

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

BY

Axxess Australia Pty Ltd (ACN 083 208 717)

Benchmark Sales Pty Ltd (ACN 092 422 120)

Peter Edward Russell Slaney

Stephen Vincent McGovern

PERSONS GIVING UNDERTAKING

- (1) This undertaking is given to the Australian Competition and Consumer Commission ("the Commission") by:
- (a) Axxess Australia Pty Ltd (ACN 083 208 717) of Level 4, 468 St. Kilda Road, Melbourne, Victoria ("Axxess");
 - (b) Benchmark Sales Pty Ltd (ACN 092 422 120) of Level 4, 468 St. Kilda Road, Melbourne, Victoria ("Benchmark");
 - (c) Peter Edward Russell Slaney of 15 Killara Court, Werribee, Victoria ("Slaney"); and
 - (d) Stephen Vincent McGovern of 9 Meaka Court, Warrandyte South, Victoria ("McGovern");
- under section 87B of the *Trade Practices Act 1974* ("the Act").

BACKGROUND - AXCESS

- (2) Axxess operates as an agent for various telecommunications service providers for the promotion and sale of telecommunications services to consumers and potential consumers throughout Australia.
- (3) Axxess was named 'Clos Pty Ltd' from its commencement date of 30 June 1998 until 21 January 1999. Slaney was appointed a director of Axxess on 7 December 1998 and remains a director as at the date of execution of this undertaking. McGovern was appointed a director of Axxess on 7 December 1998 and ceased on 19 May 2000. After ceasing to be a director of Axxess McGovern continued to be associated with Axxess in a managerial capacity.

- (4) Axxess engages in door-to-door and telephone sales, with the objective of persuading potential customers to transfer their telephone service pre-selection from their existing supplier to the telephone service provider for which Axxess is an Agent.
- (5) In or about April 2000 the telecommunications service provider One.Tel Limited (“One.Tel”) entered into an agency agreement with Axxess.
- (6) In or about April 2000 Axxess also entered into an agency agreement with the telecommunications service provider Worldxchange Pty Ltd (“Worldxchange”).
- (7) In and around July 2000, the Commission became aware of a significant number of complaints by consumers in relation to transfers of their telephone service provider to One.Tel made without the consumer’s consent or informed consent. Some of those complaints were referred to the Commission by the Telecommunications Industry Ombudsman (“TIO”). The majority of the complaints alleged that the transfers or ‘churns’, effected by means of door-to-door marketing and sales activities, were induced by misrepresentations as to the nature and effect of the transaction or as to the nature of documents presented for signature. The misrepresentations were made by individuals (“sales representatives”) employed by or working for Agents engaged by One.Tel, including Axxess.
- (8) In or about September 2000 the Commission obtained documents from Axxess pursuant to notices issued under section 155 of the Act. Those documents provided further evidence of the practices complained of.
- (9) In or about October 2000 as a result of its investigations the Commission formed the view that One.Tel, One.Tel’s Agents, including Axxess, and those Agents’ sales representatives had breached Parts IVA and V of the Act. The Commission concluded that between about April 2000 and October 2000 the Agents and the Agents’ representatives had induced transfers without the consent or informed consent of the consumers concerned.
- (10) Specifically, the Commission concluded that One.Tel, One.Tel’s Agents including Axxess, and the sales representatives, had misled those consumers who had complained as to the reason for which or the basis on which their authorisation was sought. The representations made included the following:
 - (a) that One.Tel’s services were offered by, on behalf of or at the request of Telstra;
 - (b) that One.Tel was a subsidiary of or otherwise affiliated or connected with Telstra;
 - (c) that the document presented for signature (“the transfer document”) constituted merely:
 - (i) an expression of interest by the consumer in transferring his or her telephone service pre-selection to One.Tel;

- (ii) a request by the consumer to be provided with further information; and/or
- (iii) an acknowledgment that the representative has spoken to or attended upon the consumer.
- (d) misleading statements in relation to the effect of signing the transfer documents; and
- (e) misleading statements relating to Telstra's local call product.

