

FOXTEL SPECIAL ACCESS UNDERTAKING

APPENDIX 3

Confidentiality Deed

Confidentiality Deed

FOXTEL Management Pty Ltd

Access Seeker

[Date]

Confidentiality Deed

Date	
Parties	
1.	FOXTEL Management Pty Limited (ACN 068 671 938) of [*] for and on behalf of the FOXTEL Partnership (the Disclosing Party)
2.	Access Seeker (ACN [*]) of [*] (the Receiving Party)
Recitals	
A	The Disclosing Party has certain Confidential Information which the Receiving Party acknowledges as being of significant commercial value to the Disclosing Party.
B	The Disclosing Party will make available the Confidential Information to the receiving Party for the Permitted Purpose subject to and in consideration for the Receiving Party entering into this Deed with the Disclosing Party, which is necessary to protect the valuable commercial interests of the Disclosing Party.

It is agreed as follows.

1. Definitions and Interpretation

1.1 Definitions

The following definitions apply unless the context requires otherwise.

Commission means the Australian Competition and Consumer Commission.

Confidential Information means information which is provided to the Receiving Party on a confidential basis (or the Receiving Party ought reasonably to have known was confidential to the Disclosing Party), that:

- (a) is disclosed to the Receiving Party by or on behalf of the Disclosing Party;
- (b) is acquired by the Receiving Party directly or indirectly from the Disclosing Party; or
- (c) otherwise comes to the knowledge of the Receiving Party,

whether the information is in oral, visual or written form or is recorded or embodied in any other medium.

FOXTEL means FOXTEL Management Pty Ltd (ACN 068 671 938) for and on behalf of the FOXTEL Partnership.

FOXTEL Partnership means the partnership established between Telstra Media Pty Ltd (ACN 069 279 072) and Sky Cable Pty Limited (ACN 069 799 640).

Party means a party to this Deed.

People of a party means each of that party's directors, officers and employees.

Permitted Purpose means FOXTEL and the Access Seeker negotiating and performing a Digital Access Agreement pursuant to Appendix 2 of the Undertaking.

Third Party means a party's agents, contractors, advisers and representatives.

Undertaking means the special access undertaking under Division 5 of Subdivision B of Part XIC of the *Trade Practices Act 1974* (Cth) provided to the Commission by FOXTEL and dated 6 October 2005.

1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The **singular** includes the plural and conversely.
- (b) A **gender** includes all genders.
- (c) If a **word** or **phrase** is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a **person**, corporation, trust, partnership, unincorporated body or other entity includes any of the foregoing.
- (e) A reference to a **clause** or **schedule** is a reference to a clause or a schedule to, this Deed.
- (f) A reference to any **party** to this Deed or another agreement or document includes the party's successors, permitted substitutes and assigns (and, if applicable, the party's legal personal representatives).
- (g) A reference to any **agreement** or **document** (including, without limitation, a reference to this Deed) is to the agreement or document as amended, varied, supplemented, novated or replaced from time to time except to the extent prohibited by this Deed or that other agreement or document.
- (h) A reference to any **legislation** or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (i) A reference to **conduct** includes, without limitation, an omission, statement and undertaking, whether or not in writing.
- (j) A reference to an **agreement** includes any undertaking, deed, agreement and legally enforceable arrangement whether or not in writing and a reference to a document includes an agreement (as so defined) in writing, and any certificate, notice, instrument or document of any kind.

2. Provision of Confidential Information

2.1 Availability

Subject to clause 2.2 and the other terms of this Deed, the Disclosing Party shall make the Confidential Information available to the Receiving Party for the Permitted Purpose.

2.2 Cessation of Supply of Confidential Information

The Disclosing Party may at any time cease to supply the Confidential Information to the Receiving Party if the Receiving Party is in breach of this Deed and in particular, but without limitation, if the Receiving Party uses, or the Disclosing Party believes in good faith it will use, or will be likely to use, the Confidential Information for other than the Permitted Purpose.

