FOXTEL

Supplementary submission to
Government
on the provision of services
other than simulcasting by free-to-air
broadcasters on digital spectrum

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Introduction

This submission by FOXTEL Management Pty Limited on behalf of the FOXTEL Partnership (***FOXTEL***) supplements the submission FOXTEL lodged on 20 August 2004 in response to the issues paper released by the Department of Communications, Information Technology and the Arts (***Department***) on 10 May 2004 concerning the provision of services other than simulcasting by the commercial broadcasters on digital terrestrial spectrum.

In this supplementary submission FOXTEL addresses statements in submissions which some parties have made to the Department in relation to FOXTEL and its associates which are factually inaccurate or otherwise misleading.

In particular, FOXTEL wishes to address certain statements included in the multi-channelling submissions made by:

- Seven Network Limited (***Seven***);
- Network Ten Pty Ltd (***Ten***); and
- the Australian Competition and Consumer Commission (***ACCC***).

In their submissions, Seven, Ten and the ACCC have made assertions about the state of development of the subscription television industry that are based, expressly or impliedly, on unsubstantiated assumptions about the current financial position of FOXTEL and other participants in the subscription television sector.

Part 1 of this submission addresses assertions about the financial condition of subscription television in Australia.

In Part 2 of the submission, FOXTEL examines the statements by Seven and the ACCC that the policy rationale for the prohibition against commercial broadcaster multi-channelling on digital spectrum loaned to them in 1998 no longer applies. In particular, it looks at the significance of commercial broadcaster profitability and market power in a possible multi-channel environment and on television programme acquisition practices.

Separately, in Schedule 1, FOXTEL responds to other statements made by Seven, Ten and the ACCC that are either incorrect or, in the case of Seven and Ten, misleading.

Since FOXTEL made its original submission to this review, the Federal Government in December 2004 made a policy announcement in relation to the introduction of new digital radio services that supports FOXTEL's view that the major investment by subscription television in new digital services that commenced in early 2004 should be allowed a reasonable period to establish (until 2008) before major regulatory change such as commercial network multi-channelling is allowed.

As FOXTEL has noted previously, the commercial television networks were given a minimum period of six years from the commencement of their digital services in January 2001 during which the Government committed to provide them with regulatory stability to protect their digital conversion investment by prohibiting the issue of new commercial television licences.

Subscription television is only seeking equitable policy treatment of its digital investment with those of commercial television and radio.

This policy principal for providing a period of regulatory stability to enable the establishment of digital investments was reinforced by the Minister for Communications, Information Technology and the Arts, Senator Coonan, in a statement on 20 December 2004: "Digital transmission systems offer a range of potential improvements over their analog counterparts, including better audio quality and the provision of a more diverse range of new enhanced radio services.

"The Government has agreed to a moratorium on new Licence Area Planned (LAP) commercial digital radio licences for an initial period of five years. The moratorium will commence once technology and spectrum issues are resolved and a timetable for roll out of digital services (sic) determined.

"The moratorium recognises the important contribution incumbent commercial broadcasters will make in the digital future and provide them some stability in the early stages of the introduction of digital radio".

As FOXTEL has stated previously, if multi-channelling on the terrestrial broadcasting services bands is introduced, which should not be before 2008 in any event, it should be as part of a balanced deregulation of the broadcasting services regime that includes removal of the sports anti-siphoning regime.

1. Financial condition of subscription television operators

1.1 Reported financial information relating to subscription television operators

The multi-channelling submissions made to the Department by Seven and Ten both assert that the subscription television sector is already profitable[1]. FOXTEL is concerned that this misleading assertion may lend unjustified support to the position put forward by Seven and the ACCC that the policy rationale for protecting the subscription television sector from commercial network multi-channelling no longer applies[2].

There are currently five subscription television operators competing with national and commercial open broadcasters and video and DVD suppliers for Australian television viewers:

- Austar;
- FOXTEL.
- Neighborhood Cable;
- Optus; and
- TransACT.

Publicly available financial information relating to these subscription television operators shows that they all continue to carry significant accumulated losses - and the majority of them continue to be loss-making.

According to the most recent statistics released by the Australian Film Commission[3], subscription television broadcaster operating losses for the 1996/97 financial year were $1,058.4 million, for 1999/00 were $675.8 million and for 2002/03 were 451.5 million.

