different access regimes— one where the interactive service is bundled with a new channel, and one where it is bundled with an existing channel. As the Tribunal pointed out, it is not desirable to have a “piecemeal” approach to access (paragraph 273 of the Tribunal's decision), and this is not in the long-term interests of end-users.

These problems are not present in the counterfactual, because there is no undertaking that diminishes the prospect of obtaining declaration, and no multiple access regimes when declaration is obtained. Thus, the counterfactual promotes competition, whereas the factual does not. On this basis, the undertaking in its present form should be rejected.

## **Foxtel's undertaking would require inefficient duplication**

Foxtel's undertaking will cause a potential supplier of interactive TV services to incur significant costs in setting up and running its own pay TV business. Foxtel will not supply the following services, all of which the access seeker would have to establish:

1. Marketing and advertising, including listing in the Foxtel magazine and electronic program guide (EPG).
2. Call centres to handle customer enquiries.
3. Subscriber management system - ie the database of names, addresses and smartcard numbers which determines which subscribers can view and use the service.
4. Billing of customers.
5. Use of Foxtel's POP network - the "point of presence" network, which is the network of modems located at various places around the country, which viewers' own modems dial into when seeking to use interactive services.
6. The back-end infrastructure (servers and other computer equipment) used to process interactive applications and supply services to viewers.

All of these services could be supplied by Foxtel, at the cost of an access seeker. Foxtel's proposal to exclude them means that, while Foxtel claims to be including interactive services in its undertaking, Foxtel is not actually offering access to the basic features of its system which make interactive services possible on even a remotely commercial basis.

In the UK, BSkyB as the dominant pay TV operator is required to provide access to most of these services, as well as the infrastructure which is necessary for interactivity. The regulatory regime applicable to BSkyB is summarised in Attachment B, which is an extract from a recent consultation paper issued by the UK regulator Ofcom (Office of Communications, "Provision of Technical Platform Services", November 2005). BSkyB is required to supply conditional access and EPG services, as summarised in paragraphs 3.1-3.10 of Attachment B. The EPG is crucially important, and a number of problems with Foxtel's proposal for the EPG are discussed below in Section C of this submission.

In relation to interactivity, BSkyB is required to provide certain services (described as "Access Control" services) which give third parties access to its interactive infrastructure. These services are summarised in paragraphs 3.11-3.14 of Attachment B:

*"The definition of Access Control (AC) services covers a broad range of technical services. On digital TV platforms, providers of AC services are required to provide broadcasters:*

- *Access to certain application programming interfaces (APIs) on its digital receivers.*
- *Access to the digital broadcaster's remote computer hardware and software systems using network connections that the digital receiver is able to establish.*

*Such services allow broadcasters to develop software applications (i.e. interactive TV applications) which can be loaded and executed on the digital receiver. These applications may then establish an on-line connection with the broadcaster's network infrastructure to create a "client server" computing environment.*

*Other AC services also enable the broadcaster to provide viewers with the ability to identify and access interactive applications. For example, on the Sky DSat platform TV viewers might access interactive applications by "pressing the red button" whilst watching a TV channel or selecting the service from the "Interactive Main Menu".*

*Because interactive services are bespoke software applications that run on the digital receiver they are able to support a wide range of functionality. For example, some interactive services are designed to enhance broadcast TV by providing the viewer with additional information or allowing them to access different audio or video streams whilst other interactive services are independent of the TV broadcast, such as TV banking, games or e-mail."*

Paragraph 3.15 goes on to point out that BSkyB supplies access to its authentication servers, which are a part of its back-end infrastructure used to process interactive applications. In addition, access seekers are able to use customer information derived from BSkyB's subscriber management system to facilitate interactive applications.

Two Way submits that Foxtel is in an analogous position to BSkyB, since each entity is the dominant pay TV operator in its market, and both are managed and controlled by News Corporation. Indeed, Foxtel's position in the interactive TV market in Australia is far more dominant than BSkyB's position in the UK, where there are at least some competing interactive platforms. Two Way submits that a similar approach to the regulation of Foxtel will be necessary to ensure that a competitive market can emerge for the provision of interactive TV services in Australia, along the lines of the competitive market which exists in the UK.

