



**Submission by AAPT Limited to the Australian Competition
and Consumer Commission in response to an exclusive
dealing notification lodged by FOXTEL Management Pty
Limited dated 4 May 2010**

Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to provide comment to the Australian Competition and Consumer Commission (the **ACCC**) on the exclusive dealing notification lodged by FOXTEL Management Pty Ltd (**FOXTEL**) dated 4 May 2010 (the **FOXTEL notice**).
2. AAPT considers that FOXTEL has not provided sufficient detail on the precise nature of the conduct that it proposes to undertake, consequently, AAPT has found it difficult to assess the potential impact of the proposed conduct.
3. AAPT considers that both the FOXTEL notice itself and FOXTEL's response to questions posed by the ACCC (to the extent that they were publicly released) are inadequate to fully inform interested parties on what precisely is being proposed.
4. Principally, it is not clear what specific content is to be provided in connection with the service and why this content cannot be provided using existing means, namely over the Telstra HFC network or FOXTEL's existing satellite delivery systems. AAPT is not sure why an ADSL broadband service is required in addition to FOXTEL's existing delivery mechanisms.
5. Despite this lack of detail, AAPT has some concerns about the FOXTEL notice and considers that the public detriment (principally a negative impact on competition in the broadband and the bundled broadband and fixed voice services market (both retail and wholesale)) outweighs any public benefit (which AAPT considers is non-existent).
6. Consequently, AAPT urges the ACCC to give notice to FOXTEL under s93(3A) of the Trade Practices Act 1974 (the **TPA**) that the public detriment of the conduct specified in the FOXTEL notice outweighs the public benefit



which will remove any protection FOXTEL currently enjoys from the FOXTEL notice.

AAPT's understanding of what is being proposed

7. Based on the limited documentation available, AAPT's understanding of the proposed arrangement is that FOXTEL customers with an iQ set top unit will be given access to additional content delivered over a broadband connection (in most cases this will be an ADSL broadband connection) via an Ethernet port on the iQ set top unit.
8. A condition of accessing this additional content is that FOXTEL customers must acquire the necessary broadband connection from Telstra Bigpond which has indicated that any downloads to the iQ set top unit will not be counted when assessing whether a customer has reached any applicable download caps.
9. The precise details of the content to be provided is masked as commercial-in-confidence but AAPT expects that it is likely to include films and television programs.

The relevant markets are not competitive

10. The FOXTEL notice asserts that there are three relevant markets: the retail supply of audiovisual content, the acquisition of audiovisual content and the provision of broadband telecommunications services (the **relevant markets**).
11. FOXTEL then goes on to argue that it:

- “competes in a highly competitive broad market for the supply of audiovisual content”¹;
 - “competes in a broad market for the acquisition of content rights”² with “competition from free-to-air television providers, online content providers via the PC and/or other television and subscription television providers”³; and
 - competes in the downstream retail supply of broadband internet access services against “many ISPs including Optus, iiNet, AAPT, TPG, Dodo, iPrimus and Internode”⁴.
12. In AAPT’s view this mis-characterises the state of competition in these markets. AAPT considers that the proposed exclusivity arrangement amounts to an arrangement between the dominant supplier of pay-TV services in Australia (FOXTEL) and the dominant provider of fixed line telecommunication services in Australia (ie **Telstra**) where Telstra owns 50% of FOXTEL.
13. Policy makers, the ACCC and industry participants have expressed concern for a number of years now about the nature of Telstra’s relationship with FOXTEL, in particular its ability to leverage FOXTEL’s position in pay-TV content markets to undermine competition in the downstream telecommunications markets.
14. This view is reflected, for example, in comments made by the Federal Government in the explanatory memorandum to the Telecommunications Competition and Safeguards Bill 2009 where is stated⁵:

¹ Clause 3.2 FOXTEL notice.

² Clause 3.3 FOXTEL notice.

³ Clause 3.3 FOXTEL notice.

⁴ Clause 3.3 FOXTEL notice.

⁵ Page 3, Explanatory Memorandum to the Telecommunications Competition and Consumer Safeguards Bill 2009.

The Australian telecommunications market is characterised by a very strong and highly integrated incumbent, Telstra. Telstra is one of the most integrated telecommunications companies in the world owning the only copper network connecting almost every house, the largest cable and mobile networks, and a 50 per cent stake in Foxtel, Australia's largest subscription television provider.

Partly because of this integration, it has been able to maintain a dominant position in virtually all aspects of the market, despite more than 10 years of open competition. It is the Government's view that Telstra's high level of integration has hindered the development of effective competition in the sector.

