COMPETITION POLICY REVIEW

FOXTEL RESPONSE TO DRAFT REPORT

NOVEMBER 2014

INTRODUCTION

Foxtel appreciates the opportunity to make a submission to the Competition Policy Review in response to the Panel's Draft Report dated September 2014 (**Draft Report**).

Foxtel welcomes many of the Panel's recommendations set out in the Draft 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. Foxtel particularly supports a number of the Panel's recommendations relating to simplification of the *Competition and Consumer Act 2010* (**CCA**). Foxtel sets out its comments in respect of the key recommendations that Foxtel supports in Part 1 of this submission.

While Foxtel is broadly supportive of many of the recommendations in the Draft Report, there are some that Foxtel does not support or that Foxtel believes require reconsideration by the Panel. Foxtel's comments in respect of these recommendations are the focus of Part 2 of Foxtel's submission.

There are a number of recommendations contained in the Draft Report that Foxtel does not wish to comment on at this stage. These are recommendations 1–6, 9–19, 21, 31–35, and 37–52.

EXECUTIVE SUMMARY

Recommendations supported by Foxtel

Foxtel supports, or partially supports, the following recommendations contained in the Draft Report:

- that the definition of 'competition' in the CCA should be amended to include competition from (relevantly) services supplied or capable of being supplied to Australians by persons outside Australia;
- that the cartel provisions, exclusionary provisions and exclusive dealing provisions of the CCA should be simplified and streamlined;

- that third-line forcing should no longer operate as a per se prohibition and should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition;

- that there should be consultation between the ACCC and industry regarding the timeliness of informal merger review decisions and that the ACCC's formal review process should be substantially reformed. However, Foxtel's view is that further consideration should be given to retaining the Competition Tribunal authorisation process, which is working well in its current form; and

- that section 155 notice recipients should only be required to undertake a reasonable search. Foxtel believes that this qualification should be introduced as a matter of law, together with a legislative direction for the ACCC to frame section 155 notices as narrowly as possible.

Recommendations not supported by Foxtel

Foxtel does not support, or has concerns in relation to, the following recommendations contained the Draft Report:

- that the Productivity Commission or other independent body should conduct an overarching review of intellectual property. Foxtel does not agree that there are competition issues associated with new developments in technology and markets that would warrant such a review, as technological developments have facilitated the entry of many new entrants to the Australian markets for the supply and acquisition of audiovisual content, which are highly competitive;

- that the misuse of market power provisions of the CCA should be significantly amended, including by introducing an effects test and a new defence. Foxtel's view is that intention is a critical element of section 46 liability and 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, and the proposed defence will not redress this;

- that a specific prohibition on price discrimination should not be reintroduced to the CCA. While Foxtel is not opposed to this recommendation itself, Foxtel is strongly opposed to Panel's apparent support for the circumvention of geo-blocks. Geo-blocking and

technological protection measure of this nature are of critical importance in the media industry and any attempt to assist Australians to circumvent geo-blocks will have a real impact on Australian media organisations and the Australians that they employ; and

- that resale price maintenance should continue to operate as a per se prohibition, rather than being subject to a competition test.

1. RECOMMENDATIONS SUPPORTED BY FOXTEL

Recommendation 20 – Definition of market

In its submission in response to the Panel's Issues Paper, Foxtel submitted that the definition of 'market' in the CCA was no longer operating effectively given the rise of the global digital economy.

The Panel has recommended that the current definition of 'market' in the CCA should be retained, but that the definition of 'competition' should be amended to include competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons outside Australia to persons located within Australia. Foxtel is not opposed to this recommendation.

The Panel notes that it has made this recommendation because of '*the importance of ensuring that global sources of competition are considered where relevant*'. In relation to this concern, one area in which global sources of competition are likely to be relevant is mergers. 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. 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, consistent with the Panel's recommendation in relation to the definition of 'competition', Foxtel believes that consideration should be given to whether any corresponding amendments to section 50(3)(a) of the CCA are required, so that there can be no doubt that goods and services supplied, or capable of being supplied, by persons outside Australia must be considered when determining whether a merger substantially lessens completion.

