

12 October 2009

Committee Secretary
 Senate Standing Committee on Environment, Communications and the Arts
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 Parliament House
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Dear Committee Members

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

FOXTEL Management Pty Limited (**FOXTEL**) welcomes this opportunity to make submissions to the Senate Standing Committee on Environment, Communications and the Arts (the **Committee**) in relation to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the **Draft Bill**).

As the Committee may be aware, FOXTEL has previously made submissions to the Department of Broadband, Communications and the Digital Economy (**DBCDE**) in relation to the NBN and an associated legislative framework.

In general, FOXTEL supports the amendment of Part XIC of the *Trade Practices Act 1974 (TPA)* to make it 'more streamlined and less vulnerable to opportunistic procedural delays'.¹ However, FOXTEL has some concerns with certain aspects of the amendments contained in the Draft Bill and, in particular, the amendments proposed to the *Telecommunications Act 1997 (the Telco Act)*. These concerns are discussed further below.

1. Introduction

1.1 Structure of submission

These submissions set out a brief overview of FOXTEL's history and involvement in telecommunications regulation and then make specific comment on some of the proposed amendments to Part XIC of the TPA and to the Telco Act.

1.2 Executive summary

While FOXTEL supports the rollout of the NBN as a bold and visionary initiative, the following principal issues of concern for FOXTEL arise out of the Draft Bill.

- **Dramatic regulatory changes without due consideration:** the Draft Bill proposes dramatic changes to the regulatory regime governing the telecommunications industry despite the Government not having undertaken a rigorous analysis or

¹ Second Reading Speech, p 4.

inquiry into whether there has been significant market failure justifying such changes. FOXTEL has natural concerns about the precedent this may set for future regulatory change and would request it be closely interrogated.

- **Excessive regulatory powers:** the Draft Bill proposes to give the Australian Competition and Consumer Commission (the *Commission*) broad discretion as to whether to accept or reject undertakings from Telstra to structurally separate or divest its interest in its HFC cable or FOXTEL.² Only the Commission's discretion to accept an undertaking from Telstra to structurally separate can be limited by Ministerial direction.³ FOXTEL is very concerned that a matter of such significance lacks parameters around the Commission's decision making power and the potential precedent that this may set for future law making and we suggest is an unsound approach. FOXTEL submits that the Commission's discretion should be confined, at the very least, to what is reasonable which is consistent with the approach adopted in connection with the Commission's ability to accept or reject a special access undertaking or an ordinary access undertaking. FOXTEL is also of the view that the matters the Commission must have regard to should be set out in the legislation itself and not left to determination by the Minister.
- The proposal to give the Commission the broad power to make interim access determinations without giving effected parties procedural fairness is contrary to well established principles equally of good public policy and administrative law designed to protect against arbitrary decision making.
- If the Commission is to be given the power to make binding rules of conduct without observing the requirements of procedural fairness, the circumstances in which it may exercise this power need to be carefully proscribed at a minimum.
- **No scope for negotiation:** the Draft Bill proposes to replace the current negotiate-arbitrate method of setting access terms and conditions with a regime under which the Commission will make upfront determinations of access terms and conditions. Negotiation of access terms and conditions is preferable to an upfront determination of such terms as negotiation enables the parties – those with the relevant information and expertise – to efficiently determine the applicable access terms and conditions. The Committee should recommend removing the requirement that the Commission determine access terms and conditions upfront and reinstate the current negotiate-arbitrate model. In the alternative, the Commission could have the *ability* to make an upfront determination but not be required to do so if it formed the view that determination of a particular declared service's terms and conditions of access was best done through negotiation between the parties.
- **Significant risk of detriment to investment, innovation and end-users:** the proposal to allow the Commission to make upfront access determinations, and to make interim access determinations and binding rules of conduct without giving

² See proposed ss577A(1), 577C(1) or 577E(1) of the Telco Act;

³ See proposed s577A(3) of the Telco Act.

affected parties procedural fairness, significantly increases the risk of unfair and inefficient terms and conditions of access being imposed on access seekers and access providers, which would have a detrimental impact on investment, the introduction of innovative new products and end-users.

- **Unnecessary increase in regulation of services the subject of special access undertakings:** the Draft Bill does not sufficiently distinguish between services declared by act of the Commission and services which are deemed to be declared by virtue of a person giving the Commission a special access undertaking in relation to those services. FOXTEL submits that the Draft Bill should be amended to make it clear that the Commission is not obliged to commence a public inquiry, prepare a report and make an access determination in relation to services that are merely *deemed* to be declared by virtue of a person giving the Commission a special access undertaking in relation to those services.
- **Merits review, ordinary access undertakings and ordinary exemptions should be retained:** it would be preferable to retain a form of limited merits review of decisions under Part XIC rather than abolish merits review altogether. While FOXTEL appreciates the Government's concern that merits reviews have potentially been used as a delaying tactic, FOXTEL believes that a limited form of merits review is critical to provide comfort to potential investors and conforms with sound legal precepts.
- The abolition of ordinary access undertaking and ordinary exemptions is unnecessary and unjustified.

