



Supplementary Submission to Government
on the report of the
Australian Competition and Consumer Commission
on Emerging Market Structures
in the Communications Sector

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1. Introduction

This submission by FOXTEL Management Pty Limited on behalf of the FOXTEL Partnership (**FOXTEL**) supplements the primary submission lodged by FOXTEL dated 25 July 2003 in response to the Australian Competition & Consumer Commission's (**the Commission's**) report to Senator Alston, Minister for Communications, Information Technology and the Arts on Emerging Market Structures in the Communications Sector dated June 2003 (**the Report**).

This supplementary submission does not intend to comprehensively respond to the arguments raised by third parties who have lodged submissions with the Government in relation to the Report. Rather, this submission responds to a number of statements and factual inaccuracies which third parties have made in relation to FOXTEL and the subscription television sector generally.

FOXTEL welcomes the opportunity to make this supplementary submission to the Government in relation to the Report as a number of third parties who have lodged submissions have made a number of statements of concern to FOXTEL.

This submission considers statements made in the submissions by:

- Seven Network Limited;
- Broadcast Australia;
- Commercial Television Australia (**CTVA**);
- Meridian Connections Pty Ltd;
- Special Broadcasting Service Corporation (**SBS**); and
- TransACT Communications.

2. Seven Network Limited (*Seven*)

2.1 Reform of subscription television industry

- Seven asserts that the subscription television industry 'requires urgent reform' as there is no effective competition and its current integrated structure denies any prospect of competition developing¹. FOXTEL strongly disagrees with this statement. Leaving the question of competition with open broadcasters, video and DVDs to one side, the subscription sector is more competitive now than at any time in its short history in Australia. There is current competition in subscription television between FOXTEL, Optus and Telstra with Austar in regional areas. There are also new broadband competitors such as TransACT and Neighborhood Cable and a possibility of further new entry by broadband operators taking advantage of FOXTEL's section 87B undertaking to supply its service. Finally, if FOXTEL's analogue and digital access undertakings are accepted by the Commission, there is a potential for new entry by subscription television operators with content using the Telstra cable and FOXTEL cable and satellite STUs.

2.2 'Failure' of Part XIC

- Seven asserts that the Part XIC access rules 'have failed to deliver competition in the pay TV sector'² and that C7's experience of the negotiate/arbitrate model under Part XIC of the Trade Practices Act 1974 (the *Act*) has 'departed significantly from the design'³. Seven points to factors such as challenges to the declaration of the analogue subscription television broadcast carriage service on legal grounds, the fact that it took 'several years' to achieve an interim determination and that compliance with the interim determination was met with a series of technical and legal issues. FOXTEL makes a number of comments about these assertions.
- FOXTEL and Telstra sought to enforce legal rights which they genuinely believed they had as to why they were entitled to refuse access, including that they believed that the Commission's declaration (and its earlier deeming statement) was invalid. Whilst the Federal Court ultimately found that the deeming statement was invalid, it upheld the validity of the declaration. Throughout this process, FOXTEL and Telstra still fully co-operated with the Commission in the arbitrations.
- As soon as those rights were decided by the Full Federal Court in mid-2000, FOXTEL made reasonable commercial offers to carry the C7 channels.
- C7 sought access to all of the services FOXTEL uses to provide its subscription television service, not only the cable and STUs but also the subscriber management system and

¹ Seven Network Limited Submission, ACCC's report on Emerging Market Structures in the Communications Sector, 31 July 2003 (*Seven Submission*) at 2.

² Seven Submission at 2.

³ Seven Submission at 12.

FOXTEL call centre. The purpose of the access legislation is to promote competition by allowing access at a reasonable price to bottleneck facilities. It is not to allow access seekers to have access to all of the services that an existing provider has built up. An access seeker must take some risk and expend some capital in order to commence its own competitive service. C7, however, appears not to want to actually expend any money and invest in its own competitive subscription television service but simply wants to 'free-ride' on the investment FOXTEL has made in building up its subscription television service. Clearly Part XIC was never designed to deliver a 'free-ride' and thereby erode investment incentives.