Under Foxtel's current proposal, the costs that an access seeker would be forced to incur in duplicating Foxtel's infrastructure are considerable, and constitutes a further deterrent to the provision of new and innovative interactive services to Australian consumers. In some respects, the duplication that would be required recalls the inefficient investment by Telstra and Optus in rolling out cable systems which are 80% overbuilt (that is, 80% of the potential customers could choose either cable system, even though one cable system could supply them all). However, that duplication was the result of a voluntary commercial decision on the part of both carriers. In this case, if an access seeker wishes to supply interactive TV services, the duplication required to support such services is not voluntary, and would require inefficient and unnecessary investment.

Two Way submits that such duplication does not achieve the objective of encouraging the economically efficient use of, and economically efficient investment in, interactive infrastructure. Accordingly, Foxtel's undertaking, for this reason too, is not in the long-term interest of end-users, and should be rejected.

### **C. Changes to be made to the undertaking for clarity**

If the Commission does decide to accept the undertaking, there are nonetheless a number of matters that should be clarified to ensure that it is reasonable.

#### **Lack of clarity around the terms on which interactive services can be provided**

Foxtel's undertaking does not specify the detail of how interactive services can be offered on the Foxtel platform. Access seekers must comply with various documents to be generated by Foxtel, including Operational Procedures and a Modem Services Protocol. These could have a significant impact on any interactive service, but the documents have not yet been published by Foxtel. Indeed, Foxtel does not propose to publish the Modem Services Protocol until *after* an access seeker executes the DAA (see clause 6.2(a) of the DAA). Similarly, Foxtel's supporting submission (section 5.5(c)) states that the Operational Procedures will only be provided after the DAA has been signed. These documents can also be changed at any time, even where there is a material adverse effect on access seekers (clause 11.2(b) of the DAA).

Accordingly, before the undertaking can be accepted, Foxtel should be required to submit these documents for the Commission and potential access seekers to review. The documents should specify the testing and signing process for interactive applications, and all other details which are relevant for interactive service providers. Further, Foxtel should be required to undertake that these documents will not be changed without the access seeker's consent, unless the changes do not have an adverse effect on access seekers.

*[Two Way wishes to claim confidentiality over the next paragraph, on the basis that it includes commercially sensitive information.]*

## **Problems with Foxtel's Digital Access Agreement**

The proposed Digital Access Agreement which access seekers would sign is quite complex. It is also extremely one-sided, and gives access seekers almost no power in any disputes with Foxtel. Accordingly, the terms and conditions on which access would be provided are not reasonable.

In brief, some of the more problematic clauses are:

1. Access seeker channels will not appear on the EPG, unless a viewer subscribes to them. That is, Foxtel will not give non-subscribers to a new interactive channel any indication that it exists.
2. Access seekers must provide a bank guarantee, in an amount determined by Foxtel as sufficient to cover the access seeker's obligations under the Agreement. The amount of this guarantee should be limited and based on an assessment of what the access seeker's obligations actually are.
3. Foxtel can change the terms and conditions of the DAA at any time and for any reason, even where this imposes additional costs or otherwise has a material adverse effect on an access seeker. This is not reasonable, and is not consistent with the terms of Foxtel's own undertaking.
4. Foxtel will charge access seekers for the costs of faults and repairs, unless Foxtel has been negligent. That is, even if the fault arises in Foxtel equipment, the access seeker will be charged unless it can be shown that Foxtel was negligent.
5. Access seekers must pay the costs of any enhancements to the Foxtel system that are required to enable the access seeker to provide services. These enhancements become the property of Foxtel.
6. There are a number of areas where the drafting of the DAA does not reflect the fact that it is now intended to include "Modem Services".
7. Warranties, indemnities and assignment rights are all extremely one-sided in Foxtel's favour.

Each of these problems is addressed below.

### **1. Access to the EPG**

Foxtel proposes that access seeker channels will not be included in the EPG unless viewers have already chosen to subscribe to that channel (see clause 5.2(e) of the DAA). Yet Foxtel claims that it is providing a benefit to access seekers by including their channels in the EPG, because it will make subscribers "more aware of what services are available" (see pages 19-20 of Attachment 1 to Foxtel's submission).

There is a logical inconsistency in these arguments. Subscribers will not be aware of what services are available if those services are not included in the EPG. Once the channel is included (because a subscriber has become aware of it), there is no need for that subscriber to be made aware of it.

Therefore, there is no basis on which Foxtel can impose a charge based on the benefit to access seekers of being included in the EPG, unless that benefit is actually provided.

