COMPETITION POLICY REVIEW

FOXTEL RESPONSE TO THE ISSUES PAPER

JUNE 2014

INTRODUCTION

Foxtel welcomes the opportunity to make a submission to the Competition Policy Review (**Review**) in response to its Issues Paper dated 14 April 2014 (**Issues Paper**). Foxtel agrees with the Review Panel that '*an effective competition law…should provide a high quality, enabling environment for business*'[1].

Technology-based markets are constantly evolving. With more platforms and devices available to consumers, companies are looking for new and innovative ways of delivering content, products and services.

As one of Australia's most progressive and dynamic media companies, Foxtel's view is that the current market for the acquisition of audiovisual content is highly competitive and operates effectively, subject to the restrictions of the anti-siphoning scheme applying to live sports. There are an increasing number of competitors in the Australian market seeking larger quantities of content for a greater number of delivery channels than previously available. While Foxtel produces some of its own content (for its own use and/or supply to other companies under commercially negotiated arrangements), it acquires audiovisual content in competition with other entities, many of whom have international operations and are very well-resourced.

Foxtel's submission does not respond to every question in the Issues Paper. It is focussed on the following key issues:

1. Markets.
2. Mergers.
3. Third-line forcing.
4. Resale price maintenance.
5. Misuse of market power.

Foxtel's experiences in a changing, increasingly competitive entertainment environment inform its submissions to the Review.

[1] Issues Paper, page 1.

EXECUTIVE SUMMARY

In this submission, Foxtel submits that:

- the definition of 'market' in section 50(6) of the *Competition and Consumer Act 2010* (**CCA**) should be amended to recognise that Australian mergers take place in the context of global markets;
- the ACCC's informal merger clearance process is costly, uncertain and time-consuming;
- to enhance transparency, efficiency and regulatory certainty for industry, a timetable for informal merger reviews should be introduced;
- the Commission's information gathering powers under section 155 of the CCA should be limited in relation to merger clearances and the Commission should amend its section 155 guidelines to recognise that these powers will be used differently depending upon the context;
- there is no justification for third-line forcing operating as a per se offence while other forms of exclusive dealing are subject to a competition test;
- consideration should be given to whether resale price maintenance should continue to operate as a per se offence;
- the regulatory burden on business could be quickly and easily lessened by amending the third-line forcing and resale price maintenance provisions to introduce a competition test; and
- the misuse of market power provisions of the CCA should not be amended to introduce an effects test.

1. MARKETS

Given structural changes in the economy over time, do the definitions of 'market' in the CCA operate effectively, and do they work to further the objectives of the CCA?

Given the rise of the global digital economy, Foxtel submits that the definitions of 'market' in the CCA are no longer operating effectively.

Under section 4E of the CCA, 'market' currently means a market in Australia. Similarly, in the context of mergers, 'market' as currently defined in section 50(6) of the CCA, means (at its broadest) a market for goods or services in Australia

However, there is no question that in the digital economy, Australian firms operate in a global marketplace and face ever increasing pressure from overseas competitors, particularly in the context of media where the internet has introduced many new opportunities. It is critical that the definition of market is broad enough to take into account global markets and the potential of competition from international players.

As the Review Panel has noted:

> Increasing globalisation will expose more parts of the economy to international competition, putting pressure on local firms to be more competitive… For instance, the spread and penetration of new digital technologies means that new products and markets have emerged, often expanding beyond conventional geographic boundaries, which have increased choice for consumers and allowed small, agile often distant firms to compete with large, local incumbents.[2]

In the context of mergers, a market will clearly appear more concentrated when viewed only in the context of Australia. Examining a merger solely in the context of a market in Australia may also mean that proper regard is not given to the potential entry of an international supplier.

As such, Foxtel believes that the definition of 'market' in section 50(6) of the CCA should be amended to recognise that Australian mergers take place in the context of global markets. This approach should extend to all sections of the CCA that require an assessment of the relevant market.

[2] Issues Paper, page 2.

2. MERGERS

Do the mergers provisions of the CCA operate effectively, and are they being applied effectively by regulators and the Courts?

Do the mergers provisions of the CCA operate effectively?

Subject to Foxtel's comments set out in section 1 above in relation to the definition of 'market' in section 50 of the CCA, Foxtel's view is that the mergers provisions of the CCA are generally operating effectively.

Are the mergers provisions of the CCA being applied effectively by regulators and the Courts?

