

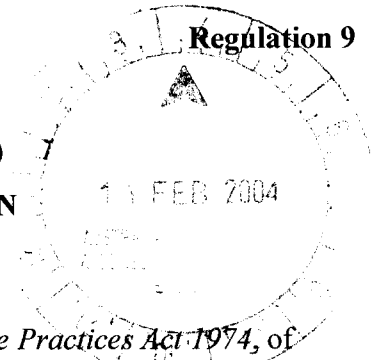
N 31277

**FORM G**

COMMONWEALTH OF AUSTRALIA

*Trade Practices Act 1974 - sub-section 93(1)*

**EXCLUSIVE DEALING: NOTIFICATION**



To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or proposed conduct of a kind referred to in sub-section 47(6) or (7) of that Act in which the person giving notice engaged or proposes to engage.

**1. (a) Name of person giving notice:**

Telstra Pay TV Pty Limited ("Telstra Pay TV") (ABN 65 095 931 614).

Telstra Pay TV is a wholly-owned subsidiary of Telstra Corporation Limited ("Telstra") (ABN 33 051 775 556). Telstra has lodged a related notification with the Commission.

Telstra and Telstra Pay TV have previously lodged other related notifications with the Commission (see N31170, N31233 and N31245 for Telstra and N31171, N31232 and N31244 for Telstra Pay TV).

**(b) Short description of business carried on by that person:**

Telstra Pay TV supplies subscription television and related services to customers who acquire telecommunications services from Telstra.

The telecommunications services offered and supplied by Telstra include fixed-line telephony services (including pre-selection to Telstra for long distance telephony services), mobile telephony services, and internet services.

**(c) Address in Australia for service of documents on that person:**

C/- Sharon Louise Henrick  
Partner  
Mallesons Stephen Jaques  
Level 60, Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

**2. (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:**

Telstra Pay TV resells subscription television services and related services to customers who acquire telecommunications services from Telstra. The subscription television and related services are acquired by Telstra Pay TV from the FOXTEL Partnership ("FOXTEL") and AUSTAR United Communications Limited and AUSTAR Entertainment Pty Limited (together "AUSTAR").

FOXTEL and AUSTAR have offered and supplied subscription television and related services to customers since 1995 and continue to offer and supply such services to customers.

This notice also relates to various telecommunications services offered and supplied to customers by Telstra, including fixed-line telephony services, pre-selection to Telstra for long-distance telephony services, mobile telephony services and internet services.

**(b) Description of the conduct or proposed conduct:**

Telstra Pay TV proposes to offer and supply subscription television and related services, and to offer and supply such services at a discount, or with allowances, rebates or credits, to customers who acquire telecommunications services from Telstra.

The telecommunications services will be supplied by Telstra pursuant to the related notification lodged with the Commission (referred to at 1(a) above).

**Re-supply of FOXTEL's digital subscription television services**

Telstra Pay TV understands that FOXTEL is proposing to commence to offer digital subscription television services.

Telstra Pay TV proposes to offer and supply FOXTEL's digital subscription television and related services to customers who elect to participate in Telstra's Rewards Packages programme, from the date on which FOXTEL commences to offer digital subscription television and related services, and who agree to receive a single bill for the subscription television and related services and the telecommunications services.

Telstra's current Rewards Packages programme comprises:

- (i) a 5% discount off eligible charges for customers who acquire a fixed-line telephony service (pre-selected to Telstra for long distance calls) together with either an eligible mobile telephony service, an eligible internet service or FOXTEL's subscription television and related services from Telstra on a single bill; and
- (ii) a 10% discount off eligible charges for customers who acquire a fixed-line telephony service (pre-selected to Telstra for long distance calls) together with two or more of an eligible mobile telephony service, an eligible internet service or FOXTEL's subscription television and related services from Telstra on a single bill.

Telstra is proposing to re-sell FOXTEL's digital subscription television and related services as an eligible service within Telstra's Rewards Packages programme to retail and business customers. A customer, therefore, will be offered a 5% discount off eligible charges, if the customer acquires a fixed-line telephony service (which is pre-selected to Telstra for long distance calls) and any one of the following services from Telstra or Telstra Pay TV (as the case may be) on a single bill:

- (i) an eligible mobile telephony service;

- (ii) an eligible internet service; or
- (iii) FOXTEL's digital subscription television and related services.

