

**UNDERTAKING**  
**TRADE PRACTICES ACT 1974**

**Undertaking to the Australian Competition & Consumer Commission given for the purposes of section 87B of the *Trade Practices Act 1974***

by

**Telstra Corporation Limited**

**ABN 33 051 775 556**

and

**Telstra Multimedia Pty Limited**

**ACN 069 279 072**

**1 Background**

- 1.1 Telstra Multimedia Pty Limited (“**Telstra Multimedia**”) is a wholly owned subsidiary of Telstra Corporation Limited (“**Telstra**”). Telstra Multimedia is the owner and operator of a hybrid-fibre coaxial cable network (“**HFC network**”).
- 1.2 Telstra Media Pty Limited (“**Telstra Media**”) is also a wholly owned subsidiary of Telstra. Telstra Media owns 50% of the issued shares in FOXTEL Management Pty Limited (“**FOXTEL**”). The remaining issued shares in FOXTEL are owned by Sky Cable Pty Limited (“**Sky Cable**”). News Corporation Limited and Publishing and Broadcasting Limited own the issued shares in Sky Cable in equal proportions.
- 1.3 FOXTEL supplies (amongst other things) an analogue subscription television service via Telstra Multimedia’s HFC network.
- 1.4 SingTel Optus Pty Limited and some of its wholly owned subsidiaries (together “**Optus**”) also supply (amongst other things) an analogue subscription television service. Optus supplies its analogue subscription television service via its own HFC network.
- 1.5 FOXTEL, Telstra Media, Sky Cable and Optus entered into a Content Supply Agreement (“**CSA**”). Under the CSA, FOXTEL will supply content to Optus for use in the subscription television service which Optus supplies via Optus’ HFC network.
- 1.6 The Australian Competition & Consumer Commission (“**Commission**”) is concerned that giving effect to the CSA will result in a substantial lessening of competition in a number of related markets.
- 1.7 To overcome the Commission’s concerns, Telstra and Telstra Multimedia proffer this undertaking under section 87B of the *Trade Practices Act 1974*.

- 1.8 Telstra Multimedia is providing an undertaking in relation to a digital subscription television carriage service in reasonable anticipation that the Government will enact the Revised Legislation.
- 1.9 Telstra Multimedia will rely on the terms of Schedule 2 to this undertaking in any application to the relevant statutory body under the Revised Legislation for an order exempting Telstra Multimedia from the obligations that would apply to it if the Digital Subscription Television Carriage Service, or services of a substantially similar nature, were subject to a statutory access regime.
- 1.10 Telstra Multimedia will rely, subject to the Revised Legislation, on the relevant statutory body having regard to the terms of Schedule 2 to this undertaking if the relevant statutory body makes a Final Order under the Revised Legislation in relation to Telstra Multimedia's application for exemption.
- 1.11 This undertaking refers to particular statutory processes that are to be undertaken by the Commission in respect of the services that are the subject of this undertaking, being the consideration of an undertaking that is to be offered under Part XIC of the Act in relation to the analogue subscription television broadcast carriage service, and an application for an ex ante exemption in respect of the digital equivalent of that service. Also, a number of other matters may arise for consideration by the Commission in respect of these services, including decisions relating to the declaration of them, or the making of arbitration directions and determinations in respect of them. Telstra acknowledges that the Commission will make its decisions in respect of such matters in light of the facts and circumstances that exist at the time, and that acceptance by the Commission of this undertaking, in no way implies that the Commission will make a particular decision or follow a particular course in respect of those other matters.

## 2 Definition and Interpretation

- 2.1 A reference to "this undertaking" is a reference to the provisions of this document and its schedules.

- 2.2 In this undertaking, unless the context otherwise requires:

**Act** means the *Trade Practices Act 1974 (Cth)*, as amended from time to time.

**Commission** means the Australian Competition & Consumer Commission.

**Control**, when used in relation to the definition of **Related Party**, is defined in accordance with section 50AA of the *Corporations Act 2001* as amended from time to time.

**Declared Analogue Service** means the analogue subscription television broadcast carriage service via line links gazetted by the Commission on 8 September 1999, as supplied by Telstra Multimedia from time to time.

**Digital Subscription Television Carriage Service** means a point-to-multipoint service for the carriage over Telstra Multimedia's HFC network of digital video broadcast signals associated with subscription television services.