15. In AAPT's view the FOXTEL notice is a clear representation of why the Federal Government the ACCC and industry participants should be so concerned about Telstra's vertical and horizontal integration.

The public benefits are non-existent

16. FOXTEL asserts that the public benefits of the proposed arrangement include an increase in consumer choice for the acquisition of content, no or minimal per-download data charge for consumers and an enhancement to competition in the relevant markets⁶.
17. In AAPT's view there are no public benefits flowing from the proposed arrangement.
18. FOXTEL indicates that the proposed conduct will lead to an increase in consumer choice for the acquisition of content but in AAPT's view such an outcome is not dependent on the proposed exclusivity arrangement.
19. There is no apparent reason why FOXTEL could not make the content available to all its subscribers with a broadband connection, regardless of the ISP supplying the broadband connection.

⁶ Clause 4.1 FOXTEL notice.

20. FOXTEL argues that a benefit of the proposed arrangement is that customers will face no or minimal per-download data charges to access the content because Telstra Bigpond will waive such carriage charges. Again, in AAPT's view, such an outcome is not dependent the proposed exclusivity arrangement between Foxtel and Telstra. There are retail plans in the market today that would effectively enable customers to access this service without data download charges. For example, AAPT has an unlimited broadband plan which could be used to download the content without any additional download charges.
21. Finally, FOXTEL asserts that the proposed exclusive arrangement will enhance competition in the relevant markets.
22. AAPT strongly disputes this assertion. In fact AAPT considers that the proposed arrangement will lead to a lessening of competition in markets which are already a long way from being effectively competitive.

The proposed arrangement will have a detrimental impact on competition

23. FOXTEL asserts that the proposed conduct will result in no public detriment in any of the relevant markets and specifically the proposed conduct will not substantially lessen competition in the market for the provision of broadband services which is already very competitive with a large number of ISPs (some of which offer competing services through their relationship with other content suppliers as Fetch TV).
24. AAPT does not accept the assertion that there will be no substantial lessening of competition or that the market for the provision of broadband services is very competitive.

25. In AAPT’s view, the retail broadband market is not competitive because it is dominated by Telstra BigPond. The Federal Government in the explanatory memorandum to its Telecommunications Competition and Safeguards Bill 2009 supported this view when it stated⁷:

In the case of retail broadband services, there has been an upward trend in the concentration of the market since 2005-08 as illustrated in the table below. The ACCC reports that during this period, Telstra grew its market share of retail services by almost 25 per cent, while its major competitors’ iiNet managed to retain its existing market share and Optus’ fell by a fifth. In addition, the share of the market held by small internet service providers halved during the same period.

Provider	2005–06	2006–07	2007–08
<i>Telstra</i>	47%	56%	58%
<i>Optus</i>	20%	19%	16%
<i>iiNet</i>	6%	8%	7%
<i>Other</i>	28%	18%	19%

Source: ACCC Report Telecommunications competitive safeguards for 2007-2008.

26. In AAPT’s view the proposed exclusivity arrangement will further undermine competition in the fixed line broadband market and because of the bundling that normally occurs between voice and broadband services this will have a detrimental flow on effect to the fixed voice market.
27. AAPT considers that the proposed exclusive arrangement appears to be focused on getting customers with alternate broadband providers to switch to Telstra Bigpond and because broadband services are often sold in a bundle with voice services, customers would likely also switch their voice services to Telstra.

⁷ Page 23, Explanatory Memorandum to the Telecommunications Competition and Consumer Safeguards Bill 2009.

28. In AAPT's view, this lessening of competition could lead to significant adverse consequences for consumers, such as reduced customer choice of access to competitive broadband and fixed line voice services, reduced levels of innovation and increased prices for access to broadband and voice services.

Conclusion

29. AAPT considers that it is not at all clear that an exclusive arrangement between FOXTEL and Telstra Bigpond is required to deliver the proposed service. Consequently, it would appear to AAPT that the exclusivity condition would largely appear to benefit Telstra at the expense of other suppliers of fixed broadband and voice services.
30. Ultimately, it will be consumers who will pay the price of even less competition in these markets which are already far from being considered effectively competitive.
31. Consequently, AAPT urges the ACCC to give notice to FOXTEL under s93(3A) of the TPA that the public detriment of the conduct specified in the notification outweighs the public benefit which will remove any protection FOXTEL currently enjoys from the FOXTEL notice.