1.3 Overview of FOXTEL and regulation

(a) Background

By way of background, FOXTEL is Australia's leading subscription television provider and is connected to over 1.6 million homes on cable and satellite through retail and wholesale distribution. FOXTEL delivers more than 150 channels covering news, sport, general entertainment, movies, documentaries, music and children's programming to over six million Australians.

FOXTEL commenced distributing its services on cable with 20 channels in 1995, expanding progressively to 31 channels and satellite distribution in 1999. FOXTEL again increased its offering to 45 channels in 2002 following the completion of the FOXTEL-Optus Content Supply Agreement.

The FOXTEL Digital service was launched in 2004, and FOXTEL now provides Australian viewers with the choice of more than 150 Digital channels. Since its launch, FOXTEL has extended its Digital innovations by adding a raft of new channels and interactive features including additional specialised news, sports and weather applications, a 28 channel near video on demand service (FOXTEL Box Office), as well as the FOXTEL iQ, a fully integrated hard disk Personal Digital Recorder, launched in 2005. FOXTEL launched its High Definition service in June 2008 with an initial five dedicated 24-hour HD channels and an On Demand Movie Service.

On 29 September 2009, FOXTEL announced a number of new services soon to be launched including the launch of a new service on 1 October 2009 by which subscribers will legally be able to download television programs to their computers. FOXTEL also announced that its subscribers will soon have access to 30 additional television channels and a number of other new functionalities and services.

FOXTEL launched a mobile service, Mobile FOXTEL, with Telstra in 2006, which now carries 33 channels and is one of the world's most substantial mobile offerings. The live broadcast service, FOXTEL Live2Air, on Virgin Blue was launched in 2007 and is now available across Australia on the Virgin Blue jet fleet providing 24 channels of live FOXTEL.

FOXTEL directly employs more than 1900 people and a further 1400 workers are indirectly engaged by FOXTEL in sales and installation services nationally.

The FOXTEL Television Centre at North Ryde in Sydney is the headquarters of FOXTEL's national subscription television operations and houses FOXTEL's television studios, broadcast operations and cable and satellite transmission facilities. FOXTEL also operates a national Customer Solutions Centre based at Moonee Ponds in Melbourne, a purpose built state-of-the-art call centre.

FOXTEL is ultimately owned by Telstra Corporation Limited (50%), The News Corporation Limited (25%), and Consolidated Media Holdings Limited (25%).

(b) Overview of regulatory environment in which FOXTEL operates

FOXTEL operates in a highly regulated environment. The key areas of Federal regulation relevant to FOXTEL's business are the *Broadcasting Services Act 1992* (the **BSA**) and Part XIC of the TPA.

FOXTEL's subscription television services are provided in accordance with subscription television broadcasting licences and subscription television narrowcasting licences as applicable under the BSA.⁴ These conditions are supplemented by the Australian Subscription Television and Radio Association Codes of Practice which are monitored and reviewed as to relevant compliance by the Australian Communications and Media Authority.

Within this regime FOXTEL is also subject to a highly restrictive so called 'anti-siphoning' regime which prevents subscription television licensees from acquiring the rights to over 1350 sporting events (in non Olympic or Commonwealth Games years) on the dedicated anti-siphoning list unless a terrestrial network first acquires the right to televise the event.

FOXTEL, as a carriage service provider, is also subject to Part XIC of the TPA which regulates access to telecommunications services. Under Part XIC, the Commission may declare carriage services and related services to be declared services. FOXTEL's experience with Part XIC is addressed in more detail below.

(c) FOXTEL's experience with Part XIC

⁴ Each licence is subject to the conditions set out in Schedule 2 of the BSA: namely, the special conditions in Part 2 (applicable to all broadcasters); Part 6 of Schedule 2 (applicable to subscription television broadcasters) or Part 7 of Schedule 2 (applicable to class licences such as subscription television narrowcasters).

FOXTEL has had extensive experience with Part XIC of the TPA. Most recently, FOXTEL's special access undertaking (**SAU**) was accepted by the Commission in March 2007. This is the only SAU that has been accepted by the Commission to date since the relevant provisions commenced in 2002. FOXTEL lodged its first SAU with the Commission in relation to its Digital Set Top Unit Services in October 2005, however this was initially rejected by the Commission in September 2006 and as a result FOXTEL subsequently withdrew the SAU and submitted a revised SAU in December 2006.

FOXTEL's SAU was lodged pursuant to section 152CBA of the TPA which was introduced into the TPA in 2002. The amendments made to the TPA in 2002 introduced both the ability for a person to lodge an SAU or seek an exemption order in respect of services that are not yet declared. The aim of these amendments was to provide regulatory certainty to investors in such services prior to the investment being made.