In addition, we note as follows:

Austar

[1] At pg 4 of Seven's multi-channelling submission and pg 6 of Ten's submission

[2] At pg 4 of Seven's multi-channelling submission and pg 12 of the ACCC's submission

[3] Australian Film Commission "*What Australians are Watching: Pay TV*" as at 2 November 2004 (***AFC Pay TV Report***) at pg 9

At the end of its last reported financial year (the year ending 30 June 2004), Austar announced[4] that its accumulated losses stood at $1.245 billion. Austar made its first ever operating profit (of $2.5 million) only in its last reported financial quarter (Q3 2004).

Neighborhood Cable

Over the 12 month period ending 30 June 2004[5], Neighborhood Cable announced that:

- its total accumulated losses were $46.9 million; and
- its loss from ordinary activities after tax for the year was $5.8 million.

TransACT

TransACT Communications Pty Limited does not release information about its financial performance publicly. Its financial position as at 30 June 2004 can, however, be gauged from the 30 June 2004 Full Financial Report of the parent of one of its eight shareholders, The Australian Gas Light Company (***AGL***). AGL's Full Financial Report for the period ending 30 June 2004 notes as follows:

- AGL’s investments in the telecommunications sector (comprising its investments in TransACT and a 35.9% interest in COMindico Holdings Pty Ltd) saw a loss of $33.3 million[6]; and
- a write-off of TransACT in an amount of $25 million[7].

FOXTEL

The total operating loss for FOXTEL for the financial year ended 30 June 2003 was $92 million, and for the year ending 30 June 2004 the loss was $149 Million. Over the same periods, FOXTEL's net loss was $61 million and $109 million respectively[8].

FOXTEL has a financial facility of $550 million all of which is expected to be utilised during the course of FOXTEL’s digital roll-out.

FOXTEL’s accumulated losses at June 30 2004 were $1.29 billion.

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[4] Austar United Communications Limited company announcement and prospectus issued on 30 August 2004 in connection with proposed refinancing arrangements, at pg 3

[5] Neighborhood Cable Ltd, Media Release dated 31 August 2004 at pg 3.

[6] AGL Full Financial Report for the period ending 30 June 2004 (***AGL 2004 Report***) at pg 9

[7] AGL 2004 Report at pg 15; over the same period, equity accounted loses/write down relating to COMindico were $23.5 million.

[8] News Corporation earnings release for the quarter and financial year ended 30 June 2004 prepared for the US market, at pg 11

Optus

Optus has not made any public announcements concerning the financial condition of its subscription television business. Reported figures indicate, however, that the number of subscribers to Optus TV fell during the calendar year ending 31 December 2003 from 241,000 to 210,606[9]. According to 30 September 2004 earnings results released by News Corporation, FOXTEL's wholesale subscribers, the majority of which are Optus subscribers, had fallen to 187,000.

On any view of these results, the majority of subscription television operators are not yet profitable and their investors are a long way from seeing returns on the substantial funding they have contributed to the development of the sector. Any assertion that subscription television is a profitable sector is simply incorrect.

The current financial condition of the subscription television operators highlights the importance of not mistaking their substantial consumer service achievements and high media profile with profitability or some inherent shift in the fundamental economics of the Australian television industry since 1998, when the prohibition on commercial open broadcaster multi-channelling was put in place. This issue is discussed in more detail in Part 2 below.

1.2 FOXTEL movie and sports channel ownership

Seven[10] and Ten[11] have both made unsubstantiated comments about FOXTEL's content payments to its shareholders that are exaggerated and misleading.

Seven provides no evidence but simply asserts that "*Pay TV is extremely profitable in Australia despite its claims to the contrary. The majority of revenues are paid to its core program providers and controlling partners News Corp and PBL for the movie and sports channels*".

Subscription television is not "extremely profitable in Australia" as demonstrated in point 1.1 above. And while entities associated with News Corporation and PBL do supply FOXTEL with some of its programming, News and PBL do not collect a majority of FOXTEL's programming expenditure which is in fact shared across more than 100 channels on the FOXTEL Digital service. The ownership of these channels is shared by 51 separate international and Australian companies, 21 of which are Australian-owned or

9 AFC Pay TV Report at pg 7

10 Seven's submission at pg 4

11 Ten's submission at pg 6

Australian-based (a complete list of FOXTEL's services and their ownership is set out in FOXTEL's original multi-channelling submission at Schedule 2).