Accordingly, all access seeker channels should be visible in the EPG to all viewers, even if a viewer has not chosen to subscribe to those channels.

Further, Two Way understands that it would require greater effort on the part of Foxtel, and thus greater cost, if access seeker channels were only visible in the EPG to subscribers to those channels. There is thus no good reason why access seeker channels should not be visible in the EPG to all viewers at all times.

In the UK, BSkyB as the dominant pay TV operator is required to provide access to its platform, including its EPG, on fair, reasonable and non-discriminatory terms. The UK regulator Ofcom has explained the policy behind the regulation of BSkyB as an EPG provider:

*“Ofcom notes that consumers may not be aware of channels not listed on EPGs, and that, even if they are, the process of tuning into those channels without an EPG listing is comparatively complex. ... Ofcom therefore considers that, as a starting point, it is appropriate... to impose conditions on EPG providers requiring them to provide access to channels seeking listings. This is particularly relevant in the case of ‘open access’ platforms, that is, those platforms on which channel providers can secure independent carriage. Unless those channels can also secure listings on relevant EPGs, it will be difficult for consumers to find them, and consequently for the channels to compete against other channels which do have listings on the EPG. Moreover, an EPG provider linked to one or more television services on that platform may be incentivised to discriminate against other television services, and either refuse listings, or only offer them on terms which are unfair.”*

Ofcom also provided a “plain English” summary of its position:

*“Ofcom wants BSkyB, which provides the EPG for the Sky multi-channel service, to allow any television service which wants it to have a listing on the Sky EPG. BSkyB must also treat that service fairly and reasonably, and it must not treat it differently than other television services without a good reason. This means that viewers would be able to use the Sky EPG to access any channel that had paid for a listing on the EPG, even if it was not part of a Sky package. There are many satellite channels that can be received by Sky subscribers, but which are not part of any Sky package. If those channels could not get listings on the Sky EPG, it would be very difficult for viewers to find them. This would be inconvenient for viewers. It would also be difficult for the channels to compete fairly with other channels that were shown on the Sky EPG.”*

(“The Regulation of Electronic Programme Guides”, Ofcom Consultation Paper, March 2004).

Two Way submits that all of these policy concerns are equally convincing in relation to Foxtel, especially as Foxtel’s undertaking will make it an “open access” platform (at least to some extent).

In order to assist viewers to identify and use interactive services, access seekers should also be able to display and advertise the fact that “red button” interactive features are available. (Interactive services are often launched by pressing the red button on the viewer’s remote control, and “red button” has become a generic description of interactive services launched in this way and provided through the STU). This functionality is available in the UK (see paragraph 3.13 of Attachment B).

## **2. Bank guarantee**

Foxtel requires access seekers to provide a bank guarantee, in an amount “reasonably determined by Foxtel, as a condition precedent to the DAA taking effect (clause 2.1 of the DAA). The amount is deemed reasonable if “it is sufficient to enable the performance of the access seeker’s obligations” under the DAA, including the payment of access charges and other costs.

Since the Agreement will have a term of between five and eight years (at the option of the access seeker), the amount of this guarantee, on the face of it, could be quite large. Foxtel also seeks the right to require the increase of the amount of the guarantee at any time, and to keep it in force for six months after the DAA terminates (clause 3.1 of the DAA).

However, Foxtel also states that access seekers can terminate the DAA on one month's notice at any time (clause 24.4(d)). Therefore, it should not be necessary to provide a bank guarantee for an amount larger than one month's access charges. Since access seekers can terminate on one month's notice at any time, even immediately after the DAA is signed, access seekers effectively only ever have one month's payment obligation to Foxtel, and Foxtel knows this from the outset.

Accordingly, clauses 2.1 and 3.1 should be amended to provide that an access seeker need only provide a bank guarantee of one month's access charges. Provided that this is kept current during the term of the DAA, Foxtel's position is adequately protected.

### **3. *The DAA can be changed at any time and for any reason***

Perhaps the most troubling aspect of the DAA is the fact that it provides no certainty whatsoever of the terms on which an access seeker can deploy its service. This is because Foxtel claims the right to change the terms and condition of the DAA at any time and for any reason (see clause 4.4, especially clause 4.4(b)). Foxtel also claims the right to change any aspect of its equipment, and the supporting documents which govern how access is actually provided under the DAA, at any time and for any reason (see clause 11.2, especially clause 11.2(d)).