FOXTEL had previously lodged an application for an exemption order in 2002 prior to the FOXTEL partners commencing their significant investment in the digital infrastructure required to convert FOXTEL to a fully digital platform. However, whilst the exemption order was initially granted by the Commission in December 2003, it was ultimately overturned by the Australian Competition Tribunal in December 2004 on appeal by the Seven Network. FOXTEL then decided to lodge an SAU in a further attempt to obtain some certainty in relation to its access obligations and the relevant terms for such access. By this stage FOXTEL had launched its Digital service, however FOXTEL was still keen to obtain commercial certainty in relation to providing access on an open basis.

In 2002, FOXTEL entered into a number of agreements that were critical to the subscription television industry. These agreements were the Content Supply Agreement with Optus which enabled Optus to resupply the FOXTEL service on the Optus network and the Telstra Resale Agreement which permitted Telstra to resell the FOXTEL service bundled with Telstra telephony products. Both of these arrangements were subject to review by the Commission and FOXTEL provided a comprehensive set of undertakings to the Commission in 2002 pursuant to Section 87B of the TPA. These undertakings were to address a number of perceived anti-competitive consequences identified by the Commission and included an analogue access undertaking and a digital access undertaking which would enable access seekers to access FOXTEL's analogue and digital set top units (**STUs**). FOXTEL has had two access seekers successfully use its digital undertaking (being TVN and Setanta Sports). TVN has since become part of the FOXTEL service, however Setanta Sports is still operating its service using the digital access arrangements.

FOXTEL has also been involved in a number of access arbitrations in relation to its analogue cable service. The Commission declared the analogue cable network for the purposes of delivering subscription television services in 1999. Following on from this declaration, both the Seven Network and TARBS sought access to both FOXTEL capacity that it was entitled to use under its agreement with Telstra and access to FOXTEL's STUs. These arbitrations continued through until 2003 when both parties ultimately withdrew their requests following on from the Commission's acceptance of FOXTEL's Section 87B undertakings and the access arrangements offered as part of those arrangements.

2. Amendments to the *Telecommunications Act 1997*

FOXTEL does not comment on whether the functional or structural separation of Telstra, as contemplated by the Draft Bill, is required. Rather, FOXTEL is concerned that the Draft Bill will impose significant legislative changes on the industry before the Government undertakes a rigorous analysis or inquiry into whether there has been significant market failure justifying such changes. FOXTEL is concerned that this has the potential to set a precedent for the future that does not accord with the usual processes followed, particularly when it is not clear why the current provisions of the TPA such as sections 45, 46 and 47 together with Part XIB are not sufficient to address any perceived market failures.

FOXTEL submits that the possibility that inadequate analysis or inquiry has been conducted by the Government is compounded by the Government's extremely short timetable for the passage of the Draft Bill through Parliament. Less than three weeks has been afforded to parties to make submissions to the Committee regarding the Draft Bill. Given the length and significance of the Draft Bill, this is surprisingly limited.

FOXTEL also submits that the discretion afforded to the Commission as to whether it should accept or reject an undertaking for Telstra to structurally separate is too broad.⁵ Until the Minister sets out in writing matters which the Commission must have regard to, the Commission is obliged to consider only those matters it considers relevant, which is an unusually open approach which whilst understandably appealing to a regulator constitutes an inappropriate policy framework for policy clarity and public clarity in objectives.

In addition, the Draft Bill does not set any limits on the Commission's power to accept or reject an undertaking for Telstra to divest its interest in its HFC cable or FOXTEL.⁶ The Draft Bill does not propose to give the Minister the power to set out in writing matters which the Commission must have regard to. Nor does the Draft Bill require the Commission to have regard to those matters it considers relevant.⁷ Enabling the Commission to have maximum flexibility and to be unconstrained as to behaving reasonably and to have an absence of the need to make public its reasoning is a major far reaching legal precedent and goes firmly against long held legal and policy principles.

By way of contrast, the current provisions of the TPA which relate to the Commission's power to accept an ordinary access undertaking or a special access undertaking require that the Commission not accept such undertakings unless, for example, it is satisfied that the undertaking is reasonable.⁸ If the Commission does not accept an ordinary access undertaking or a special access undertaking then the Commission must give written reasons for its decision. The decision would be subject to the ordinary principles of judicial review. The Draft Bill imposes no such limitation on the Commission's ability to accept or reject an undertaking from Telstra in relation to structural separation or divestment of the HFC Cable or its interest in FOXTEL. FOXTEL believes that as this is a matter of such significance with

⁵ As set out in proposed s577A(1) of the Telco Act.

⁶ See proposed ss 577C or 577E of the Telco Act.

⁷ Cf proposed s577A(3) of the Telco Act.