There are currently seven separate movie channels (plus two of these channels are provided on a time-shifted basis) available on subscription television in Australia, and a pay-per-view movie service.

These channels and their ownership is as follows:

- Movie channels owned by the Movie Network joint venture (Warner Bros (25%), MGM (25%), Disney (25%) and Village Roadshow (25%):
    - Movie One;
    - Movie Extra; and
    - Movie Greats
- Movie channels owned by the Premium Movie Partnership (Sony (20%), Universal (20%), Paramount (20%), 20th Century Fox (20%) and Liberty Media (20%) (***PMP***):
    - Showtime; and
    - Showtime Greats
- World Movies channel (owned by SBS (40%), Australian Radio Network Pty Ltd (30%) and Australian Capital Equity (which is controlled by Kerry Stokes, Chairman of Seven, and his family) (30%))
- Turner Classic Movies (owned by Time Warner (100%))
- FOXTEL Box Office (pay-per-view channel, owned 100% by FOXTEL, not its shareholders)

Neither News nor PBL have a direct or indirect interest in subscription movie channels other than News' indirect affiliation with the PMP movie channels through News Corporation's interest in 20th Century Fox, a US company whose parent company FOX Entertainment Group, Inc. (***FEG***) is listed on the New York Stock Exchange. News Corporation has an 82.1% interest in FEG and, as a result, an indirect interest of 16% in the two PMP movie channels.

The list below describes the seven sports channels carried by FOXTEL and their ownership:

- ESPN (100% owned by ESPN Inc., a division of Disney);
- Eurosportnews (100% owned by EUROSPORT Societe Anonyme, France. For FOXTEL Digital subscribers only)
- FOX Footy Channel (100% owned by FOXTEL, not its shareholders);

- Premier Media Group (owned by News (50%) and PBL (50%) (***PMG***)
    - FOX Sports
    - FOX Sports Two
    - Fuel (for FOXTEL Digital subscribers only)
- Sky Racing (100% owned by TABCorp Ltd)

The commercial arrangements between FOXTEL and sports channel suppliers ESPN, TABCorp, EUROSPORT and PMG are bona fide and were made at arm's length - entirely in keeping with market practice

2. The policy rationale for prohibiting commercial broadcaster multi-channelling on their existing digital spectrum

The multi-channelling submissions made by Seven and the ACCC make the point[12] that the policy rationale for prohibiting commercial multi-channelling on digital spectrum loaned to them in 1998 no longer applies. The stated purpose of the prohibition was to "*ensure that the developing pay TV sector is not unfairly disadvantaged by digital conversion of existing commercial and national broadcasters*"[13].

FOXTEL does not agree with Seven or the ACCC on this issue for the reasons set out below.

2.1 Commercial broadcaster profitability

Subscription television has seen substantial changes since 1998 and has delivered significant benefits to Australian television viewers[14]. However, as noted in section 1.1 above, subscription television is yet to reach a commercially viable position. While FOXTEL is optimistic that this will occur in the medium term, it does not anticipate becoming cash-flow positive until mid-2006. For the smaller operators like Neighborhood Cable and TransACT, the path to profitability may be considerably longer.

The relatively weak financial condition of the subscription television operators is in stark contrast to the financial strength of the commercial broadcasters[15]. In 2003/4, subscription television lost approximately $130 million compared with profits of approximately $680 million for commercial television (ie. the Seven Network, the Nine Network and the Ten Network).

In the 2004 financial year, Australia's commercial television networks had combined advertising revenues of approximately $2.66 billion[16], compared with $1.2 billion[17] total

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[12] Seven's submission at pg 1 and the ACCC's submission at pg 12

[13] Explanatory Memorandum, *Television Broadcasting Services (Digital Conversion) Bill 1998 and Datacasting Charge (Imposition) Bill 1998*, at pg 16

[14] Subscription television's contributions to Australian television are described in detail in section 3.3 of FOXTEL's submission of 20 August 2004, at pg 24