If the customer acquires a fixed-line telephony service (which is pre-selected to Telstra for long-distance calls) and any two (or more) of an eligible mobile telephony service, an eligible internet service, or FOXTEL's digital subscription television and related services from Telstra or Telstra Pay TV (as the case may be) on a single bill, the discount would be 10% off eligible charges.

Telstra Pay TV intends to offer FOXTEL's digital subscription television and related services at prices which are 5% to 10% lower than FOXTEL's standard retail prices for FOXTEL's digital subscription television and related services.

The 5% or 10% discount off FOXTEL's digital subscription television and related services will apply to monthly subscription fees for FOXTEL's digital subscription television services, including FOXTEL's basic service, tiers, games, and a la carte channels. However, certain services will not be eligible for the 5% or 10% discount.

The prices charged to customers for each component of Telstra's Rewards Packages programme will be separately itemised on each customer's bill, so the pricing of each component will be transparent to the customer.

Telstra Pay TV may waive installation and migration prices for FOXTEL's digital subscription television and related services.

If a customer decides not to continue to be a member of Telstra's Rewards Packages programme during the term of their contract with Telstra Pay TV for FOXTEL's digital subscription television and related services, the customer may continue to acquire FOXTEL's digital subscription television and related services from Telstra Pay TV for the remainder of the term of the contract if they continue to acquire at least one other telecommunications service from Telstra and they agree to a single bill for these services. The customer will not be eligible to receive Telstra's Rewards Packages programme's 5% or 10% discounts on FOXTEL's digital subscription television and related services from Telstra Pay TV for the remainder of the term of their contract.

If the customer does not continue to acquire at least one other telecommunications service from Telstra for the remainder of the term of their contract with Telstra Pay TV, Telstra Pay TV will facilitate the transfer of the customer to FOXTEL, and FOXTEL will supply its digital subscription television and related services to the customer if the customer enters into an agreement with FOXTEL.

Telstra Pay TV may refuse to offer or supply FOXTEL's subscription television and related services, or those services at a particular price or with a particular discount, credit, rebate or allowance, to customers who have not acquired, or who have not agreed to acquire telecommunications, or other services from Telstra.

#### **Promotion of FOXTEL's digital and analogue subscription television services**

In addition to the ongoing discounts off eligible charges as described above, Telstra Pay TV intends from time to time to promote FOXTEL's digital subscription television and related services by, for example, offering customers the chance to win prizes, and offering and supplying transient discounts, allowances, rebates or credits

to select groups of customers who commence to acquire any of FOXTEL's digital subscription television services from Telstra Pay TV and a telecommunications service from Telstra, or who refer new customers to Telstra Pay TV.

The transient promotional discounts, credits, rebates and allowances may, for example, involve Telstra Pay TV offering movie or sporting tickets, gift vouchers, e-commerce or other telecommunications products, or a credit or rebate on FOXTEL's digital subscription television and related services (including a tier, a pay-per-view service, or a game service, or a related service such as a subscription television service magazine, an additional set top box, or an installation fee).

The promotional prizes offered by Telstra Pay TV may comprise, for example, holidays; tickets to special events as well as entertainment before or after the special event; subscriptions to a season of a particular type of sport, such as football, basketball, or motor racing; or audio, visual or audio visual equipment, such as a stereo system or a television set; or a combination of all or any of these.

The promotional prizes will be offered to a very small number of customers whose names are drawn from a larger number of entrants.

Each promotional discount, allowance, rebate and credit may be offered for up to six months at a time, although the period over which the customer may receive the promotional discount, allowance, rebate and credit may be greater than six months.

Telstra Pay TV may refuse to offer and supply prizes, discounts, allowances, rebates or credits, to customers who do not acquire, or do not agree to acquire, one or more telecommunications services from Telstra.

#### **Re-supply of AUSTAR's subscription television services**

Telstra understands that AUSTAR intends to offer a new subscription television and related services offering.

From the date on which AUSTAR commences to offer the new subscription television and related services, Telstra Pay TV proposes to offer and supply those services to retail customers who acquire telecommunications services from Telstra in the areas where AUSTAR supplies its subscription television and related services, except the cabled areas of the Gold Coast.

Telstra Pay TV also intends to give or allow discounts, allowances, rebates or credits to customers who acquire AUSTAR's new subscription television and related services from Telstra Pay TV in the areas where AUSTAR supplies its subscription television services, except the cabled areas of the Gold Coast.

