



26 May 2015

General Manager  
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The Treasury  
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By email to [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

Dear Sir/Madam

### **Competition Policy Review Final Report**

Foxtel appreciates the opportunity to comment on the Competition Policy Review Final Report dated March 2015 (the **Final Report**).

Foxtel supports the goal of ensuring that Australia's competition laws are as clear, simple and easy to understand as possible, so that they are accessible to those they impact. A competition law that is clear, predictable and reliable, and therefore avoids unnecessary uncertainty, will benefit Australian businesses and consumers alike.

Foxtel welcomes the Final Report and many of its recommendations aimed at simplifying the *Competition and Consumer Act 2010 (CCA)*. Foxtel believes that the recommendations in the Final Report in relation to matters such as third line forcing (recommendation 32), the removal of the exclusionary provisions (recommendation 28) and authorisation and notification (recommendation 38) have the potential to procure better commercial outcomes and significantly improve the efficient operation of Australia's competition laws.

However, some recommendations contained in the Final Report require careful consideration by the Government or should not be acted upon. These recommendations are the focus of Foxtel's submission.

### **Recommendations 6 & 7 – Intellectual Property Review & Exception**

Foxtel was surprised that the Competition Review Panel (the **Panel**) identified Australia's IP rights regime as a priority area for review in its Draft Report dated 22 September 2014 (the **Draft Report**) and its Final Report. In the Final Report, the Panel has recommended that the Productivity Commission (or other independent body) conduct a 12 month overarching review of intellectual property. The Panel has suggested that such review should focus on '*competition policy issues in*

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*intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements*<sup>1</sup>. In the Final Report, the Panel has also recommended a separate review in relation to the Government's processes for establishing negotiating mandates for intellectual property provisions in international trade agreements.

While Foxtel is not opposed to an inquiry being instituted in relation to intellectual property issues associated with the negotiation of international trade agreements, Foxtel is of the view that the case for a broader intellectual property review has not been made out.

As Foxtel submitted in response to the Draft Report, Foxtel does not agree with the Panel's premise that there are competition issues arising from new developments in technology and markets. It is as a result of the '*disruptive technologies*'<sup>2</sup> identified by the Panel that Australians have never had more choice and flexibility with respect to content services. Foxtel's experience as a participant in the Australian markets for the acquisition and supply of audiovisual content has been that the relevant markets are highly competitive and are operating effectively. Foxtel does not believe, insofar as it relates to the supply and acquisition of audiovisual content, that there are any competition issues associated with new developments in technology and markets.

In addition, given that the ALRC inquiry into Copyright and the Digital Economy was only completed in February 2014<sup>3</sup> and the Government has subsequently separately consulted on various proposals in relation to online copyright infringement<sup>4</sup>, another inquiry focussed on copyright at this time is unnecessary.

Accordingly, if the Government accepts the Panel's recommendation to conduct an intellectual property review, Foxtel submits that the Government should precisely identify the competition issues that it believes require examination, and that copyright and audiovisual content markets should not form part of that inquiry.

Foxtel also submits that the proposed repeal of section 51(3) of the CCA should be referred to any independent review that is instituted by the Government, so that any unintended consequences of repealing section 51(3) can be considered.

## **Recommendations 27 – Cartel Conduct Prohibition**

Foxtel agrees with the Panel's observation that the cartel provisions are '*excessively complex*' and that, given the potential from criminal sanctions, '*the provisions ought to be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility*'<sup>5</sup>.

Foxtel therefore supports recommendation 27 relating to the simplification of the prohibitions against cartel conduct, including a broadening of the exemption for joint ventures.

One aspect of recommendation 27 that Foxtel submits requires careful consideration by the Government is the recommendation to introduce a new exemption for trading

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<sup>1</sup> Final Report, page 41.

<sup>2</sup> Final Report, page 100.

<sup>3</sup> The Copyright and the Digital Economy Final Report is dated 30 November 2013 and was publically released by the Government in February 2014.

<sup>4</sup> For example, the Government's Online Copyright Infringement Discussion Paper dated July 2014.

<sup>5</sup> Final Report, page 58.

restrictions imposed in connection with the supply or acquisition of goods or services. The Panel believes that *'a broader exemption should be included in the cartel laws to ensure that vertical supply restrictions are assessed under a substantial lessening of competition test rather than a per se prohibition'*<sup>6</sup>. Foxtel agrees.