Recommendation 22, 23 and 24 – Cartel conduct prohibition, exclusionary provisions and price signalling

Foxtel supports the Panel's recommendations 22, 23 and 24, in so far as they relate to simplification of the CCA.

As the Panel has observed, '*businesses… expect laws to be clear, predictable and reliable… our competition law must ensure that market participants, big and small, can compete in a way that allows the most efficient and responsive players to thrive*'[1]. Foxtel endorses these comments. A competition law that is clear, predictable and reliable, and therefore avoids unnecessary uncertainty, will benefit Australian businesses and consumers alike.

In this vein, the Panel's draft recommendations 22 and 23, to significantly reduce the complexity of some of the key per se prohibitions in the CCA, are welcomed by Foxtel.

However, Foxtel does not support the proposed extension of section 45 to 'concerted practices'. Foxtel believes that the current application of section 45 to 'contracts, arrangements and understandings' is sufficiently and appropriately broad in scope.

It is also not clear to Foxtel how a 'concerted practice', which the Panel describes as '*a regular practice undertaken by two or more firms*'[2], will practically and meaningfully differ from an 'understanding' for the purposes of section 45.

For these reasons, Foxtel submits that the Panel should give further consideration to this issue and whether the proposed extension to section 45 to 'concerted practices' is really necessary.

Recommendation 27 – Third-line forcing test

In its submission in response to the Issues Paper, Foxtel outlined its view that by operating as a per se prohibition, the third-line forcing provisions of the CCA contained in sections 47(6) and 47(7) have been hindering, rather than driving, efficient and competitive outcomes.

As the Panel has recognised, the vast majority of third-line forcing conduct is beneficial to consumers and therefore pro-competitive. The prohibition on third line forcing operating as a per se offence has created an unnecessary regulatory burden on both business and the

[1] Draft Report, page 20.

[2] Draft Report, page 42.

Commission. It has also not benefitted consumers, as 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.

Foxtel therefore welcomes and strongly supports the Panel's recommendation that third-line forcing should not operate as a per se offence and must be made subject to a competition test. This recommendation has been made many times previously, and it is hoped that Government adopts and implements this recommendation as soon as is reasonably practicable following the Panel issuing its final report.

Recommendation 28 – Exclusive Dealing coverage

Another recommendation in the Draft Report that Foxtel strongly supports is recommendation 28 relating to the simplification of section 47 of the CCA.

Foxtel's experience has been that the current exclusive dealing provisions in section 47 are very technical and complicated.

There also 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. It will clearly be simpler for all forms of vertical conduct to come within the scope of section 47.

Accordingly, Foxtel welcomes recommendation 28. The broadening of section 47 to extend to all forms of vertical conduct is logical and will have no detrimental impact given that exclusive dealing falling with the scope of section 47 will remain subject to a competition test.

Recommendation 30 – Mergers

The Panel considers that '*improvements can be made to the administration of the merger law'*[3]. Foxtel agrees with the Panel that improvements can, and should, be made. For the reasons outlined in Foxtel's submission in response to the Issues Paper, Foxtel's experience has been that the Commission's informal merger clearance process is time consuming, expensive and uncertain.

[3] Draft Report, page 48.

The Panel's specific recommendation in relation to the Commission's informal merger process is that '*there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process*'[4].

While Foxtel welcomes a consultation of this nature, it is imperative that the end result of such consultation results in more certainty for business regarding the expected timing of undertaking a merger clearance via the Commission's informal review process. Specifically, Foxtel believes that the Commission should amend its Informal Merger Review Process Guidelines following this consultation 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. As the Panel has noted, '*the public interest is served by timely merger decisions and by transparency in the public administration of the merger law*'[5].

The Panel has also made recommendations regarding the streamlining of the Commission's '*excessively complex and prescriptive*'[6] formal merger clearance process and the Competition Tribunal authorisation process. Foxtel supports the Panel's recommendations insofar as they relate to the Commission's formal merger clearance process, particularly the recommendation that the formal process should be subject to strict timelines and that the ACCC and the Competition Tribunal should each be allowed a maximum of three months to make their decisions[7].

