



FOXTEL Management Pty Limited – assessment of exclusive dealing notification N94744

REASONS

6 August 2010

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided to take no further action with respect to exclusive dealing notification N94744 lodged by FOXTEL Management Pty Limited on 25 June 2010. This means that the immunity that commenced automatically on 9 July 2010 remains in place.

THE NOTIFICATION

FOXTEL proposes to supply video content delivered to a customer's Xbox 360 games console via the internet (the FOXTEL by Xbox LIVE Service) on the condition that the customer has purchased an Xbox 360 games console and subscribes to the Xbox LIVE Gold service, or the Xbox LIVE Silver service (in the case of transactional video on demand content only), which are supplied by the Microsoft Corporation.

Further information regarding the notification is available on the ACCC's public register at www.accc.gov.au/ExclusiveDealingRegister.

THE NOTIFICATION PROCESS

Businesses may obtain legal immunity for conduct that might risk breaching the exclusive dealing provisions of the *Trade Practices Act 1974* (the Act) by lodging a notification with the ACCC. Immunity for a third line forcing notification commences automatically 14 days after the notification is validly lodged. However, the ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment.

The Act sets out a public process for assessing exclusive dealing notifications. In some cases, the ACCC will contact interested parties inviting submissions on the proposed exclusive dealing conduct to assist it to determine whether a proposed arrangement is likely to result in a net public benefit. The ACCC will then decide whether to allow the notification to stand or to revoke it.

CONSULTATION

On 28 June 2010, the ACCC commenced interested party consultation on notification N94744 to inform its consideration of the balance of public benefits and public detriments that FOXTEL claims are likely to result from the notified conduct. The ACCC received one submission supporting the notification and two opposing it.

REASONS FOR DECISION

In allowing this notification to stand, the ACCC considers:

- the notified conduct is likely to provide consumers with a new method of content acquisition and may encourage competition in all relevant markets
- the conduct does not restrict consumer choice of internet service provider
- the content to be provided via the FOXTEL by Xbox LIVE Service is not exclusive
- uptake of the proposed service is voluntary, and
- a variety of alternative products and services for the acquisition of content are available.

BROADER MARKET DEVELOPMENTS

The ACCC monitors developments in the relevant markets closely and notes that these markets are undergoing considerable change. In particular, the increasing availability of high speed broadband services is opening up new ways to supply video content to consumers. The ACCC recognises that in a dynamic environment such as this, where business models are continuing to evolve, potential competition concerns may emerge quickly. All parties need to ensure any commercial arrangements they enter into comply with the exclusive dealing provisions in the Act. In assessing the conduct of parties and any detrimental effects, the ACCC will consider the commercial environment at the time, including the impact of any existing exclusive arrangements in the relevant markets.

RECONSIDERATION OF DECISION

The ACCC's assessment of this notification has been made on the understanding that FOXTEL and Microsoft Corporation will not in any way restrict consumers' choice of internet service provider for the FOXTEL by Xbox LIVE Service at any time.

The ACCC may review notification N94744 at any time if it has concerns that the likely public benefits of the notified conduct will no longer outweigh the likely public detriments of the conduct, particularly in light of the broader market developments described above.