The Review Panel has been asked to consider whether '*the operations and processes of regulatory agencies are transparent, efficient, subject to appropriate external scrutiny and provide reasonable regulatory certainty*' [3] and whether '*administration and enforcement of competition laws is being carried out in an effective, transparent and consistent way*'[4].

Foxtel submits that some aspects of the ACCC's merger clearance processes could operate more effectively and be enhanced to improve transparency, efficiency and regulatory certainty for industry.

Uncertain timeframes

The ACCC's informal review of Foxtel's acquisition of Austar commenced on 26 May 2011. At that stage, although it could not be predicated with any certainty Foxtel anticipated that competition clearance from the ACCC could be obtained within six months and that the transaction would complete in 2011 (subject to satisfaction of the other conditions precedent).

However, the Commission's informal review of the merger was not concluded until 10 April 2012, following the Commission's acceptance on 9 April 2012 of a section 87B undertaking from Foxtel. The transaction swiftly proceeded after the Commission's announcement that it would not oppose the transaction, and completion of the Foxtel – Austar merger occurred on 23 May 2012, just six weeks after the Commission's acceptance of the section 87B undertaking.

[3] Review Terms of Reference, section 3.2.

[4] Ibid, section 3.4.2.

The Commission's mergers register records the informal review of Foxtel's acquisition of Austar as taking 106 review days to complete (being the total business days less public holidays and time during which the review was suspended)[5], but the reality is that Foxtel was extensively engaged with the Commission for close to a full calendar year.

Even at 106 review days (or approximately 21 weeks), this timeframe is not unusual for the length of an informal merger clearance. The Commission's recently updated Informal Merger Review Process Guidelines that were issued in September 2013 indicate that a "typical duration" for a merger where a statement of issues is issued will be anywhere from 16 to 30 weeks[6].

Foxtel worked cooperatively with the ACCC throughout the Austar merger clearance process and believes that the Commission and its staff acted professionally and in good faith in all of Foxtel's dealings with them. However, the fact that a merger could take almost a year to go through the Commission's informal clearance process is clearly a serious impediment to merger activity in Australia. As a relatively small economy, Australia's markets are increasingly concentrated and as they further consolidate, it is likely that more and more mergers will be considered "complex" (to use the terminology adopted by the Commission in its Guidelines).

In most instances, however, a competition clearance timetable of up to one year will simply not be feasible; it is clearly a significant period of time for a target company to have to await a decision. This extended uncertainty has negative impacts on the ability of target companies to plan for their future, delays the flow-on benefits to customers that can be achieved by a merger (such as lower prices that can arise from the economies of scale realised by combining two companies) and affects certainty and morale for staff. Time delays also affect the cost and certainty of the proposed funding arrangements for an acquisition. Moreover, where a target company is a "failing firm", extended delays are likely to place significant financial pressure on the target and may ultimately lead to the target becoming insolvent before approval is obtained. For these reasons, Foxtel's view is that the current merger clearance regime in Australia would significantly benefit from a shorter clearance timeframe.

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[5] See the ACCC's merger register in respect of Foxtel's proposed acquisition of Austar United Communications Limited, available at http://registers.accc.gov.au/content/index.phtml/itemId/1044881/fromItemId/751043

[6] ACCC, *Informal Review Process Guidelines,* September 2013, page 4, available at http://www.accc.gov.au/system/files/Merger%20Review%20Process%20Guidelines%20-%2026%20September%202013_0.pdf

Shorter timeframes could be achievable

The Commission's formal merger clearance process, which has been available since 1 January 2007 but has yet to be utilised, does include clear statutory timelines. However, the formal merger clearance process is a public one requiring disclosure of all submissions, which may not be appropriate in the context of a merger. It is worth noting that if the Commission does not make its decision within the proscribed time period of 40 business days, the proposed transaction is deemed to be opposed.

By contrast, where a merger party has grounds to approach the Competition Tribunal for authorisation of a merger due to public benefits, the current legislative framework provides that the Competition Tribunal must make a decision within 3 months of an application being lodged.

It appears that the Competition Tribunal authorisation process is working well and extremely efficiently. For example, on 29 November 2013, Murray Goulbourn Co-operative Co Limited filed an application for authorisation in respect of its proposed acquisition of Warrnambool Cheese and Butter Factory. Despite only being instituted very late in the previous month, on 9 December 2013 Mansfield J directed that the hearing of the proceeding commence on 10 February 2014 for a hearing of not more than 5 days.[7] Similarly, AGL filed an application for authorisation in respect of its proposed acquisition of Macquarie Generation on 24 March 2014 and the substantive hearing in that matter commenced on 2 June 2014.[8] Conditional authorisation was granted by the Tribunal on 25 June 2014, just three months after the proceeding was instituted.[9]

The informal merger clearance process is onerous, costly and time consuming

Foxtel's experience has been that the Commission's informal merger clearance process is extremely time consuming and expensive with respect to compiling and providing information to the Commission.