However, Foxtel's view is that there may be merit in retaining a revised formal merger clearance process separately from the Competition Tribunal authorisation process, which appears to be working well (and extremely efficiently) in its current form. Accordingly, Foxtel recommends that the Panel give further consideration to whether a streamlining of the two processes is necessary, and will facilitate an agile process which is transparent, efficient, and reasonably certain.

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[4] Draft Report, page 49.

[5] Draft Report, page 201.

[6] Draft Report, page 48.

[7] Draft Report, page 203.

Recommendation 36 - Section 155

Foxtel strongly supports the Panel's stated desire to reduce the regulatory burden associated with section 155 notices.

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. Given the onerous nature of section 155 notice and the serious consequences of non-compliance, Foxtel therefore believes that the recommended qualification to section 155 for respondents to undertake a reasonable search should be introduced as a matter of law, rather than by way of guidelines.

In relation to the ACCC's guidelines on section 155, Foxtel 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*'[8]. As Foxtel submitted in response to the Issues Paper, Foxtel believes that as part of such review, the ACCC should update its guidelines to set out the ACCC's current approach to using its statutory information gathering powers in different contexts.

In this respect, Foxtel's agrees with the Panel's observation 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*'[9]. 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 an informal merger clearance, which is a voluntary process in which the parties are likely to cooperate with the Commission as it undertakes its inquiries.

2. RECOMMENDATIONS NOT SUPPORTED BY FOXTEL

Recommendations 7 and 8 – Intellectual Property

Foxtel was surprised that the Panel has identified Australia's IP rights regime as a priority area for review and that it has recommended that the Productivity Commission (or other independent

[8] Draft Report, page 53.

[9] Draft Report, page 53.

body) conduct an overarching review of intellectual property. The Panel has suggested that such review should focus on, among other matters, '*competition policy issues in intellectual property arising from new developments in technology and markets*'[10].

Foxtel strongly disagrees that such a review is warranted and Foxtel does not accept the Panel's premise that there are competition issues arising from new developments in technology and markets. Technology-based markets are constantly evolving and with more platforms and devices available to consumers than ever before, Foxtel's experience as a participant in the markets for the acquisition and supply of audiovisual content has been that the relevant markets are highly competitive and are operating effectively.

There is no doubt that there are an increasing number of participants in the relevant Australian markets seeking larger quantities of content for a greater number of services than ever before, as companies look for new and innovative ways of delivering content, products and services.

For example, in the market for supply of audiovisual content to Australian consumers, Foxtel faces strong competition from:

- the free to air services of the commercial and national broadcasters (including their multi-channels and online 'catch up TV' services);
- Australian subscription video on demand services, including QuickFlix, EzyFlix and Nine and Fairfax's new joint venture, Stan;
- other subscription television providers (eg FetchTV);
- transactional content provided on either a short term rental, pay-per-view, or ownership basis via online stores (eg Apple iTunes, GooglePlay and Amazon Instant Video);
- free online advertising supported sites like YouTube;
- international subscription video on demand services accessed in Australia using a virtual private network to circumvent geo-blocking restrictions (which is discussed below in relation to recommendation 26), including Netflix (which has announced that it will launch an Australian service in March 2015) and Hulu Plus;
- DVD rentals; and
- illegal streaming and downloads of audiovisual content.

[10] Draft Report, page 31.

Many of the above services are recent entrants to the Australian market, which has been facilitated because of technological developments associated with the distribution of content services via the internet. Australians have never had more choice and flexibility with respect to content services and Foxtel does not accept, 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 light of the above, if the Panel proceeds with its recommendation in relation to an intellectual property review, Foxtel submits that the Panel should precisely identify the competition issues that it believes require examination, and that audiovisual content markets should not be one of those matters.

Foxtel also submits that the proposed repeal of section 51(3) of the CCA should be carefully considered and that the proposed repeal should be referred to an independent review.

Recommendation 25 – Misuse of Market Power

As Foxtel submitted in response to the Discussion Paper, 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. However, contrary to the findings of the vast majority of previous reviews, 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 would have the effect of 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.

The Panel appears to have recognised the potential chilling effect of introducing an effects test by also recommending that a new two-limb defence be introduced into section 46. However, Foxtel has a number of concerns regarding the proposed defence.