⁸ The criterion of reasonableness is expanded on in s152AH of the TPA.

the ability to have such wide reaching ramifications that it is critical that the Commission is provided with a list of matters that the Commission must have regard to and that these are set out in the legislation itself. FOXTEL submits that the Commission's powers should be confined, at the very least, to what is reasonable and that any decision must be accompanied by written reasons.

3. The proposed amendments to Part XIC of the *Trade Practices Act 1974*

FOXTEL notes that a number of the amendments proposed to Part XIC appear to be aimed at addressing concerns about access providers using the current process to delay access. As mentioned above, FOXTEL is an access provider in relation to its digital set top units and has had extensive experience with Part XIC. FOXTEL is concerned that a number of the proposed amendments place too much weight on attempting to speed up the process and removing any possible avenue for delay at the expense of the access provider. FOXTEL submits that the amendments need to be more balanced in favour of both the access seeker and access provider otherwise there is a serious risk of impacting future investment that might be subject to this regime.

3.1 Upfront access determinations

One of the major legislative amendments proposed by the Draft Bill is an amendment to the access regime in Part XIC of the TPA to allow the Commission to set upfront prices and non-price terms for declared services.⁹ In addition, while an access seeker and access provider may still negotiate their own terms of access, the mechanism for a dispute to be notified to the Commission, and a determination to be made in relation to that dispute by way of arbitration, has been removed.¹⁰

FOXTEL submits that parties determining the terms and conditions of access by a private negotiate-arbitrate model is to be preferred and the Committee should recommend removing the requirement for the Commission to determine terms and conditions upfront and reinstate the arbitration process.¹¹ In the alternative, FOXTEL submits that the Commission could have the *ability* to make an upfront determination but not be required to do so if it formed the view that determination of a particular declared service's terms and conditions of access was best done through negotiation between the parties.

In addition, FOXTEL submits that the Draft Bill should be amended so that it:

- clearly provides that the Commission is only obligated to make an access determination¹² in relation to services which are declared by act of the Commission,

⁹ Explanatory Memorandum to the Draft Bill (the *EM*), p 5.

¹⁰ By Item 136 of the Draft Bill which repeals Division 8 of Part XIC.

¹¹ See the current Division 8 of the TPA.

¹² Under proposed s152BC of the TPA.

and not in relation to services which are *deemed* to be declared under a special access undertaking,¹³ and

- provides a dispute resolution process in those situations where none of a relevant access agreement, special access undertaking, binding rules of conduct or access determination apply to a particular service.

(a) Good faith negotiations are key

According to the Second Reading Speech accompanying the Draft Bill, the reforms proposed by the Draft Bill are necessary:

to make the [Part XIC access] process more streamlined and less vulnerable to opportunistic procedural delays. This will provide greater certainty to both access providers and access seekers.¹⁴

FOXTEL supports this general approach however FOXTEL has already made submissions to the DBCDE outlining FOXTEL's position that the Commission should not be empowered to make upfront access determinations. FOXTEL again submits that:

- most services to which access is provided under Part XIC of the TPA are extremely complex;
- access providers and access seekers are best placed in commercial negotiations to determine the appropriate terms of access;
- the Commission's intervention is only necessary after the parties have tried in good faith to negotiate access terms; and
- requiring the Commission to make upfront access determinations will impose a large burden on the Commission and, contrary to the stated purpose of the Draft Bill, may in fact increase the time for access decisions.

The Draft Bill proposes that terms and conditions specified in an access determination will have no effect to the extent of any inconsistency with an access agreement.¹⁵ However, under the new access regime, the reality is that the parties will negotiate in the shadow of any applicable access determination. Indeed, it is the explicit intent of the Draft Bill that access determinations will 'create a benchmark which access seekers can fall back on'.¹⁶

The role of good faith negotiations under Part XIC will therefore be significantly limited by the amendments proposed by the Draft Bill. Access terms and conditions will instead be set out in the Commission's access determinations. Whilst the Commission is a sophisticated and well informed body it does not have a monopoly on wisdom and it needs to perform in an environment which encourages principals to negotiate outcomes wherever possible. To have automatic recourse to regulatory intervention in the manner proposed is a great step backwards in administrative and policy aspirations.

¹³ See s152AL(7) of the TPA.

¹⁴ Second Reading Speech, p 4

¹⁵ See proposed s152BCC of the TPA.

¹⁶ EM, p 5.

The Commission *must* commence public inquiries about proposals to make access determinations for at least the eight services already declared by the Commission within 12 months of the commencement of the Draft Bill.¹⁷ These public inquiries will impose significant burdens on the Commission and on those parties interested in making submissions to the public inquiries. If the Commission holds a public inquiry (which it must do for all declared services), it *must* then make a determination.¹⁸

FOXTEL submits that the existing access regime under Part XIC is preferable to that proposed by the Draft Bill as:

- the existing regime enables prices to be set by good faith negotiations between those parties that are best placed to determine appropriate terms of access; and
- the new regime will place additional and significant procedural functions on the Commission.