In the Foxtel – Austar merger, hundreds of hours of senior management time (both on Foxtel's side and Austar's side) were dedicated to responding to inquiries from the Commission. As

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[7] Directions of Mansfield J in ACT 4 of 2013 made on 9 December 2013, available at http://www.competitiontribunal.gov.au/authorisations/act-4-2013/ACT-4-2013-sealed-directions.pdf . This proceeding was withdrawn on 23 January 2014 prior to the commencement of the hearing.

[8] See generally http://www.competitiontribunal.gov.au/authorisations/#list.

[9] http://www.accc.gov.au/media-release/accc-disappointed-by-tribunal-decision-authorising-agl-to-acquire-macquarie-generation

these inquiries spanned the duration of the Commission's ten and half month process, they impacted senior management of both companies for a significant period of time.

Extensive submissions, witness statements and expert evidence was submitted to the Commission, together with thousands of documents, each of which had to undergo a privilege and confidentiality review before being provided to the Commission.

In addition to the indirect costs that both Foxtel and Austar incurred in the lost senior management and staff time that was focussed on this process, Foxtel engaged the assistance of external legal advisors and the legal costs that Foxtel incurred throughout the ACCC review process were very significant.

Recommendation

Foxtel submits that revised and improved informal merger clearance processes will assist Australia's regulatory framework to foster a productive and cost-minimising interface between the regulator and industry that is transparent, simple and efficient and provides reasonable regulatory certainty. A more streamlined merger process will enable efficient growth and investment and improve Australian industry's domestic and international competitiveness – which is which ultimately in the best interests of Australian consumers.

In particular, Foxtel believes that the Review Panel should recommend that the Commission amend its Informal Merger Review Process Guidelines to include definite timeframes for the completion of merger clearances, so that prospective merger parties have clear timeframes to work to when devising a transaction timetable. Consistent with the current authorisation process by the Competition Tribunal, Foxtel's view is that a three month review period should be achievable, with a possible extension in exceptional cases for a maximum of a further three month period.

This would provide Australian businesses with reasonable certainty as to the duration of the impact of the clearance process on their operations. A further benefit of having a strict timetable in place is that costs—for both parties seeking clearance and the ACCC—are likely to be lessened given a shorter (or at least, more certain) timetable.

Foxtel also believes that there is scope in the context of merger clearances to limit the Commission's powers under section 155 to matters directly relevant to the inquiry at hand. While Foxtel appreciates that a broad regulatory information gathering power is appropriate in

relation to cartel conduct, the Commission's informal merger review process is a voluntary one and therefore the merger parties are likely to cooperate with the Commission as it undertakes its inquiries. However, the issuing of a broadly worded section 155 notice to the merger parties 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 (to both the merger parties and the Commission).

Given the onerous nature of section 155 notice and the serious consequences of non-compliance, Foxtel also recommends that the ACCC update its guidelines in relation to section 155 of the Act to set out the ACCC's current approach to using its statutory information gathering powers in different contexts. For example, a section 155 notice issued in the context of a cartel investigation would be expected to be much broader and involve interviews as compared to a section 155 investigation in relation to a merger.

In addition, Foxtel believes that transparency in respect of the Commission's decisions in relation to mergers could be improved by the Commission providing merger parties with clear reasons and the basis on which it proposes to make its decisions, so that merger parties have access to the information and analysis on which the Commission proposes to make its decision, and an opportunity to respond to such information and analysis, prior to the Commission making its final decision.

In Foxtel's view, these suggested improvements to the informal merger review process strike the right balance between protecting competition and Australian consumers, while at the same time creating incentives for business and facilitating an agile process which is transparent, efficient, and reasonably certain.

3. THIRD LINE FORCING

Do the provisions of the CCA on third line forcing operate effectively and do they work to further the objectives of the CCA?

The terms of reference for the Review state that a key area of focus is to '*examine the competition provisions of the Competition and Consumer Act (Cth) 2010 to ensure that they are driving efficient, competitive and durable outcomes…*'[10].

Foxtel submits that by operating as a per se prohibition, the third-line forcing provisions of the CCA contained in sections 47(6) and 47(7) are hindering, rather than driving, efficient and competitive outcomes.