In particular, the scope of the new defence is unclear and will require testing, at significant time and expense. The requirement that the conduct must have the effect or likely effect of

benefitting the long-term interests of consumers is likely to be particularly difficult to advise on with any certainty. Furthermore, shifting the 'taking advantage' onus of proof from the applicant to the defendant in the manner the Panel has recommended is only likely to exacerbate the chilling effect of introducing an effects test to section 46.

For the reasons explained above, Foxtel 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, and Foxtel urges the Panel to carefully reconsider the impacts of its draft recommendation 25. Foxtel remains of the view that it is critical that the requirement for an anti-competitive purpose is retained as an integral part of section 46.

Recommendation 26 – Price Discrimination

While Foxtel does not wish to comment on the Panel's recommendation that a specific prohibition on price discrimination should not be reintroduced to the CCA, Foxtel was concerned by a number of the Panel's comments in the Draft Report in relation to price discrimination, as geo-blocking and technological protection measures of this nature are of critical importance to Australian digital media businesses like Foxtel.

For the reasons explained below, Foxtel was particularly alarmed by the Panel's comment that:

> …the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include… ensuring that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.[11]

With respect, Foxtel believes that the Panel's apparent desire to assist consumers to circumvent geo-blocks is misguided and dangerous.

To use the example of digital media services that are legitimately available in overseas jurisdictions, but are not accessible in Australia without use of a virtual private network, these foreign services 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 'legal steps' to access the service in Australia given that the such contracts of service will be governed by foreign law.

[11] Draft Report, page 45.

The Panel has observed that '*there would be significant implementation difficulties associated with any attempt to prohibit international price discrimination*'[12]. Foxtel agrees and believes that these comments are equally applicable in respect of any attempt to assist Australian consumers to take steps to legitimately access services which are not licensed for Australia.

Furthermore, what the Panel does not appear to have appreciated is that any attempt to assist Australians to circumvent geo-blocks will have a real impact on the Australian businesses that invest in Australian content, create Australian jobs and pay tax in Australia. Foxtel invests significantly in acquiring, compiling and commissioning content that is designed for Australians, whereas competing foreign services make no investment in Australian stories. In this respect, 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).[13] In 2012–13, the Australian STV sector alone invested $707 million in Australian content, supporting a record 267,391 hours of Australian programming, and employed 6,600 people.[14] The sector is estimated by Deloitte Access Economics to have made an overall direct contribution to the Australian economy of $1.6 billion.

With this contribution in mind, looking at geo-blocking from the perspective of Australian content creators, rather than Australian consumers, demonstrates its importance to Australian businesses operating in the content industry. Screen Australia statistics show that premium Australian drama programs cost, on average, $1.8 million per hour of broadcast material to make.[15] 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 and the terms on which (including price) it is distributed. Geo-blocking is therefore a critical tool in ensuring that Australian content creators obtain a fair return on their substantial investments.

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[12] Draft Report, page 45.

[13] 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.

[14] Australian Subscription Television and Radio Association Media Release, *Subscription TV invests record $707 million in Australian content*, 7 October 2013.

[15] Screen Australia reports that the *'[c]ost per hour for Australian telemovies averaged $1.66 million over the 10-year period 2000/01-2009/10. In 2012/13, the average cost per hour for Australian telemovies was $1.80 million'*. See *Australian TV drama hours produced and costs per hour by format, 2000/01–2012/13* – available at http://www.screenaustralia.gov.au/research/statistics/dramatvdramahoursxformat.aspx#Rab57893. Drama produced as a series with a greater number of episodes can be made at a slightly lower hourly cost (because, for example, sets can be re-used and the cast is employed over a longer period), but such programs typically still cost at least $1 million per hour.

Recommendation 29 – Resale Price Maintenance

While Foxtel believes that 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.

In the Draft Report, the Panel observes that '*market regulation should be as 'light touch' as possible, recognising that the costs of regulatory burdens and constraints must be offset against the expected benefits to consumers*'[16]. As Foxtel submitted in response to the Issues Paper, 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 agrees with), if this recommendation is implemented it 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 Panel should reconsider its draft recommendation and recommend that resale price maintenance will only breach the CCA where it has a purpose, effect, or likely effect of substantially lessening competition.

[16] Draft Report, page 17.