- In April 2001 the Commission issued an interim determination under Part XIC which gave C7 access to 2 channels on the Telstra cable and access to the FOXTEL STUs in order for it to commence providing a subscription television service. In the working committee set up at the Commission's direction to assist the practical implementation of the interim determination between FOXTEL, Telstra and C7, FOXTEL and Telstra were fully co-operative, convening all meetings and providing the necessary information to C7 to assist it to implement the interim determination.
- However, C7 did not attempt to commence providing its own subscription television service under the interim determination and as far as FOXTEL is aware, took none of the steps necessary for it to do so, such as establishing a customer call centre and a subscriber management system or ordering the necessary equipment. C7 also withdrew from the working committee meetings.
- FOXTEL therefore submits that Part XIC has not 'failed'; rather, C7 failed to take advantage of the interim determination. FOXTEL has now lodged analogue and digital undertakings which, if accepted by the Commission, will promote new entry by subscription television operators with content using the Telstra cable and FOXTEL's cable and satellite STUs.

2.3 Content

- Seven asserts that the FOXTEL partners own 'almost all premium content rights'⁴. FOXTEL rejects this assertion for the reasons outlined below in response to TransACT's submission.

2.4 Satellite

- Seven asserts that the content supply arrangements between FOXTEL and Optus 'deliberately excluded satellite transmission, ensuring that no other pay TV operators compete with FOXTEL'⁵.
- This is incorrect. The Content Supply Agreement between FOXTEL and Optus (**CSA**) did not provide for the licensing of FOXTEL's service to Optus for use on satellite but this did not

⁴ Seven Submission at 6.

⁵ Seven Submission at 6-7.

prevent Optus from providing a subscription television service on satellite using the substantial content it already had or any future content it wished to acquire.

- In addition, FOXTEL's section 87B undertaking to supply network operators with the FOXTEL service extends to cable, satellite and MDS (and ADSL in the future), covering all technologies. Optus is able to take advantage of this offer if it wishes to supply a satellite service with the FOXTEL service.

2.5 Austar

- Seven asserts that Austar is 'effectively a mere franchisee of FOXTEL'.⁶ Such a statement cannot be substantiated. FOXTEL supplies some programming to Austar and FOXTEL and Austar share some infrastructure. However, this does not make Austar a FOXTEL 'franchisee'. Austar licenses most of its programming directly from the channel suppliers – that much of it happens to be common to the FOXTEL programming simply reflects the fact that it is popular programming. Austar has a different pricing and tiering structure to FOXTEL and FOXTEL does not dictate the look, feel and price of the Austar service. Austar also offers other services which FOXTEL does not such as mobile and broadband.

2.6 Optus

- Seven suggests that the CSA 'effectively reduces Optus to a FOXTEL 'clone' and removes incentives for Optus to engage in independent content acquisition'⁷.
- This comment is unsubstantiated. Optus does differentiate its service by having some additional channels in basic and some FOXTEL channels in different tiers to FOXTEL. It is also not correct to assert, as Seven does, that Optus does not have an incentive to acquire content as it must offer any newly acquired content to FOXTEL. Optus must only offer movie and sport channels to FOXTEL, not general entertainment channels. FOXTEL submits that Optus continues to have an incentive to license such channels directly to differentiate its service from FOXTEL's.
- Optus has undertaken to the Commission under section 87B of the Act that it will continue to acquire at least 7 channels directly from sources other than FOXTEL⁸.
- Optus can further differentiate its service by including additional channels as tiers as well as through bundling its subscription television services with other telecommunications services. Optus is also free to price the FOXTEL basic and tiered services at its discretion and the pricing of its service in fact differs to FOXTEL's.
- Seven asserts that Optus has significantly reduced capability as a competitive force in subscription television. FOXTEL strongly disagrees. FOXTEL submits that the CSA has made

⁶ Seven Submission at 9.

⁷ Seven Submission at 9.

⁸ Optus's Section 87B Undertaking dated 21 November 2002, clause 4.

Optus a stronger retail competitor by relieving it of its high programming costs and providing it with more quality content with which to compete with FOXTEL and others, particularly on the basis of its bundled offerings.

2.7 Size of FOXTEL's basic

- Seven suggests that the size and price of FOXTEL's basic package acts as a barrier to entry for content providers and that Australia has the highest entry price for a basic television package in the major international pay television markets⁹.
- This is not correct. The size and price of FOXTEL's basic package is modest compared to many international operators eg EchoStar, DirectTV. Some operators have a 'mini basic' but tiered programming in the digital environment is generally not available as buy-through from the mini basic ie a subscriber must purchase a 'super basic' before it can purchase any additional tiers. Examples of mini basic packages such as this include Cox, Time Warner.
- Seven assumes that tiers will have low penetration. This is not the case: Some FOXTEL tiers have penetration of 50% or above. There is quality programming on tiers internationally eg Cox, Time Warner, DirectTV and EchoStar.
- The size and price of basic will not inhibit take up of tiers. Many externally produced channels are available as tiers as well as internally produced channels (eg Fox Footy; Hallmark; ESPN; The Comedy Channel; The History Channel; and Ovation).
- It is therefore possible for channel providers and access seekers to develop attractive quality programming on tiers (which FOXTEL has done and will continue to do).