In the alternative, FOXTEL submits that the Commission could be given the *ability* to set terms and conditions of access upfront, but not be required to do so. The existing arbitration process could be retained to deal with disputes, or the Commission could be required to make a determination in the event that the parties cannot reach agreement.

(b) The distinction between declared services and deemed declared services

During the 12 month period after the Draft Bill commences operation, the Commission *must* hold a public inquiry¹⁹ and make an access determination²⁰ in relation to access to each of those services in respect of which a declaration is in force²¹ immediately.²²

FOXTEL submits that the Draft Bill should be amended to make it clear that this obligation only applies to services which are actually declared by act of the Commission, as distinct from those services that are merely *deemed* to be declared by virtue of a person giving the Commission a special access undertaking in relation to those services.²³

It is clear that the obligation to make an access determination in relation to services that are declared in the future only applies if 'the Commission makes a declaration under s152AL' of the TPA.²⁴ A service that becomes a declared service in the future under s152AL(7), when a person gives the Commission a special access undertaking in relation to those services, will not automatically be subject to an access determination.

¹⁷ Proposed s152BCI(2) of the TPA.

¹⁸ Proposed s152BCK(2) of the TPA.

¹⁹ Under Part 25 of the Telco Act.

²⁰ Under the proposed s152BC of the TPA.

²¹ Under s152AL of the TPA.

²² See proposed s152BCI(2) of the TPA.

²³ See s152AL(7) of the TPA. As referred to above, FOXTEL has given the Commission a special access undertaking in connection with its Digital Set Top Unit Service; that undertaking is operational; and FOXTEL is supplying the Digital Set Top Unit Service: the FOXTEL Digital Set Top Unit Service is effectively a declared service under s152AL(7) of the TPA. To the best of FOXTEL's knowledge, its special access undertaking in connection with its Digital Set Top Unit Service is currently the only special access undertaking that has been accepted by the Commission.

²⁴ Proposed s152BCI(1) of the TPA.

By contrast, all services for which there is an existing 'declaration in force under s152AL' when s152BCI of the TPA commences, will automatically be subjected to a public inquiry and access determination. This appears to operate to catch services both declared by the Commission and services that are *deemed* to be declared if a special access undertaking is in force.²⁵ FOXTEL submits that this is clearly an inadvertent oversight as there is no *obligation* to conduct an inquiry and make an access determination in relation to services which are the subject of special access undertakings in the future.²⁶

FOXTEL submits that the Commission and interested parties should not be subject to the increased procedural burden in connection with services that are merely deemed to be declared.²⁷ Such an additional procedural burden would be unnecessary because an access determination has no effect to the extent to which it is inconsistent with a special access undertaking that is in operation.²⁸ For this reason, an access determination regarding a service which is already governed by a special access undertaking would be superfluous.

Furthermore, a service which is only deemed to be declared should not be automatically subject to an access determination because, in the process of accepting the relevant special access undertaking, the Commission must have already, for example:

- satisfied itself that the terms and conditions of access offered by the access provider in the special access undertaking are reasonable; and
- invited people to make submissions in connection with the special access undertaking, and considered those submissions.²⁹

In addition, in cases where the service is only deemed to be declared,³⁰ the Commission has obviously not been minded to declare the service itself. For these reasons, FOXTEL submits that the reference 'declaration in force' is an oversight and should read 'the Commission made a declaration'.

(c) Reduced investor certainty

As mentioned above, one of the key purposes of the Draft Bill is to provide greater certainty to both access providers and access seekers.³¹ This was also the objective of the legislature when it introduced the concept of special access undertakings.³²

If enacted in its current form the Draft Bill would remove the Commission's power to arbitrate an access dispute.³³ The parties would be required to rely on (in this order) an applicable term of an access agreement, a special access undertaking, a binding rule of conduct or an

²⁵ By the operation of s152AL(7); see proposed s152BCI(2) of the TPA.

²⁶ See proposed s152BCI(1) of the TPA.

²⁷ See s152BCI(2) of the TPA.

²⁸ See proposed s152CBIA of the TPA.

²⁹ Section 152CBD of the TPA.

³⁰ By the operation of s152AL(7) of the TPA.

³¹ Second Reading Speech, p 4.

³² Explanatory Memorandum to the Telecommunications Competition Bill 2002, page 73.

³³ See Item 136 of Part 2 of Schedule 1 to the Draft Bill, which repeals Division 8 of Part XIC of the TPA.

access determination.³⁴ However, if the parties are in dispute regarding an issue about which the applicable access agreement, special access undertaking, binding rule of conduct and access determination was silent, they would be unable to seek the arbitration of the dispute. This would then leave the parties in a very difficult position and seems contrary to the policy objective underlying these amendments.

