

**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION GIVEN UNDER SECTION 87B OF
THE *TRADE PRACTICES ACT 1974***

D00/38818



BY

**OPTUS INTERNET PTY LIMITED (ACN 083 164 532) AND EXCITE@HOME
AUSTRALIA PTY LIMITED (ACN 087 048 440)**

PERSONS GIVING UNDERTAKING

- (1) This undertaking is given to the Australian Competition and Consumer Commission ('the Commission') by Optus Internet Pty Limited (ACN 083 164 532) of 101 Miller Street, North Sydney in New South Wales ('Optus') and Excite@Home Australia Pty Limited (ACN 087 048 440) of 100 Harris Street, Pymont, in New South Wales ('Excite@Home') under section 87B of the *Trade Practices Act 1974* ('the Act').

BACKGROUND

- (2) Optus and Excite@Home jointly provide the Optus@Home residential cable Internet service ('Service'). In providing the Service, Optus owns the customer, and both Optus and Excite@Home provide the services and network used by Optus@Home customers.
- (3) Optus and Excite@Home launched the Service in January 2000. The two plans under which the Service was offered were advertised as 'unlimited'. Prior to 4 August 2000, the Internet site advertising the Service contained statements such as:
 - For a flat monthly subscription and a one-time installation fee, you'll get unlimited Internet access at blistering speeds...
 - Flat Monthly subscription – Unlimited usage with no metered or "per megabyte" charges
- (4) The Customer Terms relating to the Service require the customer to comply with an 'Acceptable Use Policy' ('the Policy'). The relevant part of the Policy is at Attachment A. Optus made available the Customer Terms and the Policy from launch on the Internet site advertising the Service.
- (5) The Customer Terms provide that Optus may suspend or terminate the supply of the Service to a customer if the customer breaches the Customer Terms, or if Optus reasonably suspects the customer has breached the Customer Terms.

- (6) Optus and Excite@Home were of the view that some customers were in breach of the Policy.
- (7) On 30 June 2000 Optus sent out the first letters to customers whom Optus concluded were in breach of the Policy and the Customer Terms. Customers who failed to reduce their usage after receipt of this warning letter were subsequently terminated from the Service.
- (8) As at 3 August 2000, 320 customers were sent warning letters and 66 customers had been terminated from the Service. Of these customers who were disconnected, 27 have since been reconnected in the good faith that they will comply with the Policy in the future.
- (9) The Commission was concerned that the Service was advertised as unlimited, yet there were relevant limitations on the Service, namely those contained in the Policy. In the Commission's view, this limitation impacted significantly upon the central marketing feature of the Service. The Commission was also concerned that the Policy may not have been sufficiently brought to the attention of consumers.
- (10) Optus and Excite@Home have informed the Commission that the purpose of the Policy is not primarily to place limits on the extent to which customers can use the Service, but that it is aimed at ensuring that customers act in accordance with the law and the permitted uses of the Service, as set out in the Customer Terms and the Policy.
- (11) Given the concerns expressed by the Commission, but without admission, Optus and Excite@Home removed from the Optus@Home website all claims of "unlimited downloads" on 26 July 2000 and "unlimited access" on 4 August 2000.
- (12) Optus and Excite@Home have taken certain actions, and are willing to undertake certain further actions, in order to remedy any confusion that may have been caused.

COMMENCEMENT OF UNDERTAKINGS

- (13) This undertaking comes into effect when:
 - (a) the undertaking is executed by Optus and Excite@Home; and
 - (b) the undertaking so executed is accepted by the Commission.

UNDERTAKINGS

- (14) Optus and Excite@Home will not advertise the Service as including "unlimited downloads" or "unlimited access" and will remove all

advertising material that incorporates references to “unlimited access” or “unlimited downloads”.