Foxtel urges the Government to ensure that the drafting of the proposed new trading restriction exemption is broader than the current exemption for section 47 and covers all forms of vertical conduct (including those that currently fall outside the scope of section 47). Foxtel believes that a sufficiently broad exemption should be the aim irrespective of whether the Government accepts the Panel's recommendation to repeal section 47.

### **Recommendation 29 – Price Signalling**

As Foxtel has previously outlined, Foxtel is not opposed to the Panel's recommendation that the 'price signalling' provisions of the CCA should be repealed.

However, Foxtel does not support the proposed extension of section 45 to so-called 'concerted practices'. The Panel describes a concerted practice as *'a regular and deliberate activity undertaken by two or more firms'*<sup>7</sup>. As Foxtel submitted in response to the Draft Report, it is not clear to Foxtel how this will practically and meaningfully differ from an 'understanding' for the purposes of section 45.

Foxtel believes that the current application of section 45 to 'contracts, arrangements and understandings' is sufficiently certain and appropriately broad in scope. In the absence of any clear evidence as to the need to extend section 45, Foxtel submits that the Government should avoid introducing uncertainty into section 45 by extending its scope to also cover an untested concept of 'concerted practices'.

### **Recommendation 30 – Misuse of Market Power**

Foxtel is strongly opposed to the recommendations in the Final Report in relation to misuse of market power. Foxtel does not agree with the Panel that section 46 'is deficient in its current form'<sup>8</sup>.

As the Panel has acknowledged, the vast majority of previous competition inquiries have found that the misuse of market power provisions of the CCA should not be subject to an effects test. However, the Panel has recommended that section 46 be amended by, among other matters, the introduction of an effects test.

In Foxtel's view, there is a real risk that the introduction of an effects test into section 46 of the CCA will lead to section 46 becoming a de facto prohibition on firms with substantial market power using their market power, rather than only preventing them from misusing their market power. Foxtel is concerned that the uncertainty of the effect or likely effect of engaging in certain conduct will be extremely difficult to advise upon and will therefore have the practical effect of deterring firms with substantial market power from engaging in pro-competitive conduct.

Foxtel agrees with the Panel that *'[o]ur competition law must ensure that market participants, big and small, can compete in a way that allows the most efficient and*

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<sup>6</sup> Final Report, page 365.

<sup>7</sup> Final Report, page 370.

<sup>8</sup> Final Report, page 9.

*responsive players to thrive*<sup>9</sup>. However, for the reasons explained above Foxtel's view is that if recommendation 30 is implemented it is likely to deter consumer-enhancing efficient conduct and therefore have the opposite effect to that desired by the Panel.

Foxtel also does not believe that the Panel's recommended changes to section 46 are consistent with the Panel's aims of clear, predictable and reliable competition law. Instead of the defence proposed in the Draft Report, the Panel has recommended that the legislation should direct the Court to have regard to two factors, which are essentially the extent to which the relevant conduct is pro-competitive and the extent to which that conduct is anti-competitive. However, no guidance is provided as to how these two factors should be balanced, which will no doubt lead to sufficient uncertainty and inconsistency in application, while at the same time failing to clearly exclude the pro-competitive conduct which the Panel has acknowledged will be inadvertently caught by their proposed form of section 46.

The Panel claims that '*competition policy should... establish competition laws and regulations that are clear predictable and reliable*'<sup>10</sup>, but unfortunately, while many of the recommendations in the Final Report reflect this objective, recommendation 30 does not. Foxtel therefore urges the Government to refrain from implementing the Panel's recommendations with respect to misuse of market power. In particular, there is a real risk that introducing an effects test will deter firms with substantial market power from engaging in pro-competitive conduct, which is in the best interests of Australian consumers. To avoid this, it is critical that the requirement for an anti-competitive purpose is retained as a mandatory aspect of a section 46 breach.

### **Recommendation 31 – Price Discrimination**

In relation to price discrimination, the Panel has declared that it '*supports moves to address international price discrimination through market solutions that empower consumers... [including] ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods*'<sup>11</sup>.

This appears to be a thinly veiled support for the circumvention of geo-blocks. This is of huge concern to Foxtel. Geo-blocking and technological protection measures of this nature are of critical importance in the media industry and any attempt to assist or encourage Australians to circumvent geo-blocks will have a real impact on Australian media organisations and the Australians that they employ.