Unlike Telstra Pay TV's proposed offering of FOXTEL's digital subscription television and related services, customers who choose to acquire AUSTAR's new subscription television and related services from Telstra Pay TV will not have to be a member of Telstra's Rewards Packages programme.

Rather, customers will be able to acquire AUSTAR's new subscription television and related services from Telstra Pay TV if the customer also acquires a fixed line telephony service from Telstra and agrees to receive a single bill for AUSTAR's new subscription television and related services from Telstra Pay TV and their fixed line telephony services from Telstra.

If a customer decides not to preselect Telstra for their long distance telephony services, Telstra Pay TV may refuse to supply discounts, allowances, rebates or credits to the customer.

If the customer chooses to acquire a fixed line telephony service from Telstra, which is pre-selected to Telstra for long distance calls, the customer will receive discounts off AUSTAR's subscription television services from Telstra Pay TV.

If a customer wishes to acquire AUSTAR's new subscription television and related services from Telstra Pay TV (as set out above) and the customer also wishes to participate in Telstra's Rewards Packages programme, the customer will become eligible for a discount from Telstra for telecommunications services as follows:

- (i) if the customer acquires their fixed line telephony service as part of Telstra's Rewards Packages programme, the customer will be entitled to receive a 5% discount off their eligible call charges;
- (ii) if the customer acquires their fixed line telephony service and their mobile telephony service as part of Telstra's Rewards Packages programme, the customer will be entitled to receive a 10% discount off their eligible call charges; and
- (iii) if the customer acquires their fixed line telephony service and their internet service as part of Telstra's Reward Packages programme, the customer will be entitled to receive a 10% discount off their eligible call charges and a 10% discount off their eligible internet services.

AUSTAR's new subscription television and related services will not be a discountable service for the purposes of Telstra's Rewards Packages programme. Accordingly, Telstra Pay TV's proposed prices for AUSTAR's new subscription television services will not be subject to Telstra's Rewards Packages programme 5% and 10% discounts.

Existing customers who wish to migrate to AUSTAR's new subscription television and related services from Telstra Pay TV may be required to pay a migration fee and will be issued with a new remote control unit. This fee will be levied by AUSTAR on Telstra Pay TV. Telstra Pay TV will not charge this fee to customers if AUSTAR waives the fee, or Telstra Pay TV otherwise chooses to waive it.

If a customer decides not to continue to purchase their fixed line telephony services from Telstra during the term of their contract to acquire AUSTAR's new subscription television and related services from Telstra Pay TV, or not to receive a single bill for their telephony and subscription television and related services, the customer will not be able to continue to acquire AUSTAR's new subscription television and related services from Telstra Pay TV for the remainder of the term of the contract. In those circumstances, Telstra Pay TV will facilitate the transfer of the customer to AUSTAR, and AUSTAR will supply its new subscription television and related services to the customer if the customer enters into an agreement with AUSTAR.

Telstra Pay TV may refuse to offer or supply AUSTAR's subscription television and related services, and refuse to give or allow a particular discount, credit, rebate or allowance, to retail customers who have not acquired, or who have not agreed to acquire, telecommunications or other services from Telstra.

### **Promotion of AUSTAR's new subscription television services**

Telstra Pay TV also intends to promote from time to time AUSTAR's new subscription television and related services in the same way as it promotes FOXTEL's digital subscription television services, as described above.

### **Net public benefit arising from Telstra Pay TV's proposed conduct**

The proposed conduct will clearly result in a net public benefit because:

- (i) the proposed conduct will benefit customers of subscription television services by providing them with discounted subscription television services packages;
- (ii) the proposed conduct will benefit customers of subscription television services by enabling Telstra Pay TV to continue to be an alternative supplier of FOXTEL and AUSTAR's subscription television services;
- (iii) the proposed conduct will further stimulate competition for the supply of subscription television and related services to customers who wish to acquire those services together with other telecommunications services, or on a stand-alone basis;
- (iv) the proposed conduct will result in customers being able to receive prizes, sporting tickets, movie passes, gift vouchers, e-commerce and other telecommunications products, transient discounts, credits, rebates and allowances on particular subscription television services (such as tier or a pay-per-view service) for no additional cost to the customer;
- (v) the proposed conduct will result in efficiencies as a result of Telstra Pay TV and Telstra being able to exploit economies of scope and scale, especially with respect to installation services for subscription television and internet services. These efficiencies will, for example, benefit customers who acquire cable subscription television and internet services from Telstra Pay TV and Telstra since Telstra Pay TV and Telstra may waive installation fees;
- (vi) the proposed conduct will allow customers to benefit from the consolidation of their subscription television and telecommunications services on a single bill, which will reduce transaction costs for customers who may otherwise receive separate bills for each of their subscription television and telecommunications services;
- (vii) the proposed conduct will result will assist the long-term viability of the subscription television services industry in Australia. To date, the subscription television services industry has been characterised by significant annual losses and relatively low, flat penetration rates; and
- (viii) the proposed conduct will increase competition in telephony and other telecommunications services markets in which components of Telstra's Rewards Packages programme are supplied, by stimulating other telecommunications service providers to match or better Telstra Pay TV's and Telstra's offerings.

