

12 July 2010

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission

**“By Email”**

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Dear Dr Chadwick

**Exclusive dealing notification N94744, lodged by FOXTEL Management Pty Limited – interested party consultation**

TransACT Communications Pty Ltd (TransACT) has recently lodged a submission<sup>1</sup> to the Australian Competition and Consumer Commission (ACCC) in relation to another FOXTEL Management Pty Limited (Foxtel) exclusive dealing notification (N94674).<sup>2</sup>

The N94674 notification was related to the supply of video and all associated services delivered via the internet to iQ set top units equipped with an Ethernet port on the condition that the customer uses a Telstra BigPond broadband connection for the carriage of those services.

As published on the ACCC website<sup>3</sup> there was overwhelming support for the ACCC to revoke that notification (N94674) for reasons associated with clear breaches of *Section 47* of the *Trade Practices Act 1974 (TPA)*, such as third line forcing, and also parts of sections 45 and 47 of the *TPA*.

Subsequently, Foxtel has withdrawn their notification (N94674), effective on 5:00 pm 9 July 2010.<sup>4</sup>

In TransACT's submission to the ACCC on notification N94674, it addressed two mains concerns:

1. the issue of third line forcing whereby the customer would have been forced to use a Telstra BigPond broadband connection for the carriage of the proposed service; and

<sup>1</sup> [TransACT response to FOXTEL Management Pty Limited - Notification N94674](#)

<sup>2</sup> <http://www.acc.gov.au/content/index.phtml/itemId/926760/fromItemId/776499>

<sup>3</sup> <http://www.acc.gov.au/content/index.phtml/itemId/926760/fromItemId/776499/display/submission>

<sup>4</sup>

<http://www.acc.gov.au/content/trimFile.phtml?trimFileName=D10+3641357.pdf&trimFileTitle=D10+3641357.pdf&trimFileFromVersionId=936980>, Foxtel withdrawal of Notification N94674.



2. Foxtel and Telstra's control over content, content distribution networks (CDN) and converged media markets in Australia.

## **Notification N94744**

While the current notification (N94744) does not purport to enter into downstream broadband telecommunication markets, as notification N94674 did, the issues surrounding the supply of video content and Foxtel's control over such content and associated CDNs still remains valid.

In TransACT's submission to notification N94674, the issues associated with equivalence of access to content and the control over content and the CDNs by Foxtel and its controlling entities was clearly identified. These issues remain relevant for this current notification and TransACT submits that the ACCC needs to consider the implications for all relevant and competitive markets when deliberating on this and any future notifications of this kind.

As a member of the Competitive Carriers Coalition (CCC), TransACT would ask that the Commission takes into consideration a recent letter from the CCC to ACCC Chairman Mr Graeme Samuel, where the CCC has asked that the Commission undertakes to better understand the business models that are emerging in communications markets as technology continues to drive convergence, and the implications for competitive markets of these business models. The CCC submits that the Commission should consider initiating a comprehensive review following on from the Emerging Market report that anticipated many of these issues in 2003, TransACT supports this approach.

The CCC highlights the potential for the horizontal leverage of market power, particularly through control of content, and submits that the Foxtel notifications presently under consideration by the Commission clearly need to be considered in this context.

As TransACT has previously noted and as indicated by the CCC this type of conduct and the ownership relationships that sit behind them, begin to establish market control between content delivery network providers, content owners and creators, and end user devices. They imply exclusive or discriminatory access arrangements, and as such are clearly of profound importance to the evolution of emerging communications market structures, particularly when moving to a next generation National Broadband Network (NBN) environment.

TransACT together with the CCC is concerned that the notification process does not lend itself to the consideration of these issues in all their dimensions, as the notifications are dealt with individually and independently, and do not appear to be considered in a broader context of emerging market structures, convergence and control arrangements.

TransACT implores the ACCC to seriously consider the full implications associated with this exclusive dealing notification (N94744) and strongly recommends that in the absence of the Commission satisfying itself that it has a full understanding of the emerging market structures that the ACCC revoke this application in its current form.

Foxtel must not be permitted to further entrench their market power and misuse that power, especially at such a critical time in the development of competitive infrastructure and content markets in Australia. Allowing this notification to stand, without full consideration of emerging market structures, would only endorse these types of anti-competitive conduct arrangements, thereby reducing competition and efficiency in telecommunications and content markets resulting in a poorer choice for consumers in price, quality and service.

For enquiries on this submission please contact:

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