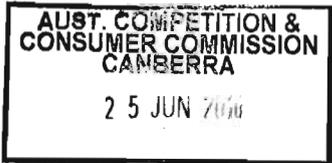


FORM G

Commonwealth of Australia

Trade Practices Act 1974 - subsection 93(1)

NOTIFICATION OF EXCLUSIVE DEALING



To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with subsection 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(6) or (7), of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

(a) Name of person giving notice:

FOXTEL Management Pty Limited (ACN 068 671 938) on behalf of the FOXTEL Partnership (**FOXTEL**).

(b) Short description of business carried on by that person:

FOXTEL provides subscription television services to members of the general public.

(c) Address in Australia for service of documents on that person:

Lynette Ireland
Director of Legal & Business Affairs
FOXTEL Management Pty Limited
5 Thomas Holt Drive, North Ryde, NSW, 2113
T: (02) 9813 7600

2. Notified arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

Video content delivered via the internet to Xbox 360 game consoles.

(b) Description of the conduct or proposed conduct:

FOXTEL will supply video content delivered via the internet (the **FOXTEL by Xbox LIVE Service**) on the condition that the customer has purchased an Xbox 360 game console and subscribes to the Xbox LIVE Gold service or the XBOX LIVE Silver service in the case of transactional video on demand content.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

(a) Class or classes of persons to which the conduct relates:

Members of the public who will subscribe to the FOXTEL by Xbox LIVE Service.

(b) Number of those persons:

(i) At the present time:

More than 50.

(ii) Estimate within the next year:

More than 50.

(c) Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:

Not applicable.

4. Public benefit claims

(d) Arguments in support of notification:

See attached submission.

(e) Facts and evidence relied upon in support of these claims:

See attached submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

See attached submission.

6. Public detriments

(f) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:

See attached submission.

(g) Facts and evidence relevant to these detriments:

See attached submission.

7. Further information

(h) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Jacqueline Downes
Partner
Allens Arthur Robinson
Level 28, Deutsche Bank Place
Cnr Hunter & Phillip Streets
SYDNEY NSW 2000
T: (02) 9230 4850

Dated.....22 June 2010.....

Signed by/on behalf of the applicant

Jacqueline Danner
.....
(Signature)

JACQUELINE DANNER
.....
(Full Name)

ALLENS ARTHUR ROBINSON
.....
(Organisation)

PARTNER
.....
(Position in Organisation)



**SUBMISSION IN SUPPORT OF NOTIFICATION BY FOXTEL MANAGEMENT PTY LIMITED
IN RELATION TO PROPOSED THIRD LINE FORCING CONDUCT**

1. The Proposed Service

FOXTEL proposes to supply video content via the internet using Microsoft's Xbox 360 games console and Microsoft's XBOX LIVE online service (the **Proposed Service**). The Proposed Service will be a separate service distinct from the other subscription video content services offered by FOXTEL but will also be available to subscribers to FOXTEL's existing cable and satellite service.

The Proposed Service will comprise of two basic components:

- (a) subscription to a linear content package containing a selection of linear channels (including a basic package and other, optional, tiered packages); and
- (b) a video on demand service with fees collected on a per transaction basis.

The Proposed Service will be offered by FOXTEL on the condition that a subscriber to the Proposed Service:

- (a) has a Microsoft Xbox 360 games console (an **Xbox**); and
- (b) subscribes to the Xbox LIVE Gold service (**XBL Gold Service**) or the Xbox Live Silver Service (in the case of access to video-on-demand content only) (**XBL Silver Service**)

The XBL Silver service enables Xbox users with a broadband connection to access free content and other content including games, videos, and some HD movies which may be either purchased or in the case of movies, rented, via the internet. There is no charge for access to the XBL Silver Service. The XBL Gold Service is a paid subscription service which provides the same services as the XBL Silver service and also enables social networking (Facebook and Twitter) video chat, multiplayer gaming between Xbox users and special content offers. Both the XBL Silver Service and the XBL Gold Service require access to a broadband connection from an internet service provider of the consumer's choice.

2. Notification

It is possible that the Proposed Service might involve conduct of the kind in section 47(6) of the *Trade Practices Act 1974* (Cth) (**TPA**) on the basis that FOXTEL will be supplying the Proposed Service on the condition that the subscriber has an Xbox and subscribes to the XBL Gold Service.