Further, the proposed conduct will not result in any detriment to the public because:

- (i) the proposed conduct is a very technical type of third line forcing conduct which will be engaged in by two related companies. If Telstra and Telstra Pay TV were not related companies but different business units within the same company, and they engaged in the conduct described in this notification, they would not be engaging in third line forcing conduct. By accepting the Dawson Committee's recommendation to amend the third line forcing provisions to exempt related companies, the Commonwealth Government has recognised the lack of detriment associated with the type of third line forcing conduct described in this notification. If the *Trade Practices Act 1974* is amended to reflect the Government's position, the proposed conduct would not amount to third line forcing;
- (ii) other suppliers of the components of Telstra's Rewards Packages programme offer and supply their products along the lines described in this notification. The proposed conduct would merely allow Telstra and Telstra Pay TV to engage in the same type of activity as their competitors;
- (iii) the price of each component of any package including subscription television services will be transparent;
- (iv) the proposed conduct will be voluntary. Each component of Telstra Pay TV's and Telstra's packages will be available separately from a number of other suppliers of telecommunications services including FOXTEL, AUSTAR, AAPT and Optus;
- (v) the Commission recognises that third line forcing conduct which is voluntary on the part of the customer is usually beneficial. For example, in the Commission's publication entitled *Guide to Authorisation and Notification for Third Line Forcing Conduct*, dated February 1998, the Commission states:

*Accordingly, ... [the Commission] does not pursue all third line forcing conduct of which it becomes aware ...*

*The Commission is unlikely to be concerned where potential purchasers have a genuine choice, based on quality and price, whether or not to purchase product A alone or to accept the supplier's third line forcing terms for the package of products A and B.*

*In particular, third line forcing conduct under which customers can buy the package of products A and B at a real saving on the total price of the products bought separately in competitive markets, has positive benefits in terms of competition and consumer welfare and would not be opposed by the Commission;<sup>1</sup>*

- (vi) the proposed conduct will not place any barriers in the paths of competitors. The proposed discounts, allowances, rebates and credits are modest and competitors will be free to match or better them; and
- (vii) the confidential re-supply agreements between Telstra and FOXTEL, and Telstra and AUSTAR are not exclusive. FOXTEL and AUSTAR are free to

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<sup>1</sup> Page 17.

supply their subscription television services to other entities, including telecommunications companies for re-supply to retail customers in competition with AUSTAR, FOXTEL and Telstra Pay TV. In fact, TransACT and AAPT offer packages of FOXTEL's subscription television services in competition with Telstra Pay TV and Telstra. Further, Primus is also reported to be negotiating an agency or re-supply arrangement with FOXTEL. The proposed conduct, therefore, will not lessen the ability of competitors to compete on the merits of their services.

For all the reasons set out above, the proposed conduct will increase competition in all relevant markets and will give rise to net benefit to the public.

**3. (a) Class or classes of persons to which the conduct relates:**

Retail customers of subscription television, telephony and other telecommunications services.

**(i) At present time:** None.

**(ii) Estimated within the next year:** Substantially greater than 50.

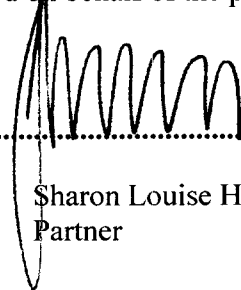
**(b) Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:** Not applicable.

**4. Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:**

Sharon Louise Henrick  
Partner  
Mallesons Stephen Jaques  
Level 60, Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

Dated 11 February 2004

Signed on behalf of the person giving this notice



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Sharon Louise Henrick  
Partner