- (15) Optus and Excite@Home have revised the Policy with a view to clarifying what it means by acceptable use, including providing practical guidelines of the types of usage and behaviour patterns that are and are not acceptable.
- (16) Optus has written to all customers who have been terminated and who have not been reconnected, confirming its position and offering a full refund of all moneys paid (including installation, monthly and termination fees), provided such customers cooperate with Optus in relation to the return of Optus equipment, in particular the cable modem.
- (17) Optus has written (by e-mail and confirmation letter) to all current customers clarifying the Policy and allowing such customers 30 days to cancel their subscription if they wish. In this case Optus has offered a refund of their installation fees, provided such customers cooperate with Optus in relation to the return of Optus equipment, in particular the cable modem. In the case of fixed term customers, they will not incur the cancellation fee.
- (18) Optus has written to all customers who have signed up for the Service but have not yet been installed clarifying the Policy, and Optus will refund their installation fees (if any) that have been paid if they wish to cancel their subscription.

ACKNOWLEDGMENTS

- (19) Optus and Excite@Home acknowledge that their actions regarding the advertising of the Service may have confused some consumers.
- (20) Optus and Excite@Home acknowledge the Commission’s right to make this undertaking available for public inspection and notes that the Commission will, at its discretion, from time to time, publish and publicly refer to this undertaking.
- (21) Optus and Excite@Home acknowledge and accept that this undertaking in no way derogates from the rights and remedies available to any person who has subscribed to the Service.

Attachment A

Extract from Optus@Home Policy

8. Bandwidth, Data Storage and Other Limitations
 - 8.1 You must comply with the then current bandwidth, data storage and other limitations on the Services.
 - 8.2 Users must ensure that their activity does not improperly restrict, inhibit, or degrade any other user's use of the Services, nor represent (in the sole judgment of Optus) an unusually large burden on the network itself. In addition, users must ensure that their activity does not improperly restrict, inhibit, disrupt, degrade or impede Optus's ability to deliver the Services and monitor the Services, backbone, network nodes, and/or other network services.
 - 8.3 Optus @Home residential customers may not resell, share, or otherwise distribute the Services or any portion thereof to any third party without the written consent of Optus. For example, you cannot provide Internet access to others through a dial up connection, host shell accounts over the Internet, provide email or new service, or send a news feed.
 - 8.4 The Optus @Home residential service offering is a consumer product designed for your personal use of the Internet. For example, the service does not provide the type of security, upstream performance and total downstream throughput capability typically associated with commercial use.
 - 8.5 You may not run network services or provide network services to others via the Optus@Home residential service. The use of a Local Area Network (LAN) for personal use is permitted. The Optus@Home residential service includes personal WebSpace accounts for publishing personal web pages. Examples of prohibited use include, but are not limited to, providing network services for e-mail, http, ftp, irc, dhcp or multi-user interactive forums.

IN WITNESS TO THESE UNDERTAKINGS

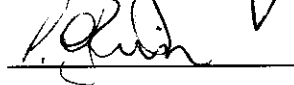
The Common seal of **OPTUS INTERNET PTY LIMITED**
(ACN 083 164 532)

was hereunto affixed in the presence of:

Director:



Director / Secretary:





This 23 day of October 2000.

The Common seal of **EXCITE@HOME AUSTRALIA**
PTY LIMITED (ACN 087 048 440)

was hereunto affixed in the presence of:

Director:



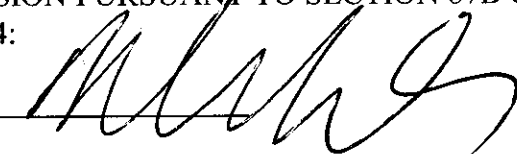
Director / Secretary:



This 23 day of October 2000.

ACCEPTANCE BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES
ACT, 1974:

Chairman:



This 20 day of October 2000.

IN WITNESS TO THESE UNDERTAKINGS

The Common seal of **OPTUS INTERNET PTY LIMITED**
(ACN 083 164 532)
was hereunto affixed in the presence of:

Director: _____

Director / Secretary: _____

This _____ day of October 2000.

The Common seal of **EXCITE@HOME AUSTRALIA**
PTY LIMITED (ACN 087 048 440)
was hereunto affixed in the presence of:

Director: A. Alankh

Director / Secretary: _____

This _____ day of October 2000.

ACCEPTANCE BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES
ACT, 1974:

Chairman: [Signature]

This 20 day of October 2000.