2.8 Control of STUs

- Seven states that there is a 'significant risk' of FOXTEL's STUs becoming the 'digital gateway' to the household as¹⁰:
 - digital STUs placed in households by Optus will have to be compatible with FOXTEL's digital pay TV content; and
 - households which have a FOXTEL STU will be highly unlikely to acquire another STU, especially if its provision is not subsidised.
- FOXTEL disagrees that this is the case. Firstly, Optus or any other subscription television service provider may choose its own technology and deploy that technology at its own election, including the broadcasting format of the transmitted content. Secondly, consumers are used to having multiple infrastructures for home entertainment and FOXTEL does not believe that there would be any significant resistance to multiple STUs. There may be reluctance to another STU if it is not in any way subsidised – but this is a commercial decision for the service

⁹ Seven Submission at 10.

¹⁰ Seven Submission at 16-17.

provider and is not linked to whether there is more than one STU. FOXTEL heavily subsidises its STUs in order to drive take-up.

- Seven also states that there are 'fundamental problems' with the Digital Access Agreement and in particular the fact that the Agreement provides that the 'excluded services' relating to FOXTEL's digital STUs include the return path and interactive functionality¹¹. Seven states that access seekers will therefore not be able to distribute interactive services pursuant to the undertaking.
- FOXTEL's Digital Access Agreement does not provide for interactive services as the services are not bottleneck services. It is open to access seekers to negotiate commercially with FOXTEL once interactive services become a reality. As FOXTEL is not seeking an exemption in relation to such services, the Commission could also consider declaring them in the future if it believed it was appropriate.
- Seven also argues that 'FOXTEL retains control over what is known as the Service Information (**SI**) function' and that¹²:

The strategic importance of the control of SI data is very significant. The entity which controls the SI data management effectively controls the 'gateway' to digital and interactive services for all STU customers. All access seekers will be dependent on FOXTEL as the controller of the SI services. This is crucial because there will be no commercial incentive for FOXTEL to enter a commercial arrangement with access seekers for the supply of interactive services. It will be in FOXTEL's interests to retain a monopoly.

- This statement misunderstands the technical role of the SI. There can only be one instance of SI per multiplex, therefore one instance of SI per network. (This means that there can only ever be one generator of the SI.)
- FOXTEL has also offered to provide conditional access (**CA**), SI and EPG services to the open broadcasters at no charge to allow a more seamless transition between viewing of open broadcast services than currently exists.
- By contrast, the current open broadcast digital STUs have to scan *each* of the five open broadcast services and build up a static table for *each* of those services within the STU itself, as they have incompatible SI. If anything changes with any of the 5 open broadcaster's services, even minor modifications, then the STU will have to be re-scanned in order to receive the particular service or services which have been modified. This is an inefficient and cumbersome approach. This re-scan has to be initiated by the customer who may never know when it has to perform this function. Rescanning is time consuming and is not customer friendly.
- Under its digital access undertaking, FOXTEL will provide Digital Set Top Unit Services to the access seeker, which includes the provision of CA and SI. The SI services provided by

¹¹ Seven Submission at 17.

¹² Seven Submission at 18.

FOXTEL (generated from the access seeker supplied information) will enable access seeker services to be equally accessed by the FOXTEL subscriber who has elected to receive the access seeker services. The SI cannot operate as a gateway for interactive services as such services will be supplied by the access seeker.