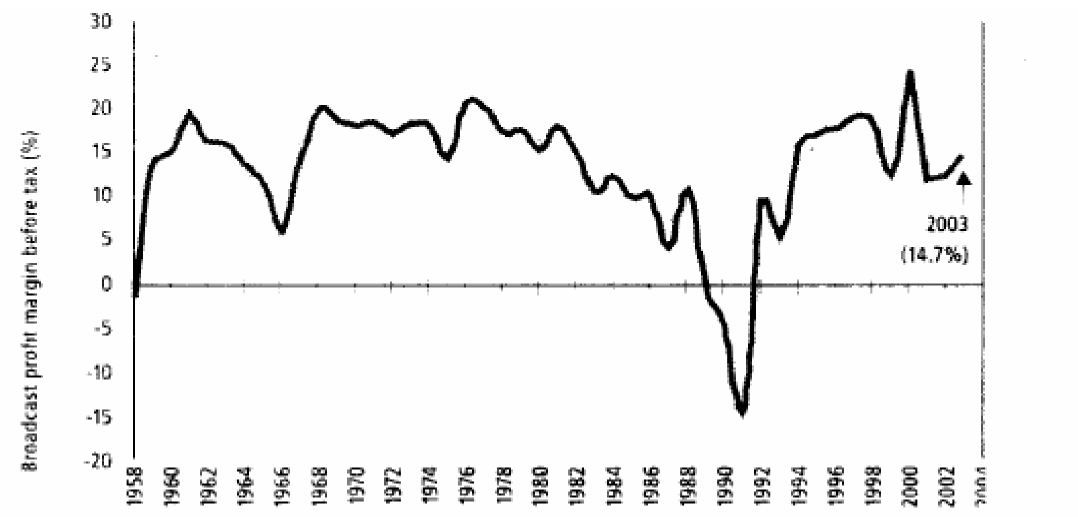
[15] In its multi-channelling submission FOXTEL describes in detail the substantial market power enjoyed by the Nine Network (***Nine***), Seven and Ten in their television operations at section 3.2 pgs 15 - 24

[16] Commercial Economic Advisory Service of Australia (***CEASA***) 01/07/03-30/06/04

revenue for subscription television providers (including approximately $105 million of advertising revenues). Subscription television revenue must support a much wider cost base including customer receiving equipment and customer service in addition to programming acquisition for the more than 100 channels that operate in the digital environment.

The high profit margins the Seven, Nine and Ten networks appear to have enjoyed in 2004 are not materially different from average profit margins in 1998 and are generally consistent with historical figures. Commercial broadcaster profit margins between 1958 and 2003 are illustrated in the following chart:

Broadcast profit margin before tax of Australian commercial television stations, fiscal 1958-2003[18]



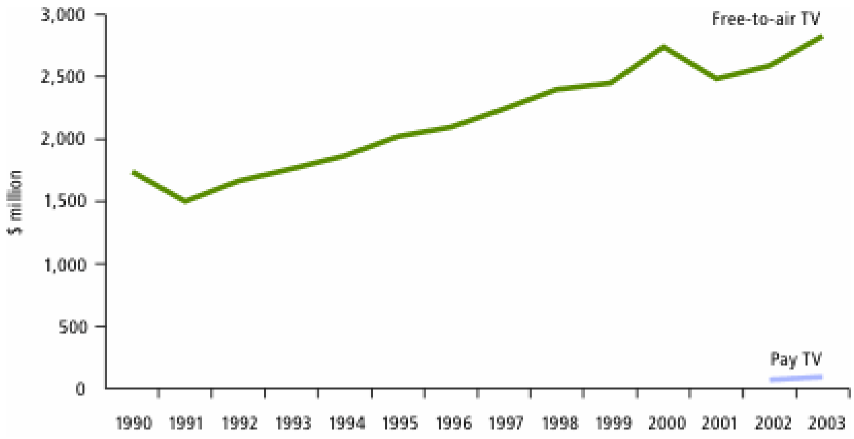
Similarly, the chart below shows that there is no material difference between the commercial broadcasters' share of total advertising expenditure compared to other media (including subscription television) in 1998 and 2004. The percentage of total advertising expenditure on subscription television is still minimal (a 1.1% share)[19].

[17] CEASA and FOXTEL Analysis

[18] Australian Film Commission "*What Australians are Watching: Free-to-Air Television"* as of 2 November 2004 (***AFC Free-To-Air Report 2004***), at pg 15

[19] AFC Free-to-Air Report 2004, at pg 12

Television's share of total advertising expenditure compared to other media, 1965-2003[20]



The long-term profitability of the commercial broadcasters has often been noted by commentators, including the ACCC:

