



Dr Richard Chadwick  
General Manager – Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

cc: Ms Jasmine Tan

24 June 2010

Dear Mr Chadwick

**Exclusive dealing notification N94674 lodged by Foxtel Management Pty Limited**

Vodafone Hutchison Australia Pty Limited (VHA) strongly objects to the proposed exclusive dealing arrangement notified by Foxtel Management Pty Limited (Foxtel) under section 93(1) of the *Trade Practices Act 1974 (TPA)*, and urges the Commission to withdraw the legal protection conferred on Foxtel by its exclusive dealing notification.

We note that VHA, through its Vodafone and '3' brands, supplies mobile broadband services in the market for the provision of broadband telecommunications services, which is identified as an affected market in the exclusive dealing notification lodged by Foxtel.

VHA understands the arrangement being proposed by Foxtel will enable Foxtel subscribers to download content, such as movies and television programs, to their iQ set top box (supplied by Foxtel) over a broadband connection. We understand Foxtel will only make this proposed service available to persons who have a Telstra BigPond broadband connection.

In our view the proposed arrangement contravenes sections 47(6) and 47(7) of the TPA, thereby constituting third line forcing by Foxtel. As such, and given that Foxtel has notified its proposal under section 93(1) of the TPA, section 93(3A) of the TPA requires the Commission to be satisfied that the likely benefit to the public from the proposed exclusive dealing arrangement outweighs the likely detriment to the public from such arrangement. For the reasons set out below, we do not think that the Commission can satisfy itself of this.

In our view, the proposed exclusive dealing arrangement is unnecessary, does not give rise to any benefit to the public, and is likely to have a detrimental effect on competition in the affected markets.



Vodafone Hutchison Australia  
Pty Limited  
ABN 76 096 304 620  
40 Mount Street  
North Sydney NSW 2060  
02 9964 4646  
vodafone.com.au three.com.au

***There is no justification for the proposed exclusive dealing arrangement***

Foxtel submits that the proposed service is a new service offered by Foxtel to its subscribers. However, Foxtel is choosing to restrict the availability of this service to subscribers with a Telstra BigPond broadband connection. We are not aware of any technological limitations or requirements that justify such a restriction. We acknowledge that Foxtel may require minimum technological standards to be satisfied by the broadband connections used by its subscribers to access the new service, however we are not aware of any impediments to the service being delivered over broadband connections provided by other Internet Service Providers (ISPs).

For Foxtel subscribers wishing to access the proposed service, we cannot envisage how, in the absence of compelling technology-related reasons, the unnecessary restriction of consumer choice regarding the third party supplier of broadband services can lead to a public benefit.

***The proposed exclusive dealing arrangement does not result in any benefit to the public***

Foxtel further submits that public benefits arise because Telstra has agreed that Telstra BigPond customers will not be charged any additional amount by Telstra in relation to data downloads when using Foxtel's proposed service. We contend that no public benefits arise from this assertion.

The benefit alleged by Foxtel focuses on the absence of additional data download charges that may otherwise apply to Foxtel's subscribers' use of a Telstra BigPond broadband connection to access the new service. But Foxtel's submission does not consider the total cost of the Telstra BigPond broadband connection and service delivery. Foxtel has not demonstrated that the total cost of the broadband connection, including anticipated data downloads for Foxtel's proposed service, will be lower by virtue of its proposed exclusive dealing arrangement with Telstra.

At least four ISPs have indicated (in their submissions to the Commission regarding Foxtel's notification) that they would also be prepared to agree arrangements with Foxtel that facilitate access to Foxtel's new service with no additional data download charges. Accordingly any benefit to the public that Foxtel submits may result from its proposed arrangement with Telstra BigPond is likely to arise even if such arrangement were not exclusive – that is, there is no benefit to the public from the exclusive dealing arrangement itself.

Further, even if Foxtel could demonstrate that the cost of delivery to the consumer (that is, the total retail prices associated with both the proposed service and the customer's broadband connection) is lower using Telstra BigPond as compared to other ISPs (which we think is unlikely), we contend that any benefit to the public arising from such cost reduction would be offset as a result of the detriment that results from consumers not being able to maximise their choice of ISP.



