# NEWS LIMITED

*Incorporated In South Australia*
ACN 007 871 178

# Submission
# in response to the

# PRODUCTIVITY COMMISSION

# regarding

# TELECOMMUNICATIONS COMPETITION REGULATION DRAFT REPORT

# JULY 2001

This submission from News Limited (***News***) is in response to the Productivity Commission's *Telecommunications Competition Regulation Draft Report*, March 2001 (*the Draft Report*).

News has a 25 percent shareholding in FOXTEL Management Pty Limited (***FOXTEL***). FOXTEL, on behalf of FOXTEL Cable Television Pty Limited (the pay television licensee), manages the provision of analogue subscription television (Pay TV) broadcast carriage services by means of line links, a service which was declared under Part XIC of the TPA by the Australian Competition and Consumer Commission (***ACCC***) on 8 September 1999.

FOXTEL is presently involved in two arbitrations under Part XIC of the TPA in relation to analogue Pay TV services. News will not comment on these in this submission.

This submission deals primarily with the undertaking regime set out in Part XIC of the Trade Practices Act 1974 (Cth) (***the TPA***). However, this submission should not be taken as an endorsement by News of the appropriateness of imposing an access regime on pay television services. The carriage of analogue subscription television services by FOXTEL does not constitute a bottleneck against the provision of such services by others. On this basis, News does not believe it was, or is, appropriate to apply the access regime on pay television service providers.

To overcome this problem, there are 3 options, summarised below.

(a) Introduce a statutory exemption into the *Telecommunications Act 1997* to clarify that pay television operators are content service providers and not carriage service providers.
(b) Introduce access holidays, although News does not believe that access holidays provide sufficient certainty regarding the medium and long term. Certainty is essential for investment to continue, as discussed below.
(c) Amend the undertaking regime set out in Part XIC of the *Trade Practices Act 1974* (Cth) (***the TPA***) to ensure certainty for investors.

The remainder of this submission deals with that third point.

**Background – Need for Certainty**

News, as one of three FOXTEL shareholders, is currently considering whether to make an investment in digital subscription television broadcast carriage services, by cable (***digital pay TV services***). The discussion amongst the FOXTEL shareholders has proceeded on the assumption that the investment will be made in an environment in which access may need to be provided to digital pay TV carriage services.

However, the uncertainty which is inherent in the processes makes it difficult, at best, and impossible, at worst, for News to predict the terms and conditions of access and the financial and business consequences thereof. Consequently, the likelihood of further investments decreases.

Further investment requires certainty before the investment is made; certainty as to costs of operating in a particular regulatory environment and the impact of that regulation on future possible returns. It is with this paramount criterion in mind that News makes this submission.

**Summary of Proposals regarding the Access Regime**

- ♦ News submits that the current arrangements in relation to undertakings should be similar to that set out in Pt IIIA of the TPA in order to provide the investor/access provider with greater certainty on the access conditions that will apply to the service. This would enable a more accurate assessment of costs related to the giving of access and the net potential returns before the investment is made.
- ♦ In adopting an arrangement like that in Pt IIIA of the TPA, News does not endorse adoption of the Telecommunications Access Forum Access Code (***TAF Code***). Rather, News submits that the terms and conditions relating to the undertakings in the TAF Code are far too stringent to provide the appropriate assistance in relation to the provision of undertakings in the context of new investment and should be abolished. News proposes that key elements of the requirements in relation to the undertakings should be prescribed in the TPA. In addition, the ACCC should be required, under the TPA, to issue guidelines (after consultation with industry and other relevant persons) on the terms and conditions of undertakings to assist access providers to satisfy the undertakings regime.
- ♦ News submits that the discretion of the ACCC over pricing is too wide and should be restricted by the introduction of pricing principles in the TPA. In addition, the ACCC should not be given any residual discretion to reject an undertaking which meets both the pricing principles under the TPA and its guidelines.

**General Comments regarding the Access Regime**

1. As the Productivity Commission stated in its Draft Report, the main goal of telecommunications access is to encourage efficient use of, and investment in, telecommunications facilities.[1]

2. However, where the regulatory processes are deficient or overly complex, this will adversely affect investment and innovation. This is especially the case when a party seeks to invest in a new, high risk venture such as digital subscription television.

3. The current access regime under Part XIC is administratively difficult and involves complex access pricing issues. It is, therefore, not surprising that investors/access providers might seek to take advantage of certain regulatory options that provide certainty and, through more rapid decision making, reduce the transaction costs associated with compliance.

[1] Productivity Commission, *Draft Report*, page 9.23

4. An investor requires a certain minimum degree of certainty before it will commit to making new or additional investments in a business. The investor must be able to assess and quantify all the costs associated with the proposed investment in order to assess the proposed investment. Specifically, News would only be prepared to provide the significant amount of capital and resources needed for FOXTEL to rollout the digital subscriber television networks if (amongst other things) it had certainty as to the terms, including price, upon which access seekers would be able to access the digital service and those terms supported a viable business plan. In view of the current uncertainty surrounding the provision of access over analogue pay TV services, the shareholders of FOXTEL publicly announced, on 14 May 2001, their decision to delay any investment in digital pay TV services for another year.

***Undertakings – non-price issues***

5. The existing arrangements in relation to undertakings under s152BS – s152CD of Pt XIC of the TPA do not address the concerns of an investor trying to reduce associated risk prior to making an investment. Under Pt XIC, an investor can only submit an undertaking to the ACCC after the declaration of the relevant service. Digital pay TV services are not declared under Part XIC of the TPA. Ordinarily, this would mean that an investor would have to initiate the process of declaration in order to submit an undertaking. However, as declarations can only apply to existing services under s152AL of the TPA, investments would have to be made at least to the extent where a service is capable of being supplied before a declaration can be sought. This is the reasoning behind the ACCC's decision not to declare the technology neutral subscription television carriage service (limited to line links) in August 1999.[2]

6. News submits that the current arrangements in relation to undertakings should be similar to those set out in Pt IIIA of the TPA. Under Pt IIIA, undertakings, once lodged and accepted, provide immunity from subsequent declaration of the service. In addition, once an undertaking has been accepted, Pt IIIA provides the investor/access provider with greater certainty as to the access conditions that will apply to the service, thus enabling the assessment of costs related to the giving of access and the net potential returns before the investment is made.

7. News believes that this should be the way that Pt XIC is applied – with scope for minimal regulatory intrusion – in respect to the commercial supply of a telecommunications service.

8. Under the TPA, the criteria for approving an undertaking are contradictory. If an undertaking adopts the model terms and conditions in the TAF Code, the ACCC is required to approve the undertaking. Where the undertaking does not comply with the TAF Code, the ACCC is required to assess the undertakings by reference to criteria gauging the 'reasonableness' of the terms and conditions of the undertakings. The terms and conditions in the TAF Code, however, are far too stringent with the result that the TAF Code does little to promote the "legitimate

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[2] ACCC, *Declaration of Subscription Television Carriage Service – A Report on the Declaration of a Technology-Neutral Subscription Television Carriage Service under Pt XIC of the Trade Practices Act* 1974 (Cth), August 1999.

interests of the access provider and the provider's investment in the facilities used to provide access". Consequently, the TAF Code does not satisfy one of the 'reasonableness' criteria set out in s152AH.

9. News submits that the TAF Code should be abolished. Instead, key elements of the requirements in relation to undertakings should be prescribed in the TPA to ensure the mandatory acceptance of those undertakings if they comply with the prescribed requirements.

10. In addition, the ACCC should be required, under the TPA, to issue guidelines (after consultation with industry and other relevant persons) on the terms and conditions of an undertaking to assist access providers to comply with the undertakings regime. For example, in relation to its power to deliberate over undertakings submitted under Pt IIIA of the TPA, the ACCC has produced a publication "*Access Undertakings – September 1999*" which provides a comprehensive guide on what the ACCC will look for in relation to an application to submit an undertaking. By contrast, the TAF Code only provides a set of model terms and conditions that cannot be varied or modified in any respect and offers no explanations or guides in relation to the ACCC's approach.

***Undertakings – Pricing issues***

11. Under the TAF Code, prices for services included in an access provider's undertaking are required to be consistent with the Commission Pricing Principles (***CPPs***) provided the CPPs are not inconsistent with any Ministerial Pricing Determinations. CPPs are not given regulatory relevance through any other means.

12. The CPPs consist of several pricing papers produced or commissioned by the ACCC on general and specific access matters. Therefore, the ACCC retains significant discretion in determining the appropriate pricing approach for any declared service under Part XIC through its capacity to vary or issue new CPPs, being the detailed cost components that feed into the TAF Code.

13. News submits that the discretion of the ACCC over pricing is too wide and should be restricted by the introduction of pricing principles in the TPA. In addition, the ACCC should not be given any residual discretion to reject an undertaking which meets both the pricing principles under the TPA and its guidelines. This will deliver pricing certainty essential for the assessment of potential new investments.