Similarly, the Proposed Service may fall within section 47(7) of the TPA if FOXTEL refuses to supply the service because a subscriber does not have an Xbox or does not subscribe to the Xbox LIVE Gold Service.

3. Relevant markets

3.1 Summary of relevant markets

There are two relevant markets:

- (a) the retail market for the supply of games consoles; and
- (b) the retail market for the supply of video content.

3.2 The retail market for the supply of games consoles

The Xbox 360 games console competes in a competitive market for the supply of games consoles. The Xbox 360 games console competes against:

- (a) Sony PlayStation - Sony also currently offers some online video content via its PlayStation 3;
- (b) Nintendo Wii;
- (c) personal computers;
- (d) handheld gaming devices; and
- (e) other mobile gaming devices such as iPhones.

3.3 The retail market for the supply of video content

FOXTEL competes in a highly competitive market for the supply of video content. The Proposed Service to be supplied by FOXTEL will compete against:

- (a) other video content services provided via game consoles including Sony's Playstation Store;
- (b) free-to-air television and "Freeview" (including their online 'catch up TV' services);
- (c) digital video discs (*DVDs*);
- (d) online video services to TV/PVR such as TiVo, BigPond Movies and Apple TV;
- (e) online video services such as Apple iStore, YouTube and ABC iView;
- (f) other subscription television providers, namely, Austar, Optus and SelecTV;
- (g) postal movie services such as QuickFlix; and
- (h) direct to TV video services such as BigPond movies streamed directly to TV sets.

It is expected that the Proposed Service will also soon compete against other online video services including those supplied by Fetch TV and Hulu.

4. Public benefits arising from the Proposed Service

4.1 The Proposed Service will result in a number of public benefits

There are a number of public benefits that will result from the Proposed Service including:

- (a) an increase in consumer choice for the acquisition of content; and
- (b) the Proposed Service enhancing competition in all relevant markets.

Although the above benefits are material, FOXTEL submits that, given there is no anticompetitive detriment arising from the proposed conduct, it is not necessary for FOXTEL to demonstrate more than minimal public benefits.

4.2 Increase in consumer choice

The Proposed Service will be a new service offered to existing FOXTEL subscribers and to consumers who do not currently subscribe to FOXTEL. Accordingly, it will provide consumers with increased choice for the acquisition of content.

4.3 The Proposed Service will enhance competition in both relevant markets

FOXTEL considers that the Proposed Service is likely to enhance competition in both markets listed above.

The retail market for game consoles

Vigorous competition already exists in the market for the supply of games consoles. Xbox was a late entrant to this market and faces strong competition primarily from Sony's PlayStation 3 and Nintendo's Wii.

This market is dynamic and driven by innovation as increasingly games consoles are not used just for gaming. Recent innovations in the games console market include the ability to access the internet, social networking and media players (including online media players and capacity to play DVD and Blu-ray disks). The Xbox 360 games console is currently the number 2 console in the Australian market holding approximately 25% share (by volume). Nintendo's Wii console has the majority of market share in Australia with 54% by volume and Sony's Playstation console is number 3 with 21% by volume.

In Australia, Sony's PlayStation 3 is already offering some video content (over 600 feature films on an on-demand basis and ABC iView) via its PlayStation Network Video service and it is expected that this offering will increase in the near future¹. Sony recently announced that Playstation 3 will be supporting a new video-on-demand service which includes purchase to own online and pay-per-view movies (on a 48 hour rental basis). The ABC's iView player is also able to be accessed via a PlayStation 3.²

The Nintendo Wii does not yet offer video content in Australia, although it does offer video content in the United States and United Kingdom. In Australia, the Wii enables internet access and gives users the ability to view any web-based video content over their television.³

The Proposed Service is likely to encourage PlayStation and Wii to enhance and expand their video content offering in Australia.

¹ <http://www.PlayStation3.com.au/video/video-store>

² <http://www.PlayStation3.com.au/tv/iview>

³ <http://www.nintendo.com.au/index.php?sectionID=32&pageID=63>

The retail market for the supply of video content

In the retail market for the supply of video content, vigorous competition exists between subscription television providers, free-to-air television service providers, as well as from DVDs and online video services such as Apple iStore and YouTube.