As Foxtel explained in response to the Draft Report, any attempt by the Government to assist Australians to circumvent geo-blocks will damage the Australian businesses that invest in Australian content, create Australian jobs and pay tax in Australia. A 2012 study from PricewaterhouseCoopers for the Australian Copyright Council reported that Australia's copyright industries employ 900,000 people (around 8 per cent of the Australian workforce) and generate more than \$90 billion annually, including \$7 billion in exports (equal at that time to 2.9 per cent of total exports).<sup>12</sup> The Australian STV sector invests more than \$600 million annually in Australian content and in 2012–13, the Australian STV sector supported a record 267,391 hours of Australian programming,

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<sup>9</sup> Final Report, page 27.

<sup>10</sup> Final Report, page 7.

<sup>11</sup> Final Report, page 63.

<sup>12</sup> PricewaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries – 1996–97 to 2010–11, 2012 (PwC Report)* – available at <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>.

and employed 6,600 people.<sup>13</sup> The sector is estimated by Deloitte Access Economics to have made an overall direct contribution to the Australian economy of \$1.6 billion.

Geo-blocking enables Foxtel and its co-producers in a premium programme like Wentworth, to determine the territories in which the programme is licensed for distribution, the terms on which it is distributed and the price at which it is licensed. Geo-blocking is therefore a critical tool in ensuring that Australian content creators obtain a fair return on their substantial investments.

Moreover, digital media services that are legitimately available in overseas jurisdictions, but are not accessible in Australia without use of a virtual private network, are typically not available in Australia because the distributor of the service has not acquired the necessary rights to distribute content in Australia. It will usually be a breach of the overseas service provider's terms of service to access the service in Australia, and in this sense, consumers will never be able to take 'lawful steps' to access the service in Australia as the Panel has proposed.

The Government will also fail to collect any taxation revenue where a foreign service which is not available in Australia is accessed by an Australian consumer using a virtual private network.

Accordingly, Foxtel is extremely concerned by the Panel's apparent support for the circumvention of geo-blocks and urges the Government to distance itself from the Panel's recommendations in this regard.

### **Recommendation 33 – Exclusive Dealing Conduct**

If the Panel's proposal in relation to misuse of market power is accepted, the Panel has recommended that section 47 should be repealed. If the changes to misuse of market power are not introduced then the Panel's recommendation is that section 47 should be simplified.

While Foxtel does not support the Panel's recommendations in relation to misuse of market power, Foxtel wishes to note that it supports in principle the Panel's recommendation that section 47 should be amended and simplified. Furthermore, Foxtel considers that the Government should consider repealing section 47 even if it does not adopt the Panel's section 46 proposal.

The Panel has correctly identified the major deficiencies with the current form of section 47; it is complex and difficult for a business person to read and understand and, notwithstanding its complexities, it is not comprehensive<sup>14</sup>. As Foxtel submitted in response to the Draft Report, Foxtel's experience has been that the current exclusive dealing provisions in section 47 are very technical and complicated. There does not appear to be a valid reason why some forms of vertical conduct currently fall within section 47, while vertical conduct that falls outside the scope of section 47 will be tested under section 45 of the CCA.

While it will clearly be an improvement for all forms of vertical conduct to come within the scope of section 47, Foxtel believes that the simplest option may be for section 47 to be repealed in its entirety, provided that the new exemption to the cartel provisions

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<sup>13</sup> Australian Subscription Television and Radio Association Media Release, *Subscription TV invests record \$707 million in Australian content*, 7 October 2013.

<sup>14</sup> Final Report, page 375.

proposed by the Panel (recommendation 27 discussed above) is sufficiently broad. In the event that the Government elects to retain section 47, Foxtel urges the Government to adopt the Panel's simplification recommendation and ensure that the drafting of amended section 47 is sufficiently broad to capture all forms of vertical conduct.

### **Recommendation 34 – Resale price maintenance**

The Panel has recommended that resale price maintenance remain subject to a competition test. While the Panel's recommendation relating to notification of resale price maintenance would be an improvement on the status quo, Foxtel remains of the view that resale price maintenance should be subject to competition test.

As Foxtel submitted in response to the Draft Report, there are clear consumer benefits that may arise where resale price maintenance that is not anti-competitive is permitted. Amending the resale price maintenance provisions to introduce a competition test will have no impact on inter-brand competition and will only potentially limit price competition between distributors of the same manufacturer's product. Depending on the nature of goods and services being distributed, competition between distributors on the basis of price only may mean that other aspects of the customer experience are overlooked. Setting a minimum retail price could facilitate competition between distributors on the basis of non-pricing aspects of distribution, such as the level of service provided to Australian consumers.