***The proposed exclusive dealing arrangement will not enhance competition***

We also believe that Foxtel has failed to demonstrate any likely benefit to the public from enhanced competition in the three markets outlined in its submission, that is:

- the market for retail supply of audiovisual content;
- the market for acquisition of audiovisual content; and
- the market for the provision of broadband telecommunications services.

Foxtel's submission indicates that some of these markets may already be considered competitive. We disagree with this assertion. Various sources indicate that, as at the end of June 2009, Foxtel accounted for 60-70% of the pay-TV subscribers on a retail and wholesale basis. And Telstra's continued dominance in the market for the provision of broadband telecommunications services is clear. In any case, Foxtel's submission seems to simply rely on its assessment of the current state of competition in the relevant markets, and does not provide any credible evidence to demonstrate how the proposed exclusive dealing arrangement would *enhance* competition. For example, in referring to the market for the acquisition of audiovisual content Foxtel submits that the market is "highly competitive", and that Foxtel faces "strong competition". These are characteristics (albeit inaccurate) of the existing market and Foxtel does not make any statement regarding how the proposed arrangement would impact this market.

In relation to the market for the provision of broadband telecommunications services, Foxtel submits that the proposed service "will encourage competing audiovisual content suppliers to offer similar IPTV services", spuriously linking this development to an increase in competition in the market for the provision of broadband telecommunication services. The Commission has previously noted the "apparent dominance of Telstra" in the provision of broadband services.<sup>1</sup> The proposed exclusive dealing arrangement limits the choices of Foxtel subscribers and encourages such subscribers to acquire broadband services from Telstra BigPond. It, therefore, will increase and cannot possibly reduce Telstra's dominant position in the market for the provision of broadband telecommunications services. In our opinion, given the likelihood that the proposed exclusive dealing arrangement will further entrench Telstra's dominant position, any encouragement of competing content suppliers to offer similar services cannot impact the structure of the market for the provision of broadband telecommunications in such a way so as to enhance competition.

Other things being equal, the proposed exclusive dealing arrangement is likely to contribute to and increase the "apparent dominance of Telstra" in the provision of broadband telecommunications services. As such, the proposed arrangement is likely to have a detrimental impact on competition in the provision of broadband telecommunications services by, amongst other things, increasing barriers to entry. The Commission must acknowledge that this potential

<sup>1</sup> ACCC 2009, *Telecommunications competitive safeguards for 2007-08*, p45.



for reduced competitive pressure in the market for the provision of broadband telecommunications is likely to be detrimental to the public.

Competition generally provides markets with the discipline necessary to generate efficient, welfare-maximizing outcomes. Therefore, the promotion of competition (or, as is the case with Foxtel's proposed arrangement, the reduction of competition) must provide a guiding principle for the Commission in its deliberation of the proposed exclusive dealing arrangements lodged by Foxtel.

### ***Conclusion***

We do not believe Foxtel has provided any evidence of a likely benefit to the public arising from the proposed exclusive dealing arrangement. To the extent any benefit may arise from Foxtel's proposed arrangement with Telstra BigPond, such benefit could equally be achieved in the absence of an exclusive dealing arrangement. However, we believe there is a significant risk that the proposed arrangement is likely to cause detriment to the public. Therefore, we do not consider that the Commission can be satisfied that the likely benefit to the public from the proposed arrangement outweighs the likely detriment to the public (as required by section 93(3A)(b) of the TPA). We urge the Commission to make a determination dismissing Foxtel's exclusive dealing notification.

Please do not hesitate to contact me on 0425 224 566 should you have any queries regarding VHA's submission.

Yours sincerely

Brian Currie  
General Manager, Regulatory



Vodafone Hutchison Australia  
Pty Limited  
ABN 76 096 304 620  
40 Mount Street  
North Sydney NSW 2060  
02 9964 4646  
vodafone.com.au three.com.au