Competition in this market has increased in recent years following the introduction of 11 new free-to-air television channels. Consequently, there are now 16 free-to-air channels when prior to June 2002 there were only five. In addition, the ABC has announced that it will relaunch its HDTV multichannel as Australia's first free-to-air 24-hour television news channel later this year.⁴ Furthermore, once analogue free-to-air transmissions cease (expected to be 2013), the commercial free-to-air operators will be permitted to deliver additional digital multi-channels, potentially creating even greater competition in this market.

Table 1 below lists the other players that FOXTEL faces competition from in the market for the supply of video content.

Table 1: other current players in market for the supply of audiovisual content

PLAYER	PRODUCT	PLATFORM	OFFERING
Apple	iTunes	<ul style="list-style-type: none"> • Free application residing on PC • Integrated with iPod, iPhone, and Apple TV • iPad 	<ul style="list-style-type: none"> • Provides store front for media products • Organises and plays digital music and video on PC (synchronises media with Apple devices inc Apple TV) • Download to rent and/or buy SD and HD movies, TV shows and music • Expected to explore content streaming options
	Apple TV	<ul style="list-style-type: none"> • OTT console with built-in Wi-Fi enabling the download of content directly from the Internet to the TV • 160GB hard drive 	
Telstra	BigPond TV/Movies/Sport	<ul style="list-style-type: none"> • Online via the BigPond website • Compatible with 3G or NextG mobile • Direct to TV (LG and Samsung) 	Movies: <ul style="list-style-type: none"> • Download movies and TV shows to PC • DVD rental (via Online shop)

⁴ See <http://www.abc.net.au/news/stories/2010/01/21/2797640.htm>

PLAYER	PRODUCT	PLATFORM	OFFERING
		brand)	Sports: <ul style="list-style-type: none"> • 24 hour delayed streaming of AFL & NRL games • 5 sports channels • Live news Music: <ul style="list-style-type: none"> • download music • watch concerts
Telstra	TBox	<ul style="list-style-type: none"> • Set-top box with PVR capabilities and EPG • 200GB hard drive 	<ul style="list-style-type: none"> • View and record free-to-air TV • Pause and rewind live TV • Gain integrated access to BigPond internet TV channels and a movie download store • Currently on trial in Melbourne
Optus	Optus Zoo	<ul style="list-style-type: none"> • Online using PC via Optus Zoo website 	<ul style="list-style-type: none"> • TV & Video: clips, trailers, etc. • Disney Connection: cartoons and video clips, music, games via broadband connection (Optus customers only) • Music: Download/purchase
	Optus Mobile TV	<ul style="list-style-type: none"> • Phone with internet browser and media player in the Optus 3G/HSPA or the Dual Band coverage 	<ul style="list-style-type: none"> • Over 25 channels across various genres (entertainment, comedy, kids, etc.)

PLAYER	PRODUCT	PLATFORM	OFFERING
		area	<ul style="list-style-type: none"> • Can subscribe a la carte or by package (e.g. MTV pack or Fun Pack) on daily or monthly basis
Microsoft	Xbox 360/ Zune	<ul style="list-style-type: none"> • Download/streaming to gaming console with WiFi capability and ethernet connection • 20-250GB hard drive 	<ul style="list-style-type: none"> • Download and/or purchase 440 movies via Xbox Live • Can choose to stream or download video in standard or high definition • Facebook and Twitter with online community
Ninemsn	MSN Video	<ul style="list-style-type: none"> • Online via the ninemsn website 	<ul style="list-style-type: none"> • 49 video channels showing short form content (videos) and various Channel 9 free to air TV shows for download and streaming
Sony	Play TV PlayStation3/PlayStation Network	<ul style="list-style-type: none"> • OTT device connected via USB to PS3 creating a PVR • Accessed with a PSP remotely via a wireless connection 	<ul style="list-style-type: none"> • Watch, pause and record digital free-to-air TV on PS3 • Remote play and record via a Sony PlayStation Portable (PSP) or Sony Ericsson Mobile