> "*An ABN AMRO report on the media sector release in July 2002 noted that the operating margins of Australia's major FTA television companies (at an average of 20 per cent) were among the highest in the world (global average of 18 per cent). Th report commented that this was the result of the benefits provided by the current regulatory structure of the Australian FTA industry.*
>
> *"A more recent report released in June 2004 forcasted an industry EBIT margin of 27 per cent for the 2004/05 financial year, with continuing margin expansion projected for the next two years reaching in excess of 30 per cent by the 2007/08 financial year. It also noted that industry pre-tax profit margins are near the upper limit of their 10-20 per cent long term range and that FTA sector EBIT margins ar above the other main media sub-sectors."*[21]

The Government's recognition of an imbalance between the relative economic strengths of the commercial open broadcasters and subscription television providers supported its policy rationale for prohibiting commercial broadcaster multi-channelling in 1998. As the above analysis demonstrates, this imbalance has not changed and the policy rationale still applies.

As importantly, commercial open broadcaster profit and advertising figures do not support the ACCC's concern that "*the restriction on FTA multi-channelling may potentially*

[20] AFC Pay TV Report 2004 at pg 11

[21] ACCC multi-channelling submission at pg 11, quoting ABN AMRO, *Time to face the FACTS,* July 2002 at pg 31, and *FTA Television – the TV margin cycle,* 22 June 2004, at pg 21

undermine the commercial viability of FTA broadcasters over the longer term"[22] or Seven's statement that "*the [prohibition on commercial broadcaster multi-channelling] should be immediately lifted to … give free TV an opportunity to arrest the decline in its audience share*"[23].

There is no evidence that the prohibition on commercial open broadcaster multi-channelling poses any short to medium term threat to the profitability of Australia's commercial television networks.

The impact of lifting the ban on commercial open broadcaster multi-channelling on the competitive balance between commercial open broadcast and subscription television is not, however, in dispute - commercial open broadcaster multi-channelling will advantage Seven, Nine and Ten as against subscription television providers, particularly in the area of programme acquisition (discussed at section 2.2 below). Any introduction of commercial broadcaster multi-channelling on the digital spectrum loaned to them in 1998 is therefore likely to increase the disparity between commercial open broadcaster and subscription television profitability.

The policy objectives of the *Broadcasting Services Act 1992* (***BSA***) would not be achieved by the early introduction of commercial network multi-channelling, particularly in isolation from other deregulation such as the abolition of sports anti-siphoning regulation, and would only increase the market power of the small group of commercial television broadcasters which already dominates the supply of television to Australian homes.

As explained in FOXTEL's submission of 20 August, the prohibition on commercial broadcaster multi-channelling should only be lifted after 2008 as part of a balanced deregulation of the television broadcasting regime focused on enhancing the market forces already driving digital television take-up in Australia.

2.2 Impact of multi-channelling on programming acquisition practices

It is in the area of programming acquisition that FOXTEL believes the policy rationale behind the 1998 restriction on commercial broadcaster multi-channelling continues to be most relevant.

[22] ACCC's submission at pg 2

[23] Seven's submission at pg 10

If commercial open broadcasters are permitted to multi-channel on their existing digital spectrum, the viability of their multi-channel services will depend on the appeal of programming included on those services.

Commercial broadcasters clearly compete with the subscription television operators for programming likely to appeal to their viewers[24]. If multi-channelling is introduced, the commercial broadcasters will need more programming to fill their new channels. This need for more programming will have an effect on the current buying practices of the commercial television broadcasters and will likely see them competing for additional programming rights.

However, as noted in section 2.1 above, the commercial open broadcasters have the benefit of much larger revenues and long-term, positive operating profits that can be reinvested into content, compared with the mainly loss-making subscription television providers such as FOXTEL. The commercial broadcasters are therefore in a greatly advantaged position when it comes to competing for attractive programming.

Commercial open broadcaster multi-channelling would have a particularly detrimental effect on subscription television providers' ability to buy sports programming.

The existing sports programming anti-siphoning regime already means that commercial broadcasters are legislatively entitled to buy valuable sports programming ahead of subscription television.

If commercial broadcasters have more channels to fill, it is likely that they will do so by seeking to acquire more sports rights under the protection of the anti-siphoning regime.

The combination of commercial open broadcaster multi-channelling and the legislative advantage they already enjoy in the form of the sports anti-siphoning rules, will have the effect of making it more difficult for subscription television providers to deliver an appealing product to Australian viewers. Here again, the result will be an increase in the dominance of the commercial open broadcasters over the provision of television entertainment to Australian homes – and the stifling of competition in the television entertainment market.

