



## **Decision**

In respect of notifications lodged by

### **Telstra Pay TV Pty Limited and Telstra Corporation Limited**

Notifications: N31277, N31278 and N31292, N31293

Commissioners:  
Samuel  
King  
Martin  
McNeill  
Smith  
Sylvan  
Willett

Date of decision: 16 June 2004

## **1. Introduction**

Third line forcing is a specific form of exclusive dealing that is a per se breach of the *Trade Practices Act 1974* ('the Act'). The conduct described in Telstra Corporation Limited and Telstra Pay TV Pty Ltd ('Telstra')'s notifications relates to sections 47(6) and (7) of the Act, which prohibit:

- supplying goods or services, or supplying at a particular price or subject to a discount or rebate, on condition that the purchaser acquire other goods or services from another person (s.47(6))
- refusing to supply goods or services, or refusing to supply at a particular price or subject to a discount or rebate, if the purchaser has not acquired, or agreed to acquire; other goods or services from another person (s.47(7)).

In this particular case, the third line force arises under sections 47(6) and (7) of the Act because Telstra Pay TV intends supplying the new digital pay TV services of the Foxtel Partnership ('Foxtel') and Austar United Communications Limited and Austar Entertainment Pty Limited ('Austar') on condition that customers acquire telecommunications services from Telstra Corporation Limited, and because the discounts or bonus telecommunications services are being provided on condition that pay TV and telecommunications services are acquired together.

Although third line forcing is prohibited, suppliers engaging in it may seek immunity from court action under the notification and authorisation process in the Act. Under the notification process, immunity from court action for third line forcing conduct is obtained automatically 14 days after lodgement, and continues unless and until the Australian Competition and Consumer Commission ('the Commission') issues a notice removing the immunity.

The Commission may issue a notice removing the immunity provided by notification of proposed conduct if it is satisfied that the likely benefit to the public from the proposed conduct would not outweigh the likely detriment to the public resulting from the conduct.

## **2. Conduct**

On the 11 February 2004, Telstra notified the Commission of its intention to resell and discount Foxtel and Austar's new digital pay TV services and on condition that customers also acquire Telstra's telephony services (N31277 and N31278 – the 'February notifications').

On 30 April 2004, Telstra provided the Commission with further third line forcing notifications (N32292 and N31293 – the 'April notifications') relating to Telstra's supply of Foxtel and Austar's new digital pay TV services on condition that customers also acquire Telstra's telephony services. The conduct described in the April notifications involves Telstra offering of bonus telecommunications services instead of percentage discounts on eligible services as in the February notifications.

Although Telstra will not continue to provide discounts to customers outlined in the February notifications after 30 June 2004, the conduct in the February notifications still needed to be considered by the Commission as Telstra intends to grandfather customers who received the February notifications discounts until the expiration of their contracts.

The conduct outlined in the February and April notifications both relate to the addition of Foxtel and Austar's new digital pay TV services to Telstra's telecommunications service discount packages.

In this paper the Commission collectively refers to the February and April notifications as the notified conduct.

The Commission has not revoked Telstra's immunity in relation to similar conduct in notifications N31170, N31171 in 2002 and N31232 and N31233 in 2003:

- the 2002 notifications involved the resale and discount of Foxtel's analogue pay TV services on condition that customers also acquire Telstra's telephony services
- the 2003 notifications involved the resale and discount of Austar's pay TV services on condition that customers also acquire Telstra's telephony services.

The conduct described in the February notifications relates to the addition of Foxtel and Austar's new digital pay TV services to Telstra's 'Rewards Packages'.

Telstra's Rewards Packages program provides customers that purchase a fixed line telephony service (pre-selected to Telstra) together with an eligible mobile telephony, internet or pay TV service with a 5 percent discount off eligible charges. The discount on eligible charges is increased to 10 percent if another type of eligible service is purchased.

The conduct described in the April notifications relates to the addition on Foxtel and Austar's new digital pay TV services to Telstra's 'Options rewards'.

Telstra's Rewards Options program provides customers who purchase a fixed line service preselected to Telstra together with an eligible mobile telephony, internet or pay TV service with one of the following reward options:

- Family Calls<sup>1</sup> up to a maximum value of \$15 per month; or
- 50 local calls per month; or
- 50 short messaging services per month; or
- \$15 credit per month against their Mobilelink Telstra pre-paid mobile.