Each One.Tel representation was false and or misleading in that:

- (a) One.Tel's services were not offered by, on behalf of or at the request of Telstra;
 - (b) One.Tel was not a subsidiary of or otherwise affiliated or connected with Telstra;
 - (c) the document presented for signature ("the transfer document") constituted more than merely:
 - (i) an expression of interest by the consumer in transferring his or her telephone service pre-selection to One.Tel;
 - (ii) a request by the consumer to be provided with further information; and/or
 - (iii) an acknowledgment that the representative has spoken to or attended upon the consumer.
 - (d) the effect of signing the transfer documents was that the consumer's telephone service was transferred to One.Tel; and
 - (e) information, particularly pricing information, about Telstra's local call product was incorrect.
- (11) In or about November 2000 the Commission became aware of a number of complaints by consumers in relation to transfers to Worldxchange made without the consumer's consent or informed consent. Some of those complaints were referred to the Commission by the TIO. Many of those complaints alleged that the transfers or 'churns', effected by means of door-to-door marketing or telephone sales activities, were induced by misrepresentations as to the nature and effect of the transaction or as to the nature of documents presented for signature. The misrepresentations were made by individuals ("sales representatives") employed by or working for sales agent companies engaged by Worldxchange, including Axxess.
- (12) The complaints referred to in paragraph (11) concern representations of a similar nature to those set out in paragraph (10), but in relation to Worldxchange.
- (13) In or about December 2000 the Commission instituted proceeding against One.Tel in the Federal Court alleging breaches of sections 51AB, 52 and 53 of the Act in relation to unauthorised customer transfers effected between April

and October 2000. The matter was settled by means of injunctive orders and One.Tel providing the Commission with a court enforceable undertaking pursuant to section 87B of the Act (“the undertaking”). The undertaking provided for One.Tel to undertake a range of measures, all designed to reduce the likelihood of customers being transferred without their authorisation to One.Tel.

- (14) In or about between February and March 2001 the Commission obtained documents from Worldxchange in relation to customer complaints made in February and March 2001 alleging unauthorised customer transfers to Worldxchange by Axxess and representatives of Axxess, between December 2000 and January 2001. Those documents provided further evidence of the practices complained of.
- (15) In or about May 2001 as a result of its investigations, the Commission formed the view that Axxess and representatives of Axxess had breached Parts IVA and V of the Act and were likely to continue to do so in the future. Specifically the Commission concluded that Axxess and Axxess’ representatives had induced transfers without the consent or informed consent of the consumers concerned.
- (16) The Commission commenced proceedings against Axxess on 25 May 2001. In or about July 2001 the Commission became aware of further complaints, which concerned representations to the effect that:
 - (a) Worldxchange was a telecommunications watchdog that monitored the services provided and/or the rates charged by telephone companies;
 - (b) Worldxchange had been authorised to act as an agent for the industry watchdog to protect the interests of consumers;
 - (c) the effect of the authority or signature requested of the consumer would be to enable Worldxchange to perform surveillance upon the consumer’s telephone account in order to protect the consumer’s interests.

Each Worldxchange representation was false and or misleading in that:

- (a) Worldxchange was not a telecommunications watchdog that monitored the services provided and/or the rates charged by telephone companies;
 - (b) Worldxchange had no authorisation to act as an agent for the industry watchdog to protect the interests of consumers;
 - (c) the effect of the authority or signature requested of the consumer would not be to enable Worldxchange to perform surveillance upon the consumer’s telephone account in order to protect the consumer’s interests, but rather to transfer the consumer’s telephone account to Worldxchange.
- (17) The Commission became aware of further complaints in or about August 2001. As a result of the Commission’s investigation of the complaints notified in July and August 2001, the Commission concluded that between June 2001 and

August 2001 Axxess and Axxess' representatives had induced or attempted to induce transfers without the consent or informed consent of the consumers concerned.

BACKGROUND - BENCHMARK

- (18) Benchmark operates as an agent for New Tel Limited ("New Tel") for the promotion and sale of telecommunications services to consumers and potential consumers throughout Australia.
- (19) Benchmark was named 'Axxess Direct Pty Ltd' from its commencement date of 11 April 2000 until 19 July 2001. Slaney was appointed a director of Benchmark on 24 November 2000 and remains a director as at the date of execution of this undertaking. McGovern was appointed a director of Benchmark on 11 April 2000 and remains a director as at the date of execution of this undertaking.
- (20) In and around 30 May 2001 Benchmark entered into an agreement with New Tel, pursuant to which Benchmark has at all material times supplied New Tel with various services for reward, including the sale and promotion of New Tel telephone services ("the New Tel services") to consumers and potential consumers of those services throughout Australia. The New Tel services were provided to consumers under the name "Worldxchange".
- (21) In or about August 2001 as a result of its investigations the Commission formed the view that Benchmark, and its sales representatives had breached Parts IVA and V of the Act. The Commission concluded that between about May 2001 and August 2001 the Agent and the Agent's representatives had induced transfers without the consent or informed consent of the consumers concerned.
- (22) Specifically, the Commission concluded that Benchmark, and its sales representatives had misled those consumers who had complained as to the reason for which or the basis on which their authorisation was sought. The representations made included the following:
 - (a) that the authority requested by the representative did not constitute an authority and request to transfer the consumers' telephone service pre-selection from another supplier to Worldxchange;
 - (b) that Worldxchange was a telecommunications watchdog that monitored the services provided and/or the rates charged by telephone companies;
 - (c) that Worldxchange had been authorized to act as an agent for the industry watchdog to protect the interests of consumers;
 - (d) that the effect of the authority requested by the representative would be to enable Worldxchange to perform surveillance upon the consumer's telephone account to protect the consumer's interests;