2.9 Multi-channelling

- Seven suggests that 'to address pay TV concerns' with multi-channelling it would support the introduction of free-to-air multi-channelling with a moratorium on subscription services until 2007 (without any content restrictions).¹³ This does not address the concerns of subscription television at all, for the reasons set out in FOXTEL's primary submission.
- Seven also states that the rationale for preventing commercial broadcasters from multi-channelling was to protect the 'fledgling subscription television industry' and the situation has changed dramatically.¹⁴ FOXTEL notes that the key driver behind the prohibition against multi-channelling was to provide a level playing field between commercial television broadcasters and the subscription television sector and the Government was concerned to ensure 'competitive neutrality' between the sectors. In addition, FOXTEL notes that at the time, commercial broadcasters Channel Nine and Network Ten fiercely opposed multi-channelling on the basis that they would be forced to find extra programming to fill air time which would dilute the mass audience that draws advertisers.
- Seven points to various factors which FOXTEL comments on below:
 - *Pay TV generates revenues in excess of \$1.2 billion annually, more than any commercial TV station.* This is neither an appropriate nor proper comparison. Seven is seeking to compare the total subscription television industry revenue against the revenue of one commercial television station. In any event, the commercial broadcasters share a revenue pool in excess of \$2.9 billion¹⁵. In addition, Seven has overlooked the substantial costs incurred by subscription television operators in reticulating programming to their subscribers while commercial broadcasters provide their digital services using gifted public spectrum.
 - *Pay TV is extremely profitable in Australia.* Subscription television is not extremely profitable. The subscription television industry continues to make a loss and is many years away from recouping the large investments its shareholders have made to date.

¹³ Seven Submission at 20.

¹⁴ Seven Submission at 20.

¹⁵ PWC: Australian Entertainment and Media Outlook: 2003-2007, Annual Edition, 2003 at page 24.

¹⁷ Broadcast Australia Submission to DCITA Relating to the ACCC Report on Emerging Market Structures in the Communications Section, June 2003 at 7.

- *Optus is gradually exiting the industry.* Optus is not exiting the industry but for reasons already outlined in FOXTEL's primary submission and in this supplementary submission has become a stronger competitor.
- *News and PBL control all major sports rights.* News and PBL do not control all major sports rights, particularly considering the anti-siphoning regime which in effect gives all the power in relation to the acquisition of sports rights to the open broadcasters.
- *FOXTEL owns and controls all major movie rights through the Premium Movie Partnership and the CSA.* This is incorrect for the reasons outlined below in response to the submission by TransACT.

3. Broadcast Australia

- Broadcast Australia asserts that it is 'sceptical' of the subscription television industry's arguments against removing the multi-channelling restriction¹⁷. It states that the 7MHz channel represents a finite resource in terms of how many channels can be transmitted simultaneously (particularly with the high definition requirement in place). This is not the case. Spectrum may be dynamically allocated during the course of a full day's transmission and in the absence of a restriction on multi-channelling, open broadcasters would be able to support approximately 5-7 digital channels within the 7MHz of spectrum allocated to them for digital transmission using today's available compression technology. This scenario would have an immediate impact on the subscription television sector (regardless of whether those services were provided on a free or subscription basis).
- In addition, Broadcast Australia asserts that it is reasonable to assume that digital terrestrial television is still considerable lengths from being a widely adopted consumer technology so that subscription television has a number of years to adjust to any impact. FOXTEL submits that this is an erroneous assumption and that multi-channelling (whether on a free or subscription basis) is likely to have an immediate impact on the subscription television sector.
- The reason for the restriction on multi-channelling by the open broadcasters in the first place was to ensure that subscription television had a number of years to mature and grow before being subject to additional competition from the open broadcasters through multi-channelling who were gifted with digital spectrum. This is even more crucial now that subscription television is about to make a significant investment in digital services¹⁸.

4. Commercial Television Australia

- CTVA asserts that the Australian digital television rollout 'is the fastest free to view rollout anywhere in the world and has been achieved with a minimum of disruption to existing

¹⁸ Subject to receiving an exemption from Part XIC currently under consideration by the Commission.

services¹⁹. This is not the case: First, the roll-out is incomplete (for example, in many regional areas, digital services are still not on-air and will not commence, in some areas, until 2005²⁰). Secondly, significant interference from the transmission of the open broadcasters' digital services was experienced by existing services, including subscription television services. For example, FOXTEL subscribers in the Sydney metropolitan area experienced interference from open broadcaster digital services operating in the Wollongong area. Further, FOXTEL subscribers in the Central Coast and Newcastle areas experienced substantial interference from open broadcaster digital services broadcasting via the Mount Sugarloaf transmitter in Newcastle.