The Government envisages that the parties would request the Commission vary binding rules of conduct or an access determination in this case.³⁵ However, as discussed further below, FOXTEL submits that these mechanisms do not provide adequate protection to access seekers and access providers in matters of such significance. Matters specific to two parties are best resolved by dispute resolution between those two parties. This is a central, indeed pivotal, issue to ensuring a workable management framework which recognises the dynamics at play in any access seeker/provider disputes. It is artificial in the extreme and impractical to abandon this style of approach which accords with commonsense and mature professional processes in an advanced information economy. For these reasons, FOXTEL submits that the Commission should retain a residual ability to arbitrate disputes in cases of last resort and that mechanisms should be introduced to make this process more efficient and less likely to be used as a delay mechanism. These may include a time frame being placed upon an arbitration and the Commission having the ability to consolidate two or more arbitrations. In addition, the Commission could be given the power to direct the parties to mediate the dispute within a set time frame.

3.2 Interim Access Determinations

If the Draft Bill were enacted in its current form the Commission:

- *must* impose an interim access determination relating to a declared service, including a deemed one, if it is unlikely that a final determination will be made within 6 months *or* the issue is urgent; and
- *may* in any event impose an interim access determination if there is a declared service, including a deemed one, and no access determination has previously been made in relation to access to that declared service.³⁶

In either case the Commission would not need to afford procedural fairness (that is, engage in a process of consultation with the affected parties) which may have a serious impact on the access provider.³⁷

Currently the Commission may make any interim access determination without affording the parties procedural justice, but only if the interim access determination is consistent with pricing principles in relation to a declared service.³⁸ Those pricing principles cannot be made without extensive consultation processes. The new proposal regarding interim

³⁴ Proposed s152AYA of the TPA.

³⁵ EM, p 140.

³⁶ Proposed s152BCG of the TPA.

³⁷ Proposed s152BCG(4) of the TPA

³⁸ In force under s152AQA or s152AQB; s52CPA of the TPA.

determinations therefore represents a significant extension of the Commission's powers.³⁹ The Commission would be able to unilaterally impose access terms and conditions on access providers and access seekers without any prior consultation, even as to significant issues such as price. As discussed above, the Commission is not necessarily in the best position to determine appropriate terms and conditions of access, particularly without any input from affected parties.

FOXTEL submits that such a significant extension of the Commission's powers is not only unnecessary; it also significantly increases the risk that unfair or inefficient access terms and conditions will be imposed on access seekers and access providers. Inefficient access terms and conditions would have a dangerous impact on investment, the introduction of innovative new products and end-users of carriage services. The rules of procedural fairness have developed to protect participants in the legal system from arbitrary decision making. They should not be suspended except (if at all) only in the most exceptional circumstances and only then when the basis for such suspension is closely defined. It is of the utmost importance that the Commission is not regarded as having and is not accorded prophet like status with supreme powers in the normal course of conduct in such complex matters where there are many valid perspectives and where the discipline of procedural fairness is central to good governance and to ensure a disciplined approach to regulatory intervention.

In addition, the Draft Bill proposes to repeal⁴⁰ the current mechanism for the Commission to make an interim determination in an access dispute, including the power to backdate a final determination and award interest.⁴¹ In circumstances where there is no fetter on the Commission to issue interim determinations for up to 12 months before a final determination is put in place, FOXTEL submits that the backdating provision should be reinstated in order for prices to be backdated if necessary.

Where the Commission's power to make interim determinations is extremely broad, and particularly where that power is not guided by any existing pricing principles determination, it is conceivable that the terms of the Commission's interim determination and the Commission's final determination could be dramatically disparate. It is clear that an access determination may be retrospective.⁴² Affected parties should be given an explicit right to interest on any difference in price, rather than relying on the Court's power to make any order that the Court thinks appropriate.⁴³

3.3 Binding rules of conduct

The Commission is also being given the power to make binding rules of conduct.⁴⁴ The possible subject matter of binding rules of conduct is exactly the same as that of access

³⁹ See proposed s152BCG of the TPA.

⁴⁰ Item 136 of Part 2 of Schedule 1 of the Draft Bill.

⁴¹ Section 152DNA of the TPA.

⁴² Proposed s152BCF(2) of the TPA.

⁴³ See proposed s152BCQ(1)(f) of the TPA.

⁴⁴ See proposed Division 4A of Part XIC of the TPA.

determinations. However, the Commission is not required to observe any requirements of procedural fairness in relation to the making of binding rules of conduct.⁴⁵ The only material restriction on the Commission's powers with respect to binding rules of conduct that does not apply to access determinations is that binding rules of conduct must specify an expiry date which must occur in the 12 month period beginning when the rules were made,⁴⁶ but the Commission is not prevented from replacing expiring rules with new rules of the same or a similar effect on a rolling basis.