- (e) that Axxess was a telephone broking company working with Worldxchange to provide discounts to consumers on their existing telephone accounts; and
- (f) that Axxess was a consumer watchdog conducting a joint venture with Worldxchange to provide discounts to former One.Tel customers.

Each New Tel representation was false and or misleading in that:

- (a) the requested authority did constitute an authority and request to transfer the consumer's telephone service pre-selection from another supplier to Worldxchange;
- (b) Worldxchange was not a telecommunications watchdog;
- (c) Worldxchange was not authorized to act as an agent for the industry watchdog;
- (d) the effect of the requested authority was not to enable Worldxchange to perform surveillance upon the consumer's telephone account;
- (e) Axxess was not a telephone broking company working with Worldxchange to provide discounts to consumers on their existing telephone accounts; and
- (f) Axxess was not a consumer watchdog conducting a joint venture with Worldxchange to provide discounts to former One.Tel customers.

COMMENCEMENT OF UNDERTAKING

(23) These undertakings come into effect when:

- (e) the undertakings are executed by Axxess, Benchmark, Slaney and McGovern; and
- (a) the undertakings so executed are accepted by the Commission.

UNDERTAKING – AXXESS, SLANEY and McGOVERN

(24) Axxess, Slaney and McGovern will, within 30 days of executing this undertaking, engage an independent assessor approved by the Commission who will undertake a complete review, to be completed by 30 June 2002, of each of the following aspects of Axxess's business:

- (a) trade practices compliance training for Parts IV and V of the Act;
- (b) selling channels and methods;
- (c) complaints handling and resolution;
- (d) Axxess' compliance with the matters set out at (10) and (16) above.

The purpose of the review is to identify operational improvements, if any, that could assist Axxess in complying with the Act and in its fair dealings with customers and potential customers obtained via telemarketing and door-to-door marketing channels. Axxess will supply the Commission with a report in relation to this review within 14 days of completion of the review.

- (25) Axxess will adopt the following Australian Communications Industry Forum (“ACIF”) industry Codes, or their revised versions, within 14 days of the date of execution of this undertaking:
- (a) ACIF C523:1999 ‘Protection of Personal Information of Customers of Telecommunications Providers’;
 - (b) ACIF C521:2000 ‘Customer Information on Prices, Terms and Conditions’;
 - (c) ACIF C541:2000 ‘Credit Management’;
 - (d) ACIF C542:2000 ‘Billing’;
 - (e) ACIF C547:2000 ‘Complaint Handling’; and
 - (f) ACIF C546:2000 ‘Customer Transfer’
- (26) Axxess will contribute \$60,000 towards a public education and awareness campaign targeted at explaining consumer rights and benefits in respect of customer transfer arrangements in order to raise general public and consumer awareness of consumers’ rights (as provided for in relevant codes and laws) concerning selling practices and telecommunications customer churn. The fund established for this purpose will be administered by the Commission in its absolute discretion. The amount paid by Axxess as referred to in this paragraph is to be paid in 3 equal monthly instalments commencing on 1 June 2002.
- (27) Axxess will pay the Commission’s legal costs in relation to this matter (to be apportioned between Axxess and Benchmark as agreed) up to the total sum of \$20,000, to be paid within 28 days of the date of execution of this undertaking.

ACKNOWLEDGMENTS – AXXESS, SLANEY and McGOVERN

- (28) Axxess, Slaney and McGovern acknowledge that by the conduct of Axxess’ sale representatives, Axxess has breached s.51AB, s.52 and s.53(c), (d) and (f) of the Act.
- (29) Axxess, Slaney and McGovern 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.

