



Australian Competition & Consumer Commission

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13 February 2004

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Dear «Salutation»

Third line forcing notifications lodged by Telstra Corporation Limited and Telstra Pay TV Pty Limited

The Australian Competition and Consumer Commission ('the Commission') has received applications for notifications of third line force conduct from Telstra Pay TV Pty Limited ('Telstra Pay TV') (notification number N31277) and Telstra Corporation Limited ('Telstra Corporation') (notification number N31278).

By way of background, third line forcing conduct occurs when one business supplies goods or services on the condition that the purchaser/consumer acquire goods or services from another business.

Part IV of the *Trade Practices Act* (the Act) prohibits third line forcing conduct (subsections 47(6) and 47(7) of the Act). However, businesses wishing to engage in this conduct can notify the Commission of the conduct. Notification provides immunity from legal action by the Commission or any other party for potential breaches of the relevant provisions of the Act. The Act provides that the Commission shall maintain a public register of all notifications lodged with it. Accordingly the notification process is conducted on an open and public basis.



Under the notification process, the Commission may issue a notice revoking the immunity if it is satisfied that the likely benefit to the public resulting from the notified conduct will not outweigh the likely detriment to the public resulting from the conduct.

Telstra Corporation and Telstra Pay TV have applied for notification of conduct that constitutes a third line force. The notifications relate to the resupply and promotion of subscription television and related services together with telephony and other telecommunications services. Once confidentiality issues are finalised, a copy of the application will be available on the Commission's public register. It will also be placed on the Commission's website at <www.accc.gov.au> — from the homepage follow the 'public registers' and then 'authorisation and notifications registers' links.

Third line forcing conduct involves the supply of goods or services on condition that the purchaser acquire a second good or service from another supplier. Under the notification process, immunity for third line forcing conduct is obtained automatically 14 days after lodgement, and continues unless the Commission issues a notice revoking the immunity. The Commission may revoke the immunity if the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public resulting from the conduct.

The notified conduct is similar to conduct described in previous notifications lodged by Telstra, including: for Telstra to bundle Foxtel (N31170, N31171), for Telstra to bundle Austar (N31232, N21233) and for Telstra to promote Foxtel and Austar by giving or allowing discounts, allowances, rebates or credits (N31233, N31245).

The proposed conduct outlined in the new notifications essentially relates to Telstra's proposal to bundle Foxtel's digital subscription service, Austar's "new" services, and to provide discounts on these services. Importantly, the conduct differs from previous notifications as it is not restricted to residential consumers. Additionally, the way in which Telstra offers Austar has changed. There are other subtle differences to the notified conduct which can be seen in the application.

To assist the Commission in its consideration of the notifications it seeks the views of interested parties as to the likely public benefits and detriments of the notified conduct. In view of commercial considerations, submissions are sought by **Tuesday 24 February 2004**. Submissions can also be lodged by email to <adjudication@accc.gov.au>.

The Commission asks for submissions to be in writing so they can be made publicly available. Submissions will be placed on a public register and may be also placed on the Commission's website. The Commission may, where it is considered appropriate, supplement written submissions with discussions with relevant parties on a mutually convenient basis. Non-confidential minutes of such discussions would also be placed on the public register.

Should you lodge a submission with the Commission you may request that information included in the submission be treated as confidential and not placed on the public register.

The Commission may take confidential information into account during its assessment of an authorisation application. Guidelines for seeking confidentiality are at Attachment A for your information.

Should you have any queries please contact Susan Sullivan on 02 6243 1354 or Elizabeth Carlile on 02 6243 1206.

Yours sincerely

Tim Grimwade
General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or a part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or processes;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words **“Restriction of Publication Claimed”** should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words **“Restriction of Publication of Part Claimed”** should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.

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