There appears to be no good reason why third-line forcing is subject to an absolute prohibition while other forms of exclusive dealing are subject to a competition test. The reality is that the vast majority of third-line forcing conduct is beneficial to consumers and therefore pro-competitive. Recent third-line forcing conduct for which Foxtel has obtained authorisation include a two month free subscription to Foxtel's new Presto service for customers who purchase or subscribe to a Telstra service[11], and a discounted subscription to Foxtel, a $50 merchandise voucher and a club branded remote for AFL club members[12]. In each instance, the conduct notified was clearly in the best interests of consumers.

The likely consumer benefits of third-line forcing are clearly evidenced by the extremely few instances in which the ACCC denies immunity to third-line forcing conduct which is notified to it. For example, in 2013 approximately 500 exclusive dealing notifications were reviewed by the Commission and allowed to stand (it is assumed that most of the exclusive dealing conduct notified related to third-line forcing arrangements).[13] One exclusive dealing notification was withdrawn and no notifications were revoked by the Commission.

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[10] Review Terms of Reference, page 1.

[11] Foxtel Management Pty Limited – Notification – N97409, available at http://registers.accc.gov.au/content/index.phtml/itemId/1178611/fromItemId/1133393

[12] Foxtel Management Pty Limited – Notification – N96519, available at http://registers.accc.gov.au/content/index.phtml/itemId/1098477/fromItemId/1107038

[13] ACCC's Exclusive Dealing Notifications Register for 2013, available at http://registers.accc.gov.au/content/index.phtml/itemId/1107038?statusfield=Allowed+to+stand

In this light, it is clear that the prohibition on third line forcing operating as a per se offence is creating an unnecessary regulatory burden on both business and the Commission. The Review Panel has been specifically asked to have regard to '*the need to be mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation*'[14].

It is also worth noting that a key element of Australia's National Competition Policy[15] is that legislation should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs, and

(b) the objectives of the legislation can only be achieved by restricting competition.

Foxtel strongly believes that third-line forcing should not operate as a per se offence and must be made subject to a competition test. It is likely that offers, discounts and rebates that constitute third-line forcing are currently being withheld due to the inconvenience of having to obtain authorisation from the Commission and authorisation not commencing for 14 days post notification. As the Review Panel has noted in the Issues Paper, competition policy reform is also about '*removing regulations and restrictions that may impede competition'*[16].

Foxtel submits that the objectives of the CCA can easily be met through third-line forcing being subject to a competition test. There is no proper basis for third-line forcing continuing to operate as a per se offence and Foxtel urges the Review Panel to make a recommendation in this regard.

[14] Review Terms of Reference, section 1.4.

[15] Issues Paper, page 11.

[16] Issues Paper, page 1.

4. RESALE PRICE MAINTENANCE

Do the provisions of the CCA on resale price maintenance operate effectively and do they work to further the objectives of the CCA?

Foxtel believes that the resale price maintenance provisions of the CCA are also not operating effectively due to their characterisation as a per se offence.

Foxtel submits that the policy rationale for resale price maintenance operating as a per se prohibition, rather than being subject to a competition test, is no longer apparent. One reason often given is that retail price maintenance can facilitate price fixing between distributors. However, this form of cartel conduct is an offence in its own right.

There are 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.

Further, allowing Australian businesses to set a minimum retail price could ensure a fair return on investment in Australian products and services. It should be assumed that Australian businesses are economically rational and will not impose a minimum retail price that the market cannot sustain.

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 submits that the resale price maintenance provisions of the CCA should be revisited. Foxtel recommends that the provisions be amended such that resale price maintenance will only breach the CCA where it has a purpose, effect, or likely effect of substantially lessening competition.

5. MISUSE OF MARKET POWER

Given the structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

Foxtel supports the findings of previous competition inquiries including the Dawson Review, that the misuse of market power provisions of the CCA should not be subject to an effects test. Foxtel does not believe that any structural changes in the economy require this finding to be revisited.

In Foxtel's view, given that the effect of conduct is a matter which is generally outside the control of a party, there is a real risk that the introduction of an effects test into section 46 of the CCA would have the effect of section 46 becoming a prohibition on firms with substantial market power *using* their market power, rather than only preventing them from *misusing* their market power. The uncertainty of the effect or likely effect of engaging in certain conduct is likely to have the practical effect of deterring firms with substantial market power from engaging in pro-competitive conduct which is ultimately beneficial to consumers.

For this reason, it is critical that the section 46 requirement for an anti-competitive purpose to be established is retained. This is also consistent with overseas jurisdictions, which typically require an intent element under monopoly conduct laws.