

**Restriction of Publication of Part Claimed**

**FOXTEL Management Pty Ltd: Exclusive dealing notification N94744 re FOXTEL by Xbox LIVE service (FOXTEL by Xbox Live Notification)**

Thank you for your letter dated 28 June 2010 inviting comment from Microsoft Australia on the FOXTEL by Xbox Live Notification.

This submission is provided on behalf of Microsoft Pty Limited (**Microsoft Australia**) and the Microsoft group of companies (together, **Microsoft**). Microsoft especially welcomes the opportunity to provide comments on, and support for the Notification, given the involvement of Microsoft companies in the provision of Xbox 360 consoles and the Xbox LIVE service in Australia. This version of the submission with the confidential sections redacted is provided for inclusion on the public register.

**A Background**

- 1 As the Commission will be aware, Microsoft Corporation and FOXTEL Management Pty Limited (**FOXTEL**) entered into an agreement in April 2010 (**Agreement**) pursuant to which FOXTEL will supply video content via the internet using Microsoft's Xbox 360 console and Xbox LIVE service (**FOXTEL by Xbox LIVE service**). The terms of the Agreement are confidential.
- 2 FOXTEL, not Microsoft, will be the supplier of the FOXTEL by Xbox LIVE service to consumers.
- 3 Access to the FOXTEL by Xbox LIVE service will require a FOXTEL account, an Xbox 360 console and an Xbox Silver or Xbox Gold subscription.
- 4 The FOXTEL by Xbox LIVE service will be available to:
  - (a) existing FOXTEL subscribers wishing to acquire the FOXTEL by Xbox LIVE service;
  - (b) new FOXTEL subscribers wishing to acquire the FOXTEL by Xbox LIVE service;
  - (c) existing Xbox 360 console owners and subscribers to the Xbox LIVE service wishing to acquire the FOXTEL by Xbox LIVE service in Australia; and
  - (d) new Xbox 360 console owners and subscribers to the Xbox LIVE service wishing to acquire the FOXTEL by Xbox LIVE service in Australia.
- 5 The content which will be available over the FOXTEL by Xbox LIVE service will be a subset of the content which FOXTEL makes available on its current subscription services. That is, the same content (and more) is already available to consumers from FOXTEL without the need for an Xbox console or an Xbox LIVE subscription.
- 6 Restriction of Publication of Part Claimed: [ **EXCLUDED FROM PUBLIC REGISTER** ]
- 7 Users of the Xbox LIVE service are free to use whichever Internet Service Provider (ISP) they choose for the broadband connection which is necessary to use the service. Microsoft does

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not, and will not restrict, in any way, consumers' choice of ISP. This will apply equally to consumers who subscribe to the Xbox LIVE service as a condition of acquiring the FOXTEL by Xbox LIVE service.

**B Comments on the Notification**

8 Microsoft supports the Notification and considers that, for the reasons set out in the submission accompanying the Notification (**Submission**) and below, the public benefits outweigh any anti-competitive detriment which might arise from the conduct of FOXTEL in offering and supplying the FOXTEL by Xbox LIVE service (**Conduct**).

**B.2 Each of the markets affected by the Conduct is highly competitive and such competition will be enhanced by the Conduct**

9 Microsoft agrees with FOXTEL's definition of the markets contained in section 3.1 of its Submission and with FOXTEL's assessment of the competitive nature of those markets contained in sections 3.2, 3.3 and 4.3 of the Submission. In addition, Microsoft notes the following:

(a) ***The retail market for supply of video content***

The distinctions between the markets in which video content is, or can be delivered are becoming increasingly blurred. The advent of new portable devices including, portable players, interactive slates (such as the iPad), e-readers, mobile telephone handsets, Internet TV set top devices, and game consoles like the Xbox 360 that are video capable have not only changed consumers' expectations for content delivery but also mean that narrow market definitions based on the mode of content delivery can no longer be justified<sup>1</sup>. As a result, not only is the market for video content a much broader market than may have previously been considered, but the extension of content delivery via the Xbox console and Xbox LIVE service will enhance consumer choice and with it enhance competition in that market. For example, subsequent to the introduction of the similar BSkyB – Xbox service in the United Kingdom, Sony announced that the BBC iPlayer 3 and the BlinkBox movie streaming (video on demand) service would be available on its PlayStation 3 consoles.

To the extent that Microsoft already competes in this market, such competition is currently relatively small, being as set out in the relevant section of Table 1 in section 4.3 of the Submission.

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<sup>1</sup> This was acknowledged by the Commission's Chairman, Graeme Samuel in a speech given at a Communications and Media Law Association Seminar in Sydney on 4 May 2010 in which he said: "No longer can traditional media boundaries be used to define separate markets when there is an increasing blending of the lines between mediums".

(b) ***The retail market for the supply of games consoles***

The market for the supply of games consoles is a highly innovative and rapidly developing market. While games consoles such as the Xbox 360 and Sony's PlayStation can, and are being developed to deliver content in addition to traditional games, their principal role currently remains that of vehicles for the delivery of games and the gaming experience. Similarly, the principal role of the Xbox LIVE service currently remains the enhancement of the gaming experience by, for example, offering gamers the ability to play multi-player games with peers from around the world. However, while Microsoft is hopeful that the Conduct will result in new subscribers signing up to the Xbox LIVE service and in consumers acquiring Xbox consoles who do not already have one, it believes that the consoles and the Xbox LIVE service will continue to face their principal competition in the gaming sphere, which competition will remain unaltered by the Conduct. Microsoft agrees with FOXTTEL's submission that the Conduct is likely to encourage its games console competitors to enhance and expand their video content offering in Australia.

(c) ***Other markets***

Microsoft has considered whether the Conduct may have an impact on other downstream markets, including the markets for the supply and acquisition of broadband services in Australia. Given that choice of ISP remains with the consumer and that there will be no restrictions placed by either Microsoft or FOXTTEL on the ISP used by the consumer for the broadband connection necessary to access the FOXTTEL by Xbox LIVE service, Microsoft considers that there will be no anti-competitive effect on these markets.

**B.3 The Conduct will increase consumer choice, not restrict content availability**

10 The content which has been acquired and which will be supplied over the Xbox LIVE service is, and will be, a sub-set of the content which FOXTTEL makes available to subscribers of its other, unrelated services. While some channels may be exclusive to FOXTTEL, the rights which FOXTTEL holds in other content (particularly videos), are non-exclusive. For such content other, alternate content providers will exist, including, for example, video stores. As such, there will be no increase in any concentration of content in FOXTTEL. Any consumer who does not wish to acquire an Xbox console and an Xbox LIVE subscription, will be able to acquire the content elsewhere, whether from FOXTTEL or otherwise.

11 The Conduct will also provide consumers with the additional benefit of reducing the amount of hardware which they need to access content. Consumers who elect to receive the FOXTTEL by Xbox service will not require a set top box nor the associated installation requirements and costs.

**B.4 The Conduct will not preclude other game console suppliers from acquiring and supplying content**

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