PLAYER	PRODUCT	PLATFORM	OFFERING
		<ul style="list-style-type: none"> • Gaming console with wireless online connectivity • Online via PlayStation Network 120 or 250GB hard drive	<ul style="list-style-type: none"> • Recently added new icon in the interface to select "TV" and watch ABC iView shows streamed over a broadband connection • Agreement with 6 major studios for HD movie downloads via PlayStation Network Free streaming music videos via Vidzone website
TiVo	TiVo 320	<ul style="list-style-type: none"> • PVR with online connection • 320GB hard drive • 160GB version also available 	<ul style="list-style-type: none"> • CASPA™ On-Demand, by Hybrid Television Services, enables movie, TV, and Music on demand • Able to record, pause and rewind live free-to-air TV • Unmetered with Internode, iprimus, Adam Internet, iiNet, Vivid Wireless and Apex Internet • Home Networking Package allows transfer of video from PC to TV
Quickflix	Online Rental	<ul style="list-style-type: none"> • DVD Rental via website 	<ul style="list-style-type: none"> • New release and library of movies and television programmes

PLAYER	PRODUCT	PLATFORM	OFFERING
			mailed to subscriber
iiNet	Freezone	<ul style="list-style-type: none"> Online via PC on Freezone website 	<ul style="list-style-type: none"> Freezone: access to free content sites (unmetered) Films/television via partnerships with iTunes, ABCiView, etc. Plans to launch IPTV service in 2010 (possibly with own set top box)
TPG	TPG IPTV	<ul style="list-style-type: none"> Streaming to PC via TPG ADSL2+ connection 	<ul style="list-style-type: none"> Selected TV channels (~18, primarily foreign language with sports coming soon)
Oovie (Hoyts)	Rental Machines	<ul style="list-style-type: none"> Retail Kiosks (e.g. Coles, Kmart) 	<ul style="list-style-type: none"> Rental of new release DVDs at supermarkets and other locations 100,000 customers
Redroom DVD	Rental Machines	<ul style="list-style-type: none"> Retail Kiosks 	<ul style="list-style-type: none"> Rental of new release DVDs from 24 hour kiosks

FOXTEL believes that competition in this market will grow even further through the imminent increased supply of on line video services from the following potential future entrants.

Table 2: likely future entrants

PLAYER	PRODUCT	PLATFORM	OFFERING
Fetch TV	FetchTV PVR	<ul style="list-style-type: none"> Set top unit with three tuners and 	<ul style="list-style-type: none"> Due to launch in 2010

PLAYER	PRODUCT	PLATFORM	OFFERING
		<p>750 GB hard drive⁵</p> <ul style="list-style-type: none"> Partnership with ISP providers iiNet, Internode and TPG⁶ (and possibly others in the future) 	<ul style="list-style-type: none"> Understood planning to deliver unmetered content over a closed-network internet platform that subscribers can watch and record using a set top unit. Unconfirmed offering but initial content partners include pay-TV channels (including Discovery networks, MTV Networks, Fox International Channels, E! Entertainment television, BBC World News, CNBC, ABC, Roadshow, Disney and MGM⁷), a suite of English and foreign-language, some on-demand content and PVR
Hulu	Hulu	<ul style="list-style-type: none"> Online via Hulu website (www.hulu.com) and 35 other sites across the 	<ul style="list-style-type: none"> Online via Hulu website and 35 other sites across the web

⁵ "iiNet's FetchTV bypasses Foxtel", *Sydney Morning Herald* online, 13 April 2010; <http://blogs.smh.com.au/digital-life/gadgetsonthego/2010/04/13/iinetsfetchtv.html#>

⁶ Corner, Stuart "FetchTV – coming soon to more ISPs"; *Exchange Daily*, 14 April 2010;

⁷ "iiNet's FetchTV bypasses Foxtel", *Sydney Morning Herald* online, 13 April 2010; <http://blogs.smh.com.au/digital-life/gadgetsonthego/2010/04/13/iinetsfetchtv.html#>

PLAYER	PRODUCT	PLATFORM	OFFERING
		web	
EdgeCast Networks ⁸	TBA	<ul style="list-style-type: none"> • Online content delivery network offering media streaming • Partnership with ISP Provider AAPT 	<ul style="list-style-type: none"> • content provided via media streaming technology
TBA (including content providers)	TBA	<ul style="list-style-type: none"> • National Broadband Network 	<ul style="list-style-type: none"> • Sport or movie content from provider direct to consumer
Nintendo	Wii/Wii Channels	<ul style="list-style-type: none"> • Gaming device with wireless online connectivity 	<ul style="list-style-type: none"> • Wii Channels- provides a variety of entertainment, communication and information. UK channels include: • BBC iPlayer channel allowing catch up on BBC TV and Radio programmes from the last seven days • News, Forecast, Internet, etc. • Agreement with Netflix for movie downloads (US)
Microsoft	Windows Media Center	<ul style="list-style-type: none"> • Online via PC 	<ul style="list-style-type: none"> • Broadcast and Internet TV on PC • Use PC as a PVR (requires TV tuner)
LG	Wireless Network HDD recorder	<ul style="list-style-type: none"> • Set top box with twin tuner and wireless connectivity 	<ul style="list-style-type: none"> • Instant connectivity to YouTube and Picasa