As noted above in relation to interim access determinations, FOXTEL submits that the ability to disregard the requirements of procedural fairness is a significant extension of the Commission's powers and could only be justified (if at all) in the most extreme cases and always on very closely defined terms. The Explanatory Memorandum to the Draft Bill (the **EM**) states that the provisions relating to binding rules of conduct:

- 'are intended to allow the ACCC to make urgent and temporary arrangements to deal with terms and conditions of access to declared services... [including to deal] with the situation where the terms and conditions on which a carrier/CSP must comply with the standard access obligations are not currently specified elsewhere';⁴⁷ and
- will be used 'to deal with urgent matters, where it is not appropriate for the ACCC to go through the process set out in Division 4 for varying an access determination'.⁴⁸

As binding rules of conduct would override any inconsistent provisions in an access determination, the EM considers that they 'operate, in essence, as a particular type of variation to an access determination'.⁴⁹ Proposed Division 4A of Part XIC does not, however, limit the Commission's powers to make binding rules of conduct to situations of urgency, or to the variation of an existing access determination. In FOXTEL's view, there is a danger that binding rules of conduct may simply become a mechanism for circumventing the public inquiry process and avoiding the requirements of procedural fairness. This is clearly contrary to the intention of the Government as expressed in the EM and should not be permitted.

FOXTEL recognises the important objective of achieving a streamlined process that is not susceptible to excessive administrative appeals, but submits that to be consistent with the Government's intention the Bill should be amended to limit the Commission's power to make binding rules of conduct to situations in which:

- an access determination is in force;
- the Commission has commenced the process of conducting a public inquiry with a view to varying or replacing the access determination; and

⁴⁵ Proposed s152BD(8) of the TPA.

⁴⁶ Proposed s152BDC of the TPA.

⁴⁷ EM, p 140.

⁴⁸ EM, p 155.

⁴⁹ EM, p 155.

- the Commission considers on reasonable grounds that there is an urgent need to vary or replace the access determination before the completion of the public inquiry.

Binding rules of conduct should then expire automatically on completion of the public inquiry and the variation or replacement of the relevant access undertaking.

If amendments of this nature are not made, an effective safeguard to ensure binding rules of conduct are only temporary should be inserted in any event. If this option were taken, the legislation could require that binding rules of conduct expire automatically after 3 months (rather than the 12 months proposed in the Draft Bill) and provide that the Commission can not replace expiring rules with fresh rules to the same or a similar effect unless it has commenced a public inquiry with a view to varying or replacing the relevant access undertaking.

If no amendments are made to ensure that binding rules of conduct can only be used for the limited purpose of temporarily amending the terms of access to a declared service pending a variation or replacement of the relevant access determination, FOXTEL considers that binding rules of conduct at the very least should not have the extensive breadth of potential subject matter that access determinations are given, and that their scope should be more limited and more precisely defined than currently set out in the Draft Bill.⁵⁰

3.4 Abolition of merits review

The Bill will abolish merits review by the Australian Competition Tribunal of decisions under Part XIC. Merits review is currently available in respect of:

- decisions relating to ordinary and anticipatory individual exemptions;⁵¹ and
- decisions by the Commission to accept or reject an undertaking or a variation to an undertaking.⁵²

Merits review will not be made available in respect of access determinations or other decisions under the proposed new provisions of Part XIC.

FOXTEL recognises the Government's concern that merits review may in some cases hinder the objective of promoting regulatory certainty and timely decision-making. FOXTEL submits it would be more appropriate to retain a form of limited merits review, under which the Tribunal would be restricted to consideration of the information before the original decision-maker while also having an ability to request additional information from the parties as necessary.

FOXTEL also submits that the removal of merits review increases the importance of considered decision making by the Commission, including where appropriate the observation of the requirements of procedural fairness. In particular, FOXTEL submits that in circumstances where merits review is unavailable, it would be inappropriate for the Commission to have the power to make binding rules of conduct or interim access

⁵⁰ See proposed section 152BD of the TPA.

⁵¹ Section 152AV of the TPA.

⁵² Section 152CE of the TPA.

determinations without affording procedural fairness. Put simply it would constitute bad law to deny the core discipline of procedural fairness in this instance and would be inconsistent with Part IIIA of the TPA that applies to declarations and access to essential facilities.

If the Commission makes an unjust or inefficient upfront determination of access terms and conditions (whether by access determination, binding rules of conduct or interim access determination), a possibility made more likely in the absence of procedural fairness, there will be significant detriment to investment, the introduction of innovative new products and end-users. Without even a limited form of merits review, there is an increased likelihood that an unjust or inefficient determination of access terms and conditions will stand with no mechanism to address its correction other than limited judicial review or public commentary. It must be noted that such public commentary from the media, legal and commercial analytical community and in Parliament itself has limited capacity for sustained attention over the sorts of periods necessary to effect change. Merits review- closely defined – is the only way of ensuring that unjust or inefficient determinations are accountable enabling recourse to an independent review central to such considerations internationally. The proposed approach will not resonate well with investors as it reposes all trust and authority in a single regulatory body which is on all established precedent an unwise approach.