Clause 4.4(b)(iii) of the DAA makes it clear that Foxtel can change the DAA for any reason, not just for the reasons set out in clause 4.4(a). However, Foxtel's undertaking to the Commission (clause 2.5) states that Foxtel may amend the DAA if Foxtel considers that "a technical or related problem necessitates a change", or if "it is necessary to make a technical change", or there is a change in "market practice". The second reason duplicates the first, unless the vague phrase "technical or related problem" is meant to be substantively different to "technical", in which case Foxtel should spell out precisely what a "related" problem might be.

In general, these provisions of clause 2.5 of the undertaking are so broad and vague that access seekers have little protection. However, even that small protection is rendered illusory by the fact that Foxtel can in fact change the DAA for any reason, not just for the reasons set out in the undertaking. That is, clauses 4.4 and 11.2 of the DAA are not consistent with clause 2.5 of the undertaking. The latter purports to impose some restriction on Foxtel's conduct, whereas no such restriction actually exists under the DAA.

If Foxtel did change the DAA for a reason which is not set out in clause 2.5 of the undertaking, that is likely to be a breach of the undertaking, and the Commission could commence proceedings to enforce it. However, it would not be a breach of the DAA, which means that an access seeker would have no contractual rights at all to restrain Foxtel's conduct. In certain circumstances, an access seeker might be able to commence proceedings for misleading and deceptive conduct, but that is uncertain. Fundamentally, access seekers should be empowered to enforce the DAA directly, without having to rely on the Commission to enforce the undertaking at public expense and using the Commission's limited litigation resources.

Clause 4.4 of the DAA does say that Foxtel will not alter Schedule 3, which sets out the access charges and pricing methodology which underlie the rate card. However, clauses 4.4 and 11.2 are so broad and vague that Foxtel could take actions which increase costs to access seekers at any time and for any reason, and bill those extra costs to access seekers in the form of "Other Payments". Accordingly, clauses 4.4 and 11.2 should be amended to ensure that Foxtel cannot increase costs to access seekers, other than through additional

investment by Foxtel which increases the relevant cost pools. Otherwise, the rate card and the commitment not to vary Schedule 3 are meaningless.

When one party to an agreement is able to impose a unilateral right to vary the agreement, that almost always indicates that there is a great inequality of bargaining power, and the parties are not contracting on reasonable terms. Where one party claims that it needs operational flexibility to manage its dealings with several counterparties, the appropriate course is to ensure that any changes which are made do not have an adverse effect on any of those counterparties.

Accordingly, clauses 4.4 and 11.2 of the DAA should be amended to provide that Foxtel can only amend the DAA, or any related documents, for the reasons set out in clause 2.5 of the undertaking. Those reasons should themselves be clarified in the light of the comments above. Further, the DAA should make it clear that Foxtel cannot make amendments if they will have an adverse effect on access seekers.

#### **4. Charges for faults and repairs**

Schedule 2 clause 6 of the DAA provides that Foxtel will charge access seekers for the costs of faults and repairs, unless the fault is a "Foxtel Fault". Schedule 10 defines this as a fault caused directly by Foxtel's negligence or breach of the DAA. In contrast, an "Access Seeker Fault" is defined as any fault in the Access Seeker's equipment or services, even if the Access Seeker has not been negligent or in breach of the DAA.

Accordingly, if a fault arises in Foxtel's equipment, the access seeker will be charged unless it can be shown that Foxtel was negligent. This is commercially unreasonable, since it will allow Foxtel to charge access seekers for fixing faults in Foxtel's own equipment, where those faults have not been caused by the Access Seeker. The definition of Foxtel Fault should be changed so that it is consistent with the definition of Access Seeker Fault.

#### **5. Ownership of enhancements**

A similar problem arises in relation to network enhancements. While access seekers must pay the costs of any enhancements to the Foxtel system that are required to enable the access seeker to provide services, these enhancements become the property of Foxtel (clause 9.3(b)(iv)). This effectively means that Foxtel will obtain a benefit from the provision of access (in the form of an enhancement to its network) which is not based on Foxtel's cost of providing access (since the access seeker is bearing the cost).

In addition, Foxtel may impose additional monthly charges "in relation to the operation and maintenance of the Enhancements" (clause 9.4). It is not clear whether these payments form part of the Access Charges – it would appear logical that they would form part of the Shared Costs, Attributable Costs or Specific Costs, and not be an additional charge imposed as an Other Payment. This should be clarified.