3. Confidentiality

3.1 Receiving Party's covenants

The Receiving Party covenants and agrees with the Disclosing Party that it:

- (a) shall hold all Confidential Information in strict confidence and shall not disclose any of it to any person except in accordance with this Deed or otherwise as permitted or directed in writing by the Disclosing Party;
- (b) will not cause or allow any Confidential Information to be photocopied, reproduced or recorded in any manner except as reasonably necessary for the Permitted Purpose;
- (c) will not make any use of the Confidential Information or any part of it except for the Permitted Purpose, and will not make any use of the Confidential Information or any part of it to the competitive disadvantage of any of the Disclosing Party;
- (d) will establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use; and
- (e) immediately notify the Disclosing Party of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

3.2 Exceptions

This Deed does not prevent the Receiving Party from using and disclosing Confidential Information which:

- (i) at the time of the first disclosure by the Disclosing Party was already in the lawful possession of the Receiving Party in written form;
- (ii) is generally available to the public otherwise than by disclosure in breach of the terms of this Deed; or
- (iii) becomes available to the Receiving Party from a third person legally entitled to possess the information and provide it to the Receiving Party, if the use or disclosure accords with the right or permission largely granted to the Receiving Party by that third person.

3.3 Extent binding

Clause 3.1 extends to and binds the Receiving Party and all of its People and extends to and also operates in respect of any note, calculation, conclusion, summary or other material derived or produced partly or wholly from any Confidential Information.

3.4 Computer secrecy

Neither the Receiving Party nor any of its People may permit or cause any of the Confidential Information to be entered into a computer or Confidential Information base not solely operated and controlled by the Receiving Party.

4. Permitted confidential disclosure by Receiving Party

4.1 Disclosure to People

The Receiving Party may disclose Confidential Information to any of its People if the disclosure is necessary solely for the Permitted Purpose and if, before any Confidential Information is disclosed, the People agree to keep that Confidential Information confidential.

4.2 Disclosure to Third Parties

The Receiving Party may disclose Confidential Information to a Third Party if the disclosure is necessary solely for the Permitted Purpose and if, before any Confidential Information is disclosed:

- (a) the Disclosing Party is notified of the identity of the Third Party; and
- (b) the Third Party agrees to keep that Confidential Information confidential by delivering to the Receiving Party a properly executed confidentiality deed, substantially in the form of this Deed.

4.3 Responsibility for acts of People and Third Parties

Without limiting the obligations and responsibilities of the Receiving Party under this Agreement or otherwise, the Receiving Party is liable to the Disclosing Party for any misuse (including unauthorised disclosure) of the Confidential Information by:

- (a) the Receiving Party's People; or
- (b) any Third Parties to whom the Receiving Party disclosed the Confidential Information.

5. Access to Confidential Information

The Receiving Party shall limit access to the Confidential Information to:

- (a) its People who reasonably require access to the Confidential Information in order that the Permitted Purpose may be achieved and who are obliged to treat the Confidential Information as confidential in the same manner and to the same extent as is provided under this Deed, and
- (b) any third parties which the Disclosing Party may approve in writing as persons to whom disclosure may be made, which approval may be refused or granted (with or without conditions) and withdrawn at any time.

6. Disclaimer

6.1 The Disclosing Party not liable

The Receiving Party acknowledges that it is making an independent assessment of the Confidential Information and will verify all information on which it intends to rely to its own satisfaction and that, subject to the Confidential Information being provided in good faith, the Disclosing Party does not and will not give any warranty as to the truth, accuracy, relevance or usefulness of any of the Confidential Information and does not accept any responsibility for any falsity, inaccuracy or misleading information or for any omission in the Confidential Information provided.

6.2 Receiving Party's conclusions its own

The Disclosing Party accepts no responsibility for any interpretation, opinion or conclusion that the Receiving Party may form as a result of examining the Confidential Information.