The inevitable impact of commercial broadcaster multi-channelling on programme acquisition practices and subscription television providers should be borne in mind when considering the multi-channelling submissions made by Seven and the ACCC and their claim that the policy rationale behind the multi-channelling prohibition – "*to ensure that the*

[24] See FOXTEL's submission at pg 19

developing pay TV sector is not unfairly disadvantaged by the digital conversion of existing commercial and national broadcasters" - is no longer relevant.

In the absence of even a minor diminution of the dominant market power of the commercial open broadcasters since 1998, FOXTEL believes that a change in broadcasting regulation that would give the commercial networks whole new digital channels – without paying markets rates for digital spectrum as subscription television must do and with the protection and advantage of sports anti-siphoning regulation- would harm subscription television and stifle competition that would otherwise benefit consumers.

On this basis, the policy rationale for the prohibition on commercial network multi-channelling in 1998 is still relevant.

Schedule 1 - FOXTEL rebuttal of certain statements made by Seven, Ten and the ACCC

Some other statements made by Seven, Ten and the ACCC in their multi-channelling submissions warrant specific response.

1.1 Claims of a Pay TV monopoly

In the multi-channelling submissions filed by Seven[25] and Ten[26], both state that the subscription television industry comprises a FOXTEL monopoly.

This monopoly assertion is rhetoric without substance in fact. There is no FOXTEL monopoly.

FOXTEL competes in the television entertainment market against other subscription television providers, the commercial and national broadcasters and DVD/video sales and rentals. There can be no FOXTEL monopoly when there are abundant substitutes in the form of television services provided by the commercial and national broadcasters and DVD/video sales and rentals

There are many examples of behaviour on both the supply side and the demand side that support this television entertainment market definition, including:

- Evidence that consumers view open television, subscription television and video and DVDs as **substitutable** with one another. This evidence includes ratings data[27], levels of churn from subscription television providers back to open television and market research conducted by FOXTEL.
- Evidence to suggest that the price of open television (which appears to a consumer to be $0) **constrains** the prices subscription television providers are able to charge for their services and has kept subscription television prices relatively stable.
- The **actions and views** of open television broadcasters[28], subscription television providers and video and DVD retailers that suggest that they perceive one another as competitors.
- Direct and vigorous competition between open broadcasters and subscription television providers (and channels) to acquire and retain the most attractive **content**.

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[25] Seven's multi-channelling submission at pg 3

[26] Ten's submission at pg 2

[27] For example, ratings data shows that on average half of television viewing in subscription television homes is spent watching subscription television.

- The methods used by open broadcasters, subscription television providers and video and DVD retailers (and their industry bodies) to **sell and promote** their respective products.
- The significant resources expended by open broadcasters and subscription television providers to **advocate** change of, or the maintenance of, Commonwealth regulation of the television industry.
- Responsive **content** and **product developments** by open broadcasters, subscription television providers and video and DVD retailers. For example:
    - in response to the broadcast of *Law & Order* on the FOX8 subscription service at 8.30pm on Sunday evenings, Network Ten stopped showing movies at 8.30pm on Sundays and scheduled in their place *Law & Order: SVU*;
    - recent reports disclose that Seven is "*planning to slash advertising volumes during Sunday night movies by 75% to keep viewers tuned in, rather than opting for a DVD or switching over to FOXTEL*"[29]
    - there is evidence that Australian open broadcasters are following the behaviour of the US open broadcasting networks through investment in subscription television services that complement their open broadcast services. For example, Seven has invested in the SKY News Australia subscription television service, and Kerry Stokes, Seven's Executive Chairman, holds a 30% interest in the World Movies subscription television service.
    - FOXTEL launched FOXTEL Digital partly as a response to the introduction of digital television by the open broadcasters and, around the time of the launch of FOXTEL Digital, the Nine Network launched a number of enhanced applications on its digital service.

Leaving the question of competition with the commercial broadcasters, video and DVDs to one side, the subscription television sector has more competitors now than at any time in its short history in Australia.

There are five subscription television operators in Australia; FOXTEL, Austar, Optus, Neighborhood Cable and TransACT, each with significant overlap particularly in metropolitan areas. In addition, Telstra sells FOXTEL and Austar services. Further, AAPT and Primus sell the FOXTEL service.

In the channel supply arena, on the FOXTEL Digital service alone, channels offered are owned by 51 different media and communication companies. There are also currently approximately 50 members of the Australian Subscription Television and Radio Association, most of which are subscription channel suppliers.