⁸ Corner, Stuart "AAPT teams with EdgeCast to offer content delivery network"; <http://ascend.itwire.com/it-industry-news/deals/38329-aapt-teams-with-edgecast-to-offer-content-delivery-network?start=3>

PLAYER	PRODUCT	PLATFORM	OFFERING
		<ul style="list-style-type: none"> 500GB hard drive 	
Sony, Panasonic, Samsung, LG	Internet Ready TVs	<ul style="list-style-type: none"> High definition TVs (e.g.- Sony Bravia, Panasonic) 	<ul style="list-style-type: none"> Panasonic recently launched (Oct 2009) first Plasma series to feature VIERA Cast functionality, giving users access to popular entertainment sites, YouTube, Google's Picasa Web Albums, Bloomberg Weather
TriplePlay ⁹		<ul style="list-style-type: none"> The company recently undertook the largest IPTV deployment in the UK, comprising over 200,000 client devices in partnership with the UK's largest consumer electronics retailers, Curry's. Have also targeted property developers to install TriplePlay inside new premises/ 	
Hybrid TV	'Widget Television' - Interactive services and video on demand.	<ul style="list-style-type: none"> CASPA – delivery of content over a broadband internet 	<ul style="list-style-type: none"> 'Widget Television' concept, originally launched by Yahoo! and Intel in August 2008. The widgets

⁹ Richards, David, 'Two New Players To Take On Foxtel', www.channelnews.com.au/Content_And_Management/IPTV/M8T6J4M6?page=2, 9 July 2009

PLAYER	PRODUCT	PLATFORM	OFFERING
		connection direct to television sets. <ul style="list-style-type: none"> Partnerships with television manufacturers for widget technology and WiFi capability. 	appear as a series of icons on the bottom of the television screen giving access to a range of services. They rely on the television having access to a broadband connection as well as the ability to support the widgets.
iiNet	IPTV offering	Unknown.	<ul style="list-style-type: none"> Due to launch at the end of March but has not disclosed its content relationships.
Primus		<ul style="list-style-type: none"> Primus is putting in place the technology to deliver IPTV to its ADSL customers. 	

The Proposed Service will further increase competition in this market as it will encourage competing suppliers, in particular competing game console providers and competing video content providers, to offer similar services to the extent they do not already do so. There are minimal barriers to entry as the majority of online content is supplied on a non-exclusive basis.

4.4 No public detriment

The proposed conduct will result in no public detriment in either of the relevant markets.

The retail market for the supply of game consoles

The Proposed Service will not substantially lessen competition in the retail market for the supply of games consoles. Rather, it will enable Xbox to compete more vigorously against PlayStation and Nintendo Wii as well as other competitors in the market. Games consoles offer many different features, of which the ability to access video content is only one. There are numerous existing content providers with more soon to enter into the market from whom other game consoles may source content.

The retail market for the supply of video content

The Proposed Service will compete against a number of other existing and imminent vigorous and effective competitors for the supply of video content as detailed in section 4.4 above. Accordingly, the Proposed Service will not substantially lessen competition in this market.

5. Conclusion

The Proposed Service will not give rise to any public detriments and will give rise to a number of public benefits. The public benefits will include increased choice of content for consumers and increased competition in both relevant markets (including as a result of other video content providers and games console manufacturers electing to match or better the Proposed Service).

Further, the Proposed Service will be provided in an environment where competition in both relevant markets is increasing as a result of the dynamic and innovative nature of these markets. These factors are most evidenced by the rapid expansion in the number of services offered by existing content providers such as the ABC and Channel 7, the current multi-media offerings of PlayStation as well as the imminent new entry of players such as Fetch TV.