Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates, 16 & 17 February 2005

Question: Add 4

Topic: **ACCC – Exclusive Deals for 3G Content**

Hansard Page: **Written**

Senator Conroy asked:

1. What legal precedent would there be for pursuing someone for anti-competitive conduct for obtaining exclusive rights over something for which there are a myriad of viable substitutes?

2. Why aren't you pursuing exclusive contracts in other markets? For example it is common for television stations to obtain exclusive rights.

3. If the existing law is not adequate to deal with this issue. Will ACCC ask for specific powers? Eg A regime preventing specified content from being siphoned off exclusively to one carrier?

4. In a recent article in the financial review (attached) you suggested that regulators in the US, UK and Europe were grappling with similar matters. Have regulators in any of those jurisdictions stopped carriers from obtaining exclusive access to sporting content?

Answer:

1. Sections 45, 46, 47 or 50 of the *Trade Practices Act 1974* (TPA) might all be applicable to matters in which parties have obtained exclusive rights to a certain thing. The grant of exclusive rights over something is not necessarily anti-competitive, however. To breach Part IV of the TPA, an exclusive arrangement must have the purpose and/or effect of substantially lessening competition in a market. This usually requires a special set of circumstances. For example, the exclusively acquired good/service might be an essential input for some downstream market and there might be a limited number of suppliers of that exclusive good/service. Other factors are also taken into account in assessing the competitive impact, including barriers to new entry for firms which could supply a substitute for the exclusive good/service, import competition, and the level of countervailing power in the market.

   In the event that there are many viable substitutes for the thing which is subject to exclusive rights, it is unlikely that the exclusivity would constitute a substantial lessening of competition. The extent to which there are substitutes available, or likely to become available in the future, is therefore a critical question the ACCC would consider before deciding whether a particular arrangement was in breach of the TPA.

2. In many cases, in particular where competitive market structures exist and firms do not exert substantial market power, the acquisition of exclusive rights does not constitute a substantial lessening of competition, and therefore is not in breach of the TPA. In relation to free-to-air (FTA) television, for example, there are several firms with approximately equal bargaining power in the market, and they are therefore likely to compete amongst themselves for the rights to particular content. Furthermore, when compared to other media, such as pay-TV and broadband internet, FTA television is more constrained in terms of available programming capacity, as each licence holder offers essentially a single channel. This means that it is difficult for an FTA licence-holder to actually find programming time in which to broadcast all the content over which it could potentially obtain exclusive rights.

3. The ACCC's consideration of exclusive content deals and their impact on the 3G markets is ongoing and, as such, the ACCC's position in relation to these matters is yet to be determined.

4. The ACCC is aware of a number of matters in the UK and Europe in which exclusive content supply raised concern with regulators.

   These include:

   - The UK Office of Fair Trading unsuccessfully brought a case against the legality of an exclusive content agreement between the Premier League and BSkyB in 1999.

   - The European Commission (EC) commenced an investigation in June 2001 into the joint selling of media rights to English Premier League soccer matches.

   - The EC also intervened in the joint selling arrangement (JSA) undertaken by UEFA (a confederation of European national football associations) and its members regarding the sale of the media rights (radio, TV, Internet, mobile) and other commercial rights of the UEFA Champions League, Europe's premier club football competition.[1] The JSA granted UEFA the exclusive right to sell the commercial rights of the UEFA Champions League.

   In the early 1990's US legislators and regulators prohibited integrated cable distributor/content companies from denying access to other distributors unless the denial of access could be shown to pass a public interest test.

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1 *Joint Selling of the Commercial Rights of the UEFA Champions League*, Case COMP/C.2-37.398, Commission Decision of 23 July 2003 (*"Champions League"*), para 1.