[28] For example, statements made Seven and Ten in their multi-channelling submissions at pg 23 and pg 7 respectively.

[29] *Ad News*, 3 December 2004

In relation to Seven's assertions that FOXTEL has acquired exclusive rights in movies and sports programming[30], and stacked its basic package with its own or affiliated channels[31], FOXTEL notes as follows:

- As noted above in section 1.2, there are currently seven separate movie channels distributed in Australia, including the World Movies channel in which Seven's Chairman, Kerry Stokes, controls an indirect 30% interest. All eight of these channels are carried on the Optus TV and Austar subscription television platforms and all three Movie Network channels and the Turner Classics Movie channel (***TCM***) are carried by Neighborhood Cable
- FOXTEL has never had exclusive rights in the Movie Network channels, World Movies or TCM; their suppliers are free to license them to any other subscription television operator;
- Voluntary undertakings made by FOXTEL to the ACCC in 2002 in connection with the CSA provide that FOXTEL will not acquire exclusive rights to the Movie Network channels (Movie One, Movie Extra, Movie Greats) or, on expiry of FOXTEL's current agreement with PMP in 2007, the PMP movie channels (Showtime, Showtime Greats), unless this is a requirement of the movie channel supplier, or another party has bid for those rights exclusively;
- Of the seven sports channels available on subscription television, all of FOX Sports, FOX Sports Two, ESPN and the Fox Footy Channel are carried on the Austar and Optus TV platforms as well as on FOXTEL; in addition, ESPN is available through TransACT and both ESPN and the FOX Footy channel are carried by Neighborhood Cable; Sky Racing is available to all subscription TV operators; and Eurosportnews and Fuel are available to FOXTEL Digital,and Austar Digital subscribers.
- The sports anti-siphoning regime gives the commercial and national broadcasters exclusive first opportunity to purchase and broadcast events on the anti-siphoning list, putting subscription television at a severe disadvantage in acquiring popular sports rights.
- The undertakings given by FOXTEL to the ACCC in 2002 in connection with the CSA included the following commitments aimed at enhancing competition:
    - a commitment by FOXTEL to make its channel line-up (including its movie and sports services) available to competing subscription television platforms for delivery to their subscribers; the undertaking extends to the supply of the FOX Footy Channel to other subscription television operators independently of FOXTEL's other channels

[30] Seven's submission at pg 10

[31] Seven's submission at pg 28

    - an undertaking to ensure that at least 30% of the subscription television channels in its basic service are completely non-affiliated with FOXTEL and its shareholders
    - a commitment to limit increases in the maximum price of FOXTEL's basic package to CPI until the end of 2005 (based on FOXTEL's satellite basic pacakage).
- As a matter of practice, the value of FOXTEL's service to the Australian consumer has increased significantly with the introduction of FOXTEL Digital. The new FOXTEL Digital basic service costs $49.95 per month for 67 channels (37 television channels plus 30 audio channels, plus interactive news and sports services) compared with the $49.95 per month paid by subscribers for the 25 channels comprising the FOXTEL satellite service made available under contracts entered into before the FOXTEL Digital launch.

For all of these reasons, FOXTEL is clearly not a monopoly.

1.2 Exclusion of Seven from subscription television

In its submission, Seven claims that FOXTEL and its partners have excluded Seven and others from participating in subscription television[32].

Seven has not been prohibited from involvement in subscription television.

There are four subscription television platforms currently operating in Australia other than FOXTEL and there has never been any restriction on Seven's ability to negotiate for the right to participate in any of these, or on Seven constructing its own subscription television operation.

As to the involvement of Seven and its related parties in the production and distribution of subscription television channels, both Australian Capital Equity, a private company controlled by Kerry Stokes, Seven's Chairman, and Seven itself have benefited from an on-going involvement with FOXTEL for more than seven years; through their ownership in the suppliers to FOXTEL of the World Movies and Sky News channels respectively. The World Movies and Sky News channels are, similarly, carried on the Austar and Optus subscription television platforms. Seven's statement that it has been prevented from diversifying its business or gaining positions on subscription television platforms is therefore plainly has the incorrect.

Finally, if Seven wishes to distribute more of its channels to FOXTEL's subscriber base, it has the opportunity to do so by using the section 87B access undertakings FOXTEL and Telstra gave to the ACCC in connection with the CSA.