- (30) Axxess, Slaney and McGovern acknowledge and accept that this undertaking in no way derogates from the rights and remedies available to any person arising from Axxess's conduct.

UNDERTAKING – BENCHMARK, SLANEY and McGOVERN

- (31) Benchmark, Slaney and McGovern will, within 30 days of executing this undertaking, engage an independent assessor approved by the Commission who will undertake a complete review, to be completed by 30 June 2002, of each of the following aspects of Benchmark's business

- (a) trade practices compliance training for Parts IV and V of the Act;
- (b) selling channels and methods;
- (c) complaints handling and resolution;
- (d) Benchmark's compliance with the matters set out at (22) above.

The purpose of the review is to identify operational improvements, if any, that could assist Benchmark in complying with the Act and in its fair dealings with customers and potential customers obtained via telemarketing and door-to-door marketing channels. Benchmark will supply the Commission with a report in relation to this review within 14 days of completion of the review.

- (32) Benchmark will adopt the following ACIF industry Codes, or their revised versions, within 14 days of the date of execution of this undertaking:

- (a) ACIF C523:1999 'Protection of Personal Information of Customers of Telecommunications Providers';
- (b) ACIF C521:2000 'Customer Information on Prices, Terms and Conditions';
- (c) ACIF C541:2000 'Credit Management';
- (d) ACIF C542:2000 'Billing';
- (e) ACIF C547:2000 'Complaint Handling'; and
- (f) ACIF C546:2000 'Customer Transfer'.

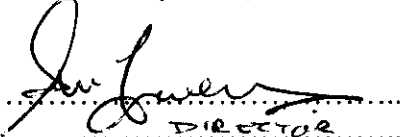
- (33) Benchmark will pay the Commission's legal costs in relation to this matter (to be apportioned between Axxess and Benchmark as agreed) up to the total sum of \$20,000, to be paid within 28 days of the date of execution of this undertaking.

ACKNOWLEDGMENTS – BENCHMARK, SLANEY and McGOVERN

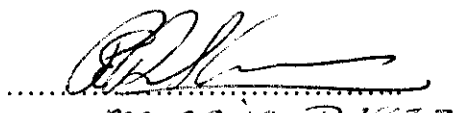
- (34) Benchmark, Slaney and McGovern acknowledge that by the conduct of Benchmark's sales representatives, Benchmark has breached s.51AB, s.52 and s.53 (d) of the Act.
- (35) Benchmark, Slaney and McGovern acknowledge the Commission's right to make this undertaking available for public inspection and notes that the Commission will, at it discretion, from time to time, publish and publicly refer to this undertaking.
- (36) Benchmark, Slaney and McGovern acknowledge and accept that this undertaking in no way derogates from the rights and remedies available to any person arising from Benchmark's conduct.

IN WITNESS TO THESE UNDERTAKINGS

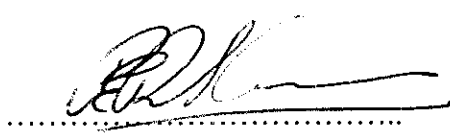
- (a) Signed for and on behalf of **Axxess Australia Pty Ltd** (ACN 083 208 717):

Signature of authorised person: 
Office held: DIRECTOR
Name of authorised person: STEPHEN MCGOVERN
This 20th day of March 2002.

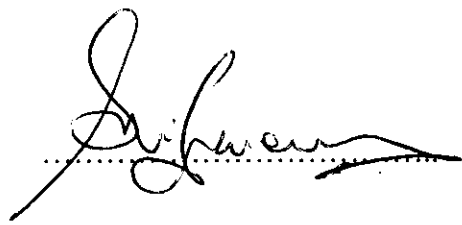
- (b) Signed for and on behalf of **Benchmark Sales Pty Ltd** (ACN 092 422 120):

Signature of authorised person: 
Office held: MANAGING DIRECTOR
Name of authorised person: PETER E. R. SLANEY
This 20th day of March 2002.

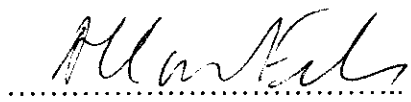
- (c) Signed by:
Peter Edward Russell Slaney
This 20th day of March 2002.



- (d) Signed by:
Stephen Vincent McGovern
This 20th day of March 2002.



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

Professor Allan Fels, Chairperson: 
This 20th day of March 2002.
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