Accordingly, to address the issues of delay associated with merits review FOXTEL submits that it is critical that a limited form of merits review is retained that is restricted to a review of the information before the Commission and that there be a time limit imposed (so as to address potential 'gaming' of the system) upon this process. In addition, FOXTEL believes that limited merits review should be available for all access decisions including declarations and arbitration determinations to best ensure investor confidence.

3.5 Abolition of ordinary access undertakings and ordinary exemptions

The Draft Bill will also remove the ability for access providers to give, and the Commission to accept, ordinary access undertakings.⁵³ Special access undertakings will continue to be available.

The EM explains the abolition on the basis that:

In practice, almost all undertakings submitted to the ACCC since 1997 were rejected on the basis that they did not promote the long-term interests of end-users. Ordinary access undertakings have not only failed to promote regulatory certainty, their use has resulted in significant regulatory uncertainty and the allocation of considerable resources by the ACCC, access providers and access seekers.

Under the reforms made to Part XIC by this Bill, access providers will have the opportunity to make submissions to the ACCC during a public inquiry into making an access determination, concerning the terms and conditions of access they would like to be included in the access determination, and the ACCC will consider those submissions.⁵⁴

FOXTEL submits that under a regime of upfront access determinations which set price and non-price terms for declared services, the ability of access providers to offer different terms

⁵³ See item 117 of the Draft Bill, which repeals subdivision A of Division 5 of Part XIC of the TPA.

⁵⁴ EM, p 161.

in an undertaking to the Commission would not result in significant regulatory uncertainty and any suggestion that is not the case is simply wrong. While access determinations may make different provisions with respect to different access providers,⁵⁵ FOXTEL submits that there may be circumstances in which it is not practical or appropriate to determine the commercial terms specific to each access provider as part of a broader public inquiry process for an access determination relating to a declared service. It is not clear that the resources of the Commission would be more efficiently employed by attempting to deal comprehensively with the unique position of all access providers in a single process rather than allowing access providers to offer individual terms in a separate undertaking for consideration by the Commission. The blunt 'one system for all' approach is unusually narrow and inflexible and fails to recognise the disparate operational landscape and commercial context for these matters – seen for instance in the differences between FOXTEL and telecommunications carriers generally.

Once an upfront access determination is in force, the Commission would be under no duty to consider whether to vary the access determination even if requested to do so by an access provider.⁵⁶ Gaps in an access determination or a change of circumstances could require additional or different terms or conditions to apply to a particular access provider after the access determination has been finalised. FOXTEL submits that ordinary access undertakings would be an appropriate mechanism to deal with this situation, having regard to both regulatory certainty and the administrative resources of the Commission.

The Commission would still decide whether to accept an ordinary undertaking offered by an access provider or to reject it and allow the access to the relevant declared service continue to be governed by the access determination.

FOXTEL has similar concerns about the removal of ordinary exemptions under s152AS,⁵⁷ and considers that no harm would result from retaining the option of ordinary exemptions and where no adequate explanation for the removal of such exemptions has been offered.

4. Regulation of Access to Content

In FOXTEL's submission to the DBCDE in response to the Government's Discussion Paper "National Broadband Network: Regulatory Reform for the 21st Century Broadband" (**Discussion Paper**), FOXTEL was concerned the Government might be minded to introduce a legislative regime that would prohibit exclusive arrangements in relation to access to content. This proposal was discussed in the context of Telstra however the Discussion Paper noted that it "could apply to any number of market players". FOXTEL strongly disagrees with the need for any regulatory intervention in relation to access to content and believes that Part IV of the TPA (in particular sections 45, 46 and 47) together with Part XIB are sufficient to deal with any issues of market power and anti-competitive

⁵⁵ Under the proposed s152BC(5) of the TPA.

⁵⁶ Proposed s152BCN(5) of the TPA.

⁵⁷ Repealed by Item 93 of the Draft Bill.

conduct. FOXTEL submits that any legislative regime in relation to access to content will constitute an inappropriate interference with the economic rights of rights holders and content providers and will ultimately undermine the value of such rights.

FOXTEL again thanks the Committee for the opportunity to make these submissions. If you have any further queries in relation to this submission, please contact Lynette Ireland, FOXTEL's Director of Legal and Business Affairs on 02 9813 7600 or Adam Suckling, FOXTEL's Director of Corporate Affairs and Policy on 02 9813 7593.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Kim Williams', written in a cursive style.

Kim Williams AM
Chief Executive
FOXTEL