- In relation to anti-siphoning, CTVA asserts that subscription television 'has not been disadvantaged' by the current scheme²¹. FOXTEL vehemently rejects this assertion for the reasons set out in its primary submission. There are some factual inaccuracies in CTVA's submission that FOXTEL wishes to point out, however:
 - The Fox Footy Channel does not boast 'of carrying every single NRL and AFL game' as claimed by CTVA²². The Fox Footy Channel only carries AFL programming (which includes 3 live games per week broadcast on a state by state basis with games being broadcast in replay) not NRL programming which is shown on Fox Sports. Fox Sports does show all NRL games (which has never been done by the open broadcasters) and has the right to show 5 out of 7 games live. However, due to the anti-siphoning regime, national coverage of games such as the Grand Final and State of Origin is still not achieved.
 - CTVA claims that 'the overwhelming majority of events on the list are broadcast on free-to-air television, with most shown live'²³. CTVA suggests that FOXTEL's claim that only 35% of listed events are shown by the commercial broadcasters is 'grossly inaccurate' and based on the assumption that there are nearly 7,000 hours on the list. CTVA says that this figure could only be arrived at 'by separately counting every game of every round of tennis in a multi-round event, or every hole of every golfer in every round of a tournament, even where this coverage is not made available by the host broadcaster.' Every game of every round of tennis must be counted as this is how the legislation works – the fact that not all games could be shown by the open broadcasters simply demonstrates that the listing of entire events is unworkable. FOXTEL does not, however, count every hole of every golfer in every round of a

¹⁹ ACCC Report to Senator Alston on Emerging Market Structures in the Communications Sector, Submission by CTVA, 29 July 2003 (**CTVA Submission**) at 6.

²⁰ For example, digital reception details for the Ulladulla area: Southern Cross, WIN and Prime will not commence broadcasting digital services until 2005: www.dba.org.au and www.aba.gov.au

²¹ CTVA Submission at 9.

²² CTVA Submission at 9.

²³ CTVA Submission at 9.

tournament – it begins counting hours at the first tee-off by the first golfer and stops 4 hours after the last tee-off. This is consistent with the legislation.

- CTVA asserts there are only 2,400 total available hours of sport on the list, of which 1800 hours were shown by the open broadcasters, with the majority shown live. CTVA does not include de-listed events such as cricket test matches in New Zealand and overseas one day internationals in 2002 calendar year. In addition, for example, CTVA assumes 100% coverage of golf events (clearly incorrect) and only 7 live hours per day for all tennis Grand Slams except the Australian Open.
- The figures quoted by FOXTEL are calculated in accordance with the legislation and have been audited every year by a major accounting firm.
- CTVA also states that a dual rights regime has been found not to work elsewhere in the world, with sport migrating to subscription television and by subscription television bidding up the price of rights in an effort to obtain de facto exclusivity by making free-to-air coverage of the event uneconomic²⁴. This submission cannot be given any credence. There is no evidence that sport will migrate to subscription television or that subscription television makes bidding for rights by open broadcasters uneconomic. CTVA is deliberately selective in its reference to overseas jurisdictions – equally the example of the US where there is no list could be pointed to where there has been no migration of sport to open broadcast.

5. Meridian Connections

- Meridian Connections says that re-transmission of open broadcast signals by the subscription television operators should be delivered according to the standards and specifications of its owner, the open broadcaster, and should not be scrambled and encrypted by the subscription television operator 'with possible quality changes in the process'²⁵. This is not the case. FOXTEL re-transmits unaltered via cable the programs that are transmitted by the open broadcaster. The broadcast signal of any open broadcaster is not processed by FOXTEL in a manner which will alter or affect the quality of that broadcast signal as transmitted by the open broadcaster and re-transmitted by FOXTEL.
- Meridian Connections also claims that the STU will prevent other subscription television services from connecting to the 'computer'²⁶.

²⁴ CTVA Submission at 10.

²⁵ Emerging Infrastructures, a response to the ACCC document, "Report to Senator Alston, Minister for Communications, Information Technology and the Arts, on Emerging Market Structures in the Telecommunications Sector, June 2003" (**Meridian Submission**) at 4.

²⁶ Meridian Submission at 10.

- The STU's primary purpose is to connect to the television set. In addition, more than one STU can be connected to a television set so that the STU does not need to be disconnected and the cable reconnected with the competitor's STU to allow the television to receive the services of another subscription television provider. Furthermore, consumers may install a switching device which will accommodate multiple devices such as a DVD and games console through the television. STU's may be connected to a computer with a video display card for display of the output of the STU on the computer monitor. If multiple STU's are required then a switch may also be fitted. For example, if both data and television are required from the same carriage service provider, a cable modem may be connected to the same carriage service provider cabling in the home via the splitter, thus allowing simultaneous subscription television and data to be accessed.
- Thus Meridian's statement that the 'prime purpose' of the STU 'is for the operators of the PayTV business to have only their channels and no other PayTV channels (without their permission and by their commercial arrangement) to access to home receiver'²⁷ is fundamentally flawed. Other STUs can be connected to the television to allow subscribers to receive competitors' services. In addition, FOXTEL has undertaken to provide access to its STUs on the terms and conditions set out in its analogue and digital undertakings.