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<sup>1</sup> Family Calls will include all fixed to mobile, mobile to fixed and mobile to mobile voice calls made within Australia between all of the customer's fixed and mobile telephony services billed to their single bill. International roaming, satellite mobile service, and diverted calls will be excluded.

Customers that qualify for Telstra Options rewards, and purchase two additional eligible service types receive an increase in their selected reward option:

- Family Calls up to a maximum value of \$25 per month; or
- 125 local calls per month; or
- 125 short messaging services per month; or
- \$25 credit per month against their Mobilelink Telstra pre-paid mobile.

### **3. Statutory test**

The Commission must decide whether to revoke or maintain Telstra's immunity in relation to the notified conduct. In assessing notified conduct relating to section 47(6) and (7) of the Act, section 93(3A) of the Act states that the Commission must assess whether:

93(3A) (b) the Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment from the conduct or proposed conduct;

The term 'public benefit' is not defined in the Act, but the Australian Competition Tribunal has stated that it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress<sup>2</sup>

The Commission considered that the potential effect of the notified conduct on competition in the markets for pay TV and telecommunications services is a key relevant factor in assessing whether the notified conduct would result in a net public benefit. An increase in competition in markets is likely to be in the public interest because competition promotes efficiency in supply, and provides better service and prices for consumers.

### **4. Current market developments**

The Commission is concerned that there may be potentially worse competitive dynamics in the pay TV market from those that existed when it assessed the previous notifications.

In particular, the Commission believes that the level of competitive pressure placed on Telstra from other telecommunications firms able to supply bundles of telecommunications and pay TV services in the future may be lessened. This lessening of competitive pressure is due to the differences between Optus's analogue pay TV services and Foxtel and Austar's new digital subscription television services. The

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<sup>2</sup> *Queensland Co-operative Milling Association Ltd, (QCMA) and Defiance Holdings Ltd (1976)*, ATPR 40-012, at 12,242.

supply of digital services provides increased opportunities for greater content and interactive services.

## **5. The Commission's assessment**

The Commission's assessment involved weighing the likely public benefits of the notified conduct against the likely public detriments.

The Commission requested submissions from interested parties for both the February and April notifications. Non-confidential versions of the submissions provided to the Commission are available on the public register on the Commission's website, at [www.accc.gov.au](http://www.accc.gov.au).

The primary public benefit associated with the notified conduct is the discounts or bonus telecommunications services some customers will receive from incorporating Telstra's pay TV services into their Telstra Rewards 'Package' or 'Option'.

The notified conduct will likely lead to an increased level of competition in the pay TV market. However, any such increase will be small because:

- as a pure reseller of Foxtel and Austar's pay TV services, Telstra will only provide limited non-price competition
- Telstra's equity interest in Foxtel limits its incentive to compete with Foxtel
- the reduced competitive pressure from Optus, unless it provides digital pay TV services.

The notified conduct may also result in a small increase in competition in telecommunications service markets due to increased customer flexibility. That is, the notified conduct will provide some existing Telstra rewards customers that wish to purchase pay TV services with the flexibility to maintain the current level of discount they receive from Telstra, and decide to purchase mobile or internet services from another provider.

The effect of the notified conduct on competition in the telecommunications market in the long term is unclear. However, it does not appear likely that competition in the telecommunications service market will be decreased:

- Telstra's forecasts of take-up indicate that the proportion of customers that have sufficiently strong preferences for bundles of pay TV and telecommunications services is small.

Therefore, firms who only supply telecommunications services are likely to only suffer a small reduction in their 'addressable market' as a result of the notified conduct.

- based on data provided to the Commission via the regulatory accounting framework and the accounting separation record keeping rules it appears unlikely that a vertical price squeeze will result.

## **6. Conclusion on public benefits and detriments**

On balance, the Commission considers that the notified conduct will result in a net public benefit because the notified conduct will provide some customers with discounted or bonus telecommunications services.

Having said that, the Commission believes there is a need to closely monitor the development of bundled offerings provided to customers who acquire Foxtel or Austar's new digital pay TV services from Telstra. The Commission will continue to use the existing bundling record keeping rule to assist it to monitor the effect on competition of the notified conduct.

## **7. Decision**

For the reasons outlined above, the Commission has decided not to issue a notice revoking notifications N31277, N31278 and N32292, N32293.

As with any notification, the Commission may act to remove the immunity afforded by this notification at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct.