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FOXTEL proposed undertaking
Submission of the Accommodation Association of Australia

Introduction

1. The Accommodation Association welcomes the opportunity to provide input into the FOXTEL proposed undertaking.
2. Foxtel Management Pty Limited has provided the proposed undertaking in response to concerns regarding the proposed acquisition of AUSTAR United Communications Limited.

About the Accommodation Association of Australia

3. The Accommodation Association of Australia (The Association) was launched on 15 February 2011. The Association evolved out of the former Hotel Motel & Accommodation Association that operated for over 40 years. The purpose of the Association is to provide a unified voice for the tourism accommodation sector.
4. The Association's membership is made up of 2000 properties, including hotels, resorts, serviced apartments, motels, bed & breakfasts, guesthouses, backpacker establishments, caravan parks and timeshare properties in metropolitan, regional and rural Australia. Our membership is representative of 110,000 rooms.
5. The Association's members include major international accommodation chains, including Accor Hotels, Mirvac Hotels and Resorts, Hilton Hotels, Toga Hospitality, Mantra Group, Quest Serviced Apartments, Amora Hotels and InterContinental Hotels Group as well as marketing and cooperative groups such as Golden Chain, Best Western and ARRA.
6. By number of properties, major international accommodation chains make up approximately 20 per cent of the membership of the Association. The remainder of our membership is predominantly small businesses (with 20 or less employees), the majority of which are located in regional and rural parts of Australia. A typical member is a 40 - 50 room regional motel.
7. One of the Association's core activities is to build and maintain strong, positive relationships with key federal and state/territory political decision-makers. Our goal is to

provide real information and tangible evidence on how policy issues are having an impact on the business of tourism accommodation beds in Australia.

8. Similarly the Association has strong official and / or working relationships with key industry stakeholders including tourism industry councils in each state and territory, the Caravan Camping Industry Association, NSW & ACT Bed & Breakfast and Farmstay Association and Caravan, RV & Accommodation Industry of Australia.

RE: FOXTEL Management Pty Limited proposed acquisition of AUSTAR United Communications Limited

9. The Accommodation Association of Australia agrees with the ACCC and is also concerned that the proposed acquisition would have the effect or be likely to have the effect of substantially lessening competition in:
 - the national market for the retail supply of subscription television services; and/or
 - a number of regional markets for the supply of fixed broadband and fixed voice telephony products.
10. The Association also believes that concerns of the ACCC's are well founded and as asserted would:
 - bring together the two market participants in Australia who each have a substantial customer base in subscription television and access to key content; and
 - extend Telstra's 50% ownership of one of those key players (i.e.FOXTEL), to both of them (i.e. FOXTEL and AUSTAR).
11. Furthermore, having reviewed the considerations which the ACCC has made in regard to the merger, the Association believes that the ACCC has effectively identified and justified the majority of their concerns for the merger whereas Foxtel Management Pty Limited has not sufficiently addressed those concerns in order to allow for the merger to proceed in the best interests of consumers.
12. In response to the specific areas posed in "Attachment A" the Association's position is as follows reflecting the format provided within "Attachment A":

Term:

An eight year term is not sufficient to allow for the development of effective competition in this market. Existing competition in the IPTV market is currently limited as has been the growth of that competitive base in the current climate. If the merger is to be granted, for any potential competitors to enter the market those businesses should be availed of sufficient time to establish and implement a long term business strategy in order to compete effectively. The Association would suggest fifteen years to be more appropriate.

Movie Transactional Video on Demand (TVOD) rights:

- a) Restrictions on exclusivity to Movie TVOD for the proposed merger are of extremely high importance to the Association. Tourist accommodation suppliers have invested substantial revenue into the provision of Movie on Demand solutions and the Association would be concerned at any restriction which may result directly or indirectly from the proposed merger that may impact on the capacity to populate those services with content. As the delivery of these services varies vastly we would be seeking assurances that the existing

formats for delivery in any form would be protected. Similarly we potentially see an unfair competitive advantage developing as a result of the availability of IPTV directly to guests' rooms should any level of exclusivity become available.

- b) The Association does not believe that the restrictions outlined are sufficient to allow parties other than the merged entity to acquire their own TVOD rights. In relation to clauses 5.1, 5.2, 5.3 and 7 the qualifications, conditions and exemptions placed within the proposal enhance the capacity to introduce exclusivity into content provision so restricting competition to an unreasonable degree impacting on the cause of our concerns as outlaid in item a) above.
- c) The Association has no official position on this item.

Acquisition of rights from FOXTEL's ultimate shareholders:

- a) Clauses 5.3 and 6.3 do not adequately address the potential for circumvention of the obligations of Clauses 5.1 and 6.1, the qualifications, conditions and exemptions placed within the proposal enhance the capacity to introduce exclusivity into content provision, so restricting competition to an unreasonable degree impacting on the cause of our concerns as outlaid above and relating to Movie Transactional Video on Demand (TVOD) rights.
- b) The exemptions in clause 5.2 relate directly to the concerns of the Association in maintaining a fair and reasonable access to content without restriction of exclusivity and the qualifications, conditions and exemptions placed within the proposal enhance the capacity to introduce exclusivity into content provision, so restricting competition to an unreasonable degree impacting on the cause of our concerns as outlaid above and relating to Movie Transactional Video on Demand (TVOD) rights. This would apply to any major movie production company, however, the relationship between Foxtel and Twentieth Century Fox Film Corporation is clear and restrictions on exclusivity should be tightened rather than made more freely available.

Scope of the distribution rights covered by the proposed undertaking:

- a) Yes, this limitation would undermine the proposed undertaking's ability to address concerns in relation to regional telecommunication markets and the national subscription television. The resultant proposed merged entity would have a distinct and enhanced unfair competitive advantage given the scope of the entity's resultant client base and bundling capacity. Regional accommodation providers already suffer from a lack of competition given the geographical broadcast rights demarcation between FOXTEL and Austar and to extend or enhance this would impact greatly on the already limited competition as well as reduce the likelihood of further competitors entering the market.
- b) The Association has no official position on this item.
- c) The Association has no official position on this item.
- d) The Association cannot speak to the planning or capacities of potential competitors, however, the use of HFC networks should be available to any potential competitors without restriction resulting exclusivity clauses within this agreement.
- e) With the development of technologies and evolution of communications, the Association feels it is likely that technical developments over the term of the proposed undertaking have

the potential to undermine these definitions or render them obsolete. This being the case, we envisage the potential to restrict competition may evolve with those technologies. With the involvement of Telstra as an ultimate shareholder it is feasible that they have the potential to, hasten, enhance or develop such technology with the purpose of allowing those technologies to render these definitions obsolete.

Scope of the content covered by the proposed undertaking:

- a) The Association believes the potential to enable sufficient content to be available to allow parties other than the merger parties to develop a sustainable and competitive IPTV service would be limited due to the relationship between Foxtel (being part owned by News Corporation) and Twentieth Century Fox Film Corporation (being owned by News Corporation).
 - i. Fox Sports Australia - The Association believes the potential to enable sufficient content to be available to allow parties other than the merger parties to develop a sustainable and competitive IPTV service would be limited due to the relationship between Foxtel (being part owned by News Corporation) and Fox Sports Australia (being owned by News Corporation). Such content is critical to accommodation suppliers and a direct guest benefit in relation to business travellers and is reflected as highly desirable by accommodation providers.
 - ii. Fox News Network - The Association believes the potential to enable sufficient content to be available to allow parties other than the merger parties to develop a sustainable and competitive IPTV service would be limited due to the relationship between Foxtel (being part owned by News Corporation) and Fox News Network. Such content is critical to accommodation suppliers and a direct guest benefit in relation to business travellers and is reflected as highly desirable by accommodation providers.
 - iii. Fox International Channels - The Association believes the potential to enable sufficient content to be available to allow parties other than the merger parties to develop a sustainable and competitive IPTV service would be limited due to the relationship between Foxtel (being part owned by News Corporation) and Fox International Channels. As the content of these channels is broad within Australia the availability of the content is critical to accommodation suppliers and a direct guest benefit in relation to business travellers, families and independent travellers.
 - iv. NGC Network - The Association believes the potential to enable sufficient content to be available to allow parties other than the merger parties to develop a sustainable and competitive IPTV service would be limited due to the relationship between Foxtel (being part owned by News Corporation) and NGC Network. The availability of the content is important to accommodation suppliers and a direct guest benefit in relation to business travellers, families and independent travellers.
 - v. Premium Movie Partnership (Showtime) - The availability of the content is important to accommodation suppliers and a direct guest benefit in relation to business travellers, families and independent travellers and is reflected as highly desirable by accommodation providers particularly SME's with limited capacity to deliver alternate options.
 - vi. Nickelodeon Australia - The availability of the content is important to accommodation suppliers and a direct guest benefit in relation to families and is reflected as highly

desirable by accommodation providers particularly SME's with limited capacity to deliver alternate options.

In relation to the definition of content:

- a) No, the definition provided would allow for the circumvention of acquisition of Linear Channels on at least a partial basis and for exclusive use.
- b) The Association has no official position on this item.
- c) Based on several of the clauses included there is a strong capacity to establish the acquisition of key individual programs from particular channels on an exclusive basis and therefore provide the potential to undermine the objectives of the proposed undertaking.

Most favoured nation:

Given the strength of negotiation of the merged entity combined with the influence which may be provided by the ultimate shareholders, the ability to generate a MFN applicable arrangement would be substantial and would be contrary to the proposed undertaking to address the ACCC's concerns.

- a) The Association has no official position on this item.

Exception for competing bids:

The Association has no official position on this item.

Signal access undertaking:

The Association has no official position on this item.

Special access undertaking:

The Association has no official position on this item.

General comments:

The Accommodation Association of Australia agrees with the majority of concerns expressed by the ACCC and would only vary in areas where the Association does not have sufficient technical knowledge to appropriately form a view. It is noted that there is no reference to, and perhaps has been no consideration of, commercial users of Foxtel and Austar services such as those in the accommodation sector many of which subscribe to either Foxtel or Austar and as such are restricted by the geographic broadcast rights demarcation. Accommodation suppliers subscribing to either service have a heavy investment in supplying the facility for guests with feedback being that there is limited options other than engage the service due to guest expectations. Feedback from operators indicates a high level of frustration with the lack of competitive bargaining available for product.

As indicated with the answers provided previously, there is a concern for operators who have invested in substantial and long term contracts for the provision of pay to view Movies on Demand systems which may be caught under, and limited by, exclusivity clauses within the undertaking. Similarly with the inclusion of Twentieth Century Fox Film Corporation as an ultimate stakeholder in Foxtel there is a concern at the influence this may bring to the provision of both free services to guests via subscription & in-house pay to view options.

The Association agrees that the strengths delivered to the proposed merger by AUSTAR provides for a distinct and established substantial customer base, actual or potential independent access to attractive content, and access to satellite content delivery infrastructure. The proposed acquisition would consolidate these distinct strengths in the hands of the merged entity creating a highly uncompetitive environment. This combined with the negotiating power brought by FOXTEL's Ultimate Shareholders has the potential to create what is already seen by many accommodation providers as a virtual monopoly which would discourage new entrants into the market.

In the opinion of the Association, the undertaking provided by FOXTEL Management PTY Limited has failed to alleviate most of the concerns of the ACCC as outlined and certainly does not satisfy the Association that the accommodation industry or the travelling public will benefit from the merger. In fact the qualifications, exceptions and definitions provided within the undertaking are of such substance as to indicate that the overall purpose of the undertaking could very well and easily be contradicted in implementation and application.

The Association agrees that a more beneficial outcome for consumers is to encourage competition from AUSTAR with FOXTEL and Telstra in subscription television and telecommunications markets and the dissolution of geographic broadcast rights demarcation between FOXTEL and AUSTAR which will be facilitated by the emerging NBN using Internet Protocol Television (IPTV). Given the rollout of the NBN and its potential to facilitate greater use and access to IPTV services, the Association believes the priority should in fact be the dissolution of geographic broadcast rights demarcation as opposed to any merger.

I am available for further comment on this matter should you wish.



Richard Munro
Chief Executive Officer
Accommodation Association of Australia