7. Re-Delivery

The Receiving Party shall immediately re-deliver to the Disclosing Party (or destroy, where delivery is not physically possible) all Confidential Information held by it or which is under its control, and all notes, calculations or summaries or other material derived or produced partly or wholly from any of the Confidential Information and any or all computer records (including copies, reproductions and recordings of them) derived or produced partly or wholly from any of the Confidential Information, and shall provide to the Disclosing Party a Statutory Declaration from a duly authorised senior officer of the Receiving Party that to his or her personal knowledge all such records have been delivered, erased or destroyed in the following circumstances:

- (a) when the Confidential Information is no longer required for the Permitted Purpose;
- (b) when the Confidential Information is generally available to the public otherwise than through a breach by the Receiving Party of this Deed;
- (c) on the demand of the Disclosing Party if the Receiving Party is in breach of this Deed; or
- (d) if ordered by a court.

8. Other Disclosure by Disclosing Party

The Receiving Party acknowledges that the Disclosing Party is free to disclose any Confidential Information to any other person, should it so desire, and in those circumstances would not be under any obligation to notify the Receiving Party.

9. Termination

The provisions of this Deed binding on the Receiving Party will continue for a period of [*].

10. Remedies

The Receiving Party acknowledges that any unauthorised use or disclosure of the Confidential Information or any part of it in breach of this Deed will cause material damage to the Disclosing Party. Consequently, each of the Disclosing Party have the right, in addition to any other remedies available at law or in equity, to seek injunctive relief against the Receiving Party and any of its People in respect of any breach of this Deed by the Receiving Party or any of its People.

11. Indemnity

The Receiving Party indemnifies the Disclosing Party from all claims, costs, expenses, losses and liabilities (including legal costs on a solicitor and own client basis) suffered or incurred by any of them (including, without limitation, in connection with the enforcement of this Deed) as a result of or in connection with any breach of this Deed by the Receiving Party or any of its People.

12. Notices

Any notice given under this Deed:

- (a) must be in writing addressed to the intended recipient at the address shown below
Disclosing Party
Attention: [*], FOXTEL Management Pty Limited
Fax: [*]
Receiving Party
Attention: [*]
Fax: [*]]
- (b) must be signed by a person duly authorised by the sender,
- (c) will be taken to have been given when delivered, received or left at the above address. If delivery or receipt occurs on a day when business is not generally carried on in the place to which the notice is sent, or is later than 4 pm (local time), it will be taken to have been duly given at the commencement of business on the next day when business is generally carried on in that place.

13. Entire Agreement

This Deed contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

14. Amendment

This Deed may be amended only by another deed executed by all parties.

15. Assignment

The rights and obligations of each party under this Deed are personal. They cannot be assigned, charged or otherwise dealt with, and no party shall attempt or purport to do so, without the prior written consent of all the parties.

16. No Waiver

No failure to exercise and no delay in exercising any right, power or remedy under this Deed will operate as a waiver. Nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.

17. Further Assurances

Each party shall take all steps, execute all documents and do everything reasonably required by any other party to give effect to any of the transactions contemplated by this Deed.

18. Stamp Duty and Costs

Each party shall bear its own costs arising out of the preparation of this Deed. All Stamp duty (including fines and penalties) chargeable on this Deed, on any instruments entered into under this Deed, and in respect of a transaction evidenced by this Deed shall be borne by the Receiving Party. The Receiving Party shall indemnify the Disclosing Party on demand against any liability for that stamp duty (including fines and penalties).

19. Governing Law

This Deed is governed by the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

20. Counterparts

This Deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

EXECUTED and delivered as a deed in New South Wales.

**Signed Sealed and Delivered by
FOXTEL Management Pty Limited:**

Director Signature

Director/Secretary Signature

Print Name

Print Name

**Signed Sealed and Delivered by
[Receiving Party]:**

Director Signature

Director/Secretary Signature

Print Name

Print Name