#### **6. Revision of drafting to include Modem Services**

There are a number of places where the DAA does not reflect the fact that Foxtel is now undertaking to provide "Modem Services". The DAA appears to have been based on the previous version given by Foxtel as part of its section 87B undertaking, and the minimal changes made are not sufficient to reflect the terms of Foxtel's new undertaking.

This can be seen most clearly in the fact that Access Seekers will now be providing three types of content: Subscription Television Services, Related Services, and Access Seeker Modem Content. Clause 9.2(d) of the DAA correctly refers to all three types of content. However, the description of the Modem Services in Appendix 1 to Foxtel's undertaking, and Schedule 1 Part D of the DAA, does not reflect the fact that Access Seekers will be providing Access Seeker Modem Content for download to the STUs. Accordingly, the description of Modem Services should be changed as follows:



*“Modem Services which consist of services for downloading Access Seeker Modem Content to a Digital Set Top Unit and using a modem integrated with Conditional Access Customer Equipment which enable a customer to send to the provider of the content a reaction of the customer to that content.”*

Further, there are a number of places in the DAA where a reference to Access Seeker Modem Content needs to be included (consistent with clause 9.2(d)). These include Recital C and clauses 4.1(g), 20.3(a)(i) and the definition of “Digital Set Top Unit” in Schedule 10.

In addition, clause 4.2(a) of the DAA lists a set of “excluded services”. Previously “EPG services” was listed as one of the excluded services, but this has now been deleted because Foxtel is providing some degree of (albeit limited and insufficient) access to the EPG. However, clause 4.2(a)(v) still provides that one of the “excluded services” is:

*“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”.*

This is confusing, because the Modem Services encompass the use of the modem in the STU to dial in to a return path, so some part of “return path functionality” is in fact provided as part of the Modem Services.

More fundamentally, as part of the Commission’s decision to accept Foxtel’s section 87B undertaking in December 2003, the Commission required that the equivalent of clause 4.2(a)(v) of the DAA be deleted and replaced with the term “Interactive Services”. Since “interactive services” can now be provided under the guise of “Modem Services”, it would be more logical to delete clause 4.2(a)(v) entirely, just as the reference to “EPG services” has now been deleted due to the fact that they are no longer an “excluded service”.

## **7. Warranties, indemnities and assignment rights**

In general, these provisions are extremely one-sided in favour of Foxtel, and are not reasonable. For example, the access seeker indemnifies Foxtel for consequential loss and legal fees on a full indemnity basis (clause 22.1(a)). In contrast, Foxtel provides no indemnities at all, and specifically excludes liability for consequential loss (clause 23.1), even when caused by the negligence or unlawful or wilful misconduct of Foxtel (compare clause 23.1(a)). Similarly, Foxtel places a limit on its liability under clause 23.2, whereas there is no such protection for the access seeker. This imbalance is unreasonable, since Foxtel has far greater capacity to inflict damage on the business of an access seeker by (for example) altering or breaching the DAA.

Similarly, the access seeker may not assign its rights or obligations under the DAA (clause 29.1), whereas Foxtel may assign or purport to novate any or all of its rights and obligations (clause 29.2), even (it would seem) where the assignee is not capable of performing Foxtel’s obligations.

Once again, the existence of grossly unbalanced provisions of this sort indicates that there is a great inequality of bargaining power, and the parties are not contracting on reasonable terms.

## **D. Conclusion**

Two Way submits that Foxtel’s undertaking is not in the long term interests of end users, because it would not allow a competitive market for interactive services to emerge in Australia. It would also require access seekers to make inefficient investment in duplicating Foxtel’s infrastructure.

Further, the undertaking is premature, as it omits most of the detailed documents which set out how interactive services can actually be provided.

Finally, the terms on which access would be provided under the DAA are not reasonable, and significant changes should be required before the undertaking is accepted.

For these reasons, the undertaking in its present form should be rejected. Two Way submits that it would not be in the long-term interests of end users to accept the undertaking unless a revised version, which addresses the problems set out above, is submitted.

**MindGames Channel System Overview**

## **Attachment 2**

---

**Extract from Ofcom Document – “Provision of Technical Platform Services”  
(UK Office of Communications, November 2005)**