Given that the Panel has recommended that third line forcing should cease to operate as per se prohibition (which Foxtel strongly supports), if implemented this would mean that resale price maintenance would be the only form of conduct that is traditionally considered less serious that would remain a per se prohibition. It is also worth noting that many jurisdictions around the world (including the United States) no longer treat resale price maintenance as a per se prohibition.

For these reasons, Foxtel believes that the Government should introduce amendments to the CCA to provide that resale price maintenance will only breach the CCA where it has a purpose, effect, or likely effect of substantially lessening competition.

### **Recommendation 35 – Mergers**

As part of its recommendation 35, the Panel has made two recommendations in relation to the timeliness of merger administration processes; firstly, that there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process and secondly, that the formal process involve strict timelines that cannot be extended without the consent of the merger parties.

Foxtel welcomes these aspects of recommendation 35, as Foxtel's experience has been that the Commission's informal merger clearance process is time consuming, expensive and uncertain. Foxtel agrees with the Panel that *'the public interest is served by timely merger decisions and by transparency in the public administration of the merger law'*<sup>15</sup>.

The Panel has also made recommendations regarding the streamlining of the Commission's formal merger clearance process, with its *'unnecessary restrictions and*

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<sup>15</sup> Final Report, page 326.

*requirements*<sup>16</sup>, and the Competition Tribunal authorisation process, Foxtel does not support this aspect of recommendation 35.

As Foxtel has previously stated, Foxtel believes that there is merit in retaining a revised formal merger clearance process separately from the Competition Tribunal authorisation process. By all accounts, the Competition Tribunal authorisation process is working well (and extremely efficiently) in its current form and the Government should therefore avoid intervening or making changes to its operation. By way of contrast, the formal clearance process has yet to be utilised by a single prospective merger party, and Foxtel submits that this should be the focus of the Government's attention. Foxtel would welcome any changes to the formal process which result in a simpler and more transparent and efficient formal clearance process.

#### **Recommendation 40 – Section 155 Notices**

The last matter on which Foxtel wishes to comment is aspects of the Panel's recommendations in relation to the ACCC's powers under section 155 of the CCA.

The Panel has recommended that section 155 of the CCA should be amended to provide a defence for respondents who have undertaken a reasonable search. Foxtel supports the principle behind this recommendation and believes that the 'reasonableness' qualification should be introduced as a matter of law, rather than by way of guidelines.

Foxtel also welcomes the Panel's recommendation that the ACCC should review its guidelines on section 155 notices '*having regard to the increasing burden imposed by notices in the digital age*'<sup>17</sup> and the Panel's finding that '*the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated*'<sup>18</sup>. Foxtel believes that the Government should give consideration to enshrining such responsibility within the text of section 155 itself.

One aspect of recommendation 40 that is of concern to Foxtel is the proposed extension to the Commission's section 155 powers to the investigation of alleged contraventions of court-enforceable undertakings. In Foxtel's experience, the issuing of a section 155 notice is likely to involve searching hundreds of thousands of documents, each of which must be reviewed for privilege and confidentiality, at a great time cost and expense. The issuing of a section 155 notice to obtain access to documents should therefore be a last resort which is used by the Commission only where a party is not cooperating with the ACCC and the ACCC has no other tool available.

However, in Foxtel's experience a Court-enforceable undertaking will invariably contain audit and reporting obligations which compel the party to the undertaking to produce information and documents to the Commission (and in some cases, a third party independent auditor). In such circumstances, Foxtel believes that the proper avenue is for the ACCC to issue proceedings and utilise the Court-supervised discovery and subpoena processes, if the Commission suspects that a party is in breach of its undertaking.

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<sup>16</sup> Final Report, page 333.

<sup>17</sup> Final Report, page 71.

<sup>18</sup> Final Report, page 419.

In closing, Foxtel welcomes and strongly supports the Final Report and its recommendations, subject to the comments outlined in this letter. Foxtel urges the Government to move to implement the recommendations of the Final Report (with the suggested amendments outlined above) as soon as possible, so that the economic benefits envisaged by the Panel for Australian businesses and consumers alike can be realised.

Yours sincerely



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