FOXTEL has acted in accordance with all the Federal Court's rulings in relation to providing C7 with access to the FOXTEL distribution platform.

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[32] Seven's submission at pg 28

In 2001 and 2002, FOXTEL offered to carry the C7 channels on an a la carte (or stand alone) basis under a revenue share arrangement so that C7 and FOXTEL shared in the risk. C7 declined both offers. In 2002, Seven said it would only agree to the C7 channels being carried in FOXTEL basic.

1.3 Impact of the FOXTEL/Optus Content Sharing Agreement (*CSA*)

Both the ACCC[33] and Seven[34] assert in their submissions that the advent of the CSA, among other changes to the subscription television industry since 1998, have made the policy rationale behind the prohibition on commercial broadcaster multi-channelling redundant.

FOXTEL agrees that subscription television has seen progress since 1998 and made a significant contribution to the television industry by hugely expanding the choice of television entertainment available to Australian viewers (see section 3.3 of FOXTEL's initial multi-channel submission).

However, the CSA has not made any fundamental change to the environment in which subscription television operates. The purpose of the CSA was to establish a framework in which the sector could move towards financial sustainability and attract investment support for its digital roll-out. In this way the CSA secured for the subscription television sector the prospect, but not the guarantee, of becoming self-sustaining.

In FOXTEL's view, it is important not to mistake the high profile of subscription television as an innovator, and the hard-earned success of FOXTEL and Austar in attracting subscribers to their digital services, with profitability, substantial market power or an inherent shift in the fundamental economics of the Australian television industry.

The substantial losses subscription television operators continue to carry and, in most cases continue to incur on a day-by-day basis, are proof that the sector is still in a developmental phase. In light of the profitability and market power of the Seven, Nine and Ten networks (which remains substantially unchanged since 1998), subscription television continues to be vulnerable to regulatory change such as commercial network multi-channelling that would disadvantage it as against the commercial open broadcasters and seriously destabilise the market.

A summary of the pro-competition undertakings given by FOXTEL in connection with the CSA arrangements is set out in section 3.3 of FOXTEL's original multi-channelling submission.

[33] ACCC's submission at pg 12

[34] Seven's submission in the Executive Summary and elsewhere

1.4 Capacity arrangements for the FOXTEL service

Seven implies in its submission that FOXTEL's commercial arrangements with Optus for use of capacity on the Optus C1 satellite have had a detrimental effect on competition[35].

The contract under which FOXTEL uses satellite capacity on the Optus C1 satellite was negotiated on an arms' length basis with a view to securing carriage of FOXTEL's digital television service to existing and future subscribers.

FOXTEL is not aware of any reason why Optus would not have sold Seven capacity on the C1 satellite for value. There is, in addition, transponder capacity available on other satellites with footprints covering Australia that could be used to deliver subscription television services.

Seven goes on to assert that "*FOXTEL has had the use of a significant public asset entirely without payment to the Australian public in the form of the Telstra cable*"[36]. This is incorrect.

FOXTEL's rights to use Telstra cable arise under commercial agreements negotiated on an arms' length basis and FOXTEL pays large amounts to Optus and Telstra annually for the provision of satellite and cable capacity respectively.

1.5 FOXTEL access regimes

Ten and Seven have both included statements in their submission querying the effectiveness of the Part XIC access regimes applying to FOXTEL and Telstra subscription television systems[37].

The ACCC accepted FOXTEL's digital access regime as part of its section 87B undertakings in 2002. Notwithstanding the December 2004 decision of the Australian Competition Tribunal (the ***Tribunal***) to set aside FOXTEL's digital exemption, FOXTEL's voluntary digital undertakings remain in place and FOXTEL is continuing to offer a fair and transparent access regime to access seekers in accordance with the digital access regime that was accepted by the ACCC in November 2002 as part of FOXTEL’s 87B Undertakings to the ACCC.

The Tribunal rejected FOXTEL's exemption essentially on the grounds of its finding that FOXTEL would have invested in the digital service and provided access even in the absence of an exemption. While the Tribunal expressed some concerns about the terms and conditions under which FOXTEL offers access to its digital services, FOXTEL believes that these can be addressed - most aspects of the terms and conditions were accepted by the Tribunal as reasonable, including the pricing methodology.

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35 Seven submission at pg 3

36 Seven's submission at pg 30

37 Seven's submission at pg 9 and Ten's submission at pgs 2 and 19