6. SBS

- FOXTEL wishes to make some comments on the arguments put forward by SBS in relation to anti-siphoning:
 - SBS states that the Australian Hardcourt Tennis Championships were covered by SBS in 1996 and 1997 'live and in full'²⁸. FOXTEL understands that SBS showed only 17 hours of live coverage of the Championships in 1996 and 9 hours of live coverage of the Championships in 1997. FOXTEL does not believe that SBS can accurately claim that it broadcast the Championships 'live and in full' as there were 31 singles matches and 15 doubles matches played in each of the 1996 and 1997 Championships over a 7 day period; and
 - SBS does not believe that a dual rights system would be for the public benefit for the following reasons:
 - (i) it is difficult for broadcasters such as SBS to extract commercial value from events for which it has non-exclusive rights;
 - (ii) if exclusivity is abandoned, costs are likely to increase; and

²⁷ Meridian Submission at 11.

²⁸ ACCC Report to Senator Alston, Minister for Communications, Information Technology, and the Arts, on Emerging Market Structures in the Communications Sector, Submission to the Department of Communications, Information Technology and the Arts, Special Broadcasting Service Corporation, August 2003 (*SBS Submission*) at 2.

- (iii) SBS would be priced out of the market for events such as the FIFA World Cup, and such events would migrate to subscription television²⁹.
- FOXTEL wishes to point out that SBS itself chose to continue to broadcast the FA Cup Final in 1996, 1997, 1998 and 1999 even though it was also being broadcast by Fox Sports and has shown the NFL Superbowl in each of the last 3 years simultaneously with ESPN or Fox Sports. Similarly, SBS licenses rights to the English Premier League from Fox Sports although Fox Sports retains the subscription rights and broadcasts the English Premier League on subscription television. It is therefore disingenuous for SBS to assert that open broadcasters will no longer have an incentive to show live rights under a dual rights regime.
- In relation to SBS's assertion that there will be a migration of sport to subscription television, see FOXTEL's comments in response to CTVA's submission above.

7. TransACT

- TransACT states that FOXTEL has exclusive access to much of the premium content that other network operators need in order to offer a competitive service³⁰. FOXTEL does not agree with this statement, particularly in light of the section 87B undertakings given by FOXTEL.
- As outlined by FOXTEL in its primary submission, FOXTEL undertook:
 - not to acquire certain channels exclusively (including Antenna, BBC World, Cartoon Network, CNBC, CNN, Disney, ESPN, National Geographic, RAI, Sky News, Sky Racing, TCM, TVSN and World Movies)³¹;
 - not to acquire the Movie Network channels exclusively (including Movie One, Movie Extra and Movie Greats) unless it is required to do so by the Movie Network or another party has bid for those rights exclusively³²;
 - at the expiry of its current arrangement with PMP in December 2007 not to acquire the PMP channels exclusively (Showtime and Encore) unless it is required to do so by PMP or another party has bid for those rights exclusively³³;

²⁹ SBS Submission at 3.

³⁰ TransACT Communications Submission to DCITA Emerging Market Structures in Communications Sector, July 2003, Executive Summary.

³¹ FOXTEL's section 87B undertaking, clause 7.1.

³² FOXTEL's section 87B undertaking, clause 7.2 – 7.3.

³³ FOXTEL's section 87B undertaking, clause 7.4.

- to sub-license the AFL channel to all subscription television operators on terms and conditions which do not discriminate unfairly for so long as FOXTEL holds exclusive rights to the AFL and/or produces the Fox Footy Channel³⁴; and
 - to license its subscription television service (including sport and movie channels) to cable, satellite and MDS infrastructure operators who request the service on certain terms and conditions³⁵.
- All movies and sport are therefore available to network providers to license either directly on a stand-alone basis from the channel suppliers (eg ESPN, Fox Footy, Movie One) as Neighborhood Cable does or as a package from FOXTEL or Austar (eg Fox Sports, Showtime).
 - In addition, there is an abundance of non-exclusive programming including movies, sport and general entertainment available to subscription television operators and a significant amount of programming content freely available overseas which is not yet currently supplied in Australia.

³⁴ FOXTEL's section 87B undertaking, clause 10.

³⁵ FOXTEL's section 87B undertaking, clause 8 and Schedule 3; Austar section 87B undertaking, clause 3.1.