**Final Order** means:

- (a) a written order made by the relevant statutory body pursuant to the Revised Legislation exempting a service provider from the access obligations that would be applicable to the service provider in relation to a service if the service were subject to an access regime and in respect of which no appeal is lodged and any applicable appeal period has expired; or
- (b) if an appeal is lodged, there is a final resolution of that appeal and any subsequent appeals in a way which permits the written order of the relevant statutory body referred to in paragraph (a) to take effect according to its terms.

**Force Majeure** means an event or cause beyond the reasonable control of the party claiming force majeure, including, without limitation:

- (a) an act of God;
- (b) acts or omissions by any governmental authority;
- (c) war, revolution or any other act against public order or authority;
- (d) industrial action or trade disputes of whatever nature; and
- (e) the requirements of any law.

**Holding company**, when used in relation to the definition of **Related Party**, is defined in accordance with section 4A of the *Trade Practices Act 1974* as amended from time to time.

**Regulatory Change** means the Government passing legislation which has the effect of:

- (a) preventing providers of subscription television services or any one of them from acquiring subscription television rights or subscription television rights to television programs or channels (other than rights, programs or channels consisting predominantly of movies) on an exclusive basis;
- (b) requiring providers of subscription television services or any one of them to supply television programs or channels to other providers of subscription television services; or
- (c) allowing open broadcasters to multi-channel prior to January 2007 or provide subscription television services using the terrestrial broadcasting services bands.

**Related Party** means in relation to the first party:

- (a) any person, company or entity that exercises or has the ability to exercise, practical control of the affairs of the first party or is controlled by the first party;
- (b) all holding companies, subsidiary companies and subsidiaries of holding companies of the first party (where the first party is a company); and

- (c) all directors (but not shareholders) of the first party where the first party is a company or partners or trustees or other office holders however described of the first party (where the first party is unincorporated).

**Revised Legislation** means legislation enabling a service provider that provides a service, or expects to provide a service, to:

- (a) apply for an exemption from the access obligations that would be applicable to that service provider in relation to that service if that service were subject to a statutory access regime and for the relevant statutory body to make an order exempting the service provider; and
- (b) give a written access undertaking in connection with the provision of access to that service which sets out the circumstances in which the service provider agrees to provide that service and for the relevant statutory body to approve in writing the undertaking.

**Subsidiary**, when used in relation to the definition of **Related Party**, is defined in accordance with section 4A of the *Trade Practices Act 1974* as amended from time to time.

### **3 Commencement of this Undertaking**

3.1 This undertaking comes into effect when:

- (a) the undertaking is executed by Telstra;
- (b) the undertaking is executed by Telstra Multimedia; and
- (c) the undertaking so executed is accepted by the Commission.

### **4 Undertaking by Telstra**

4.1 Telstra undertakes to procure that Telstra Multimedia will satisfy Telstra Multimedia's obligations in this undertaking, or in the event that Telstra Multimedia is wound up, that another wholly owned subsidiary of Telstra will satisfy Telstra Multimedia's obligations in this undertaking.

4.2 Telstra undertakes to procure that within 7 days of the coming into effect of this undertaking, Telstra Media will agree to amend the CSA to:

- (a) delete clause 9;
- (b) amend the relevant provisions of the CSA so as to allow Optus to grant access to its cable network to third party access seekers; and
- (c) insert a new clause 15.8.

4.3 An explanation by the parties of the amendments to the CSA since 5 March 2002 is contained in the document entitled "Summary of amendments to the CSA", provided to the Commission.

## **5 Declared Analogue Service Access Undertaking**

- 5.1 Telstra Multimedia undertakes to change its current capacity allocations so as to make 10 channels of 7 MHz each in respect of the Declared Analogue Service available on its HFC network for use by persons other than Related Parties of FOXTEL or Telstra if the Commission accepts the written access undertaking referred to in paragraph 5.2 of this undertaking.
- 5.2 Telstra Multimedia undertakes that within 7 days of the date of the coming into effect of this undertaking, it will give to the Commission a written access undertaking in relation to the Declared Analogue Service applicable to the 10 channels of 7 MHz each referred to in paragraph 5.1 of this undertaking.
- 5.3 Telstra Multimedia will provide the written access undertaking to the Commission under section 152BS of the Act.
- 5.4 The written access undertaking will be in the form of Schedule 1 to this undertaking.
- 5.5 If the Commission accepts the access undertaking under section 152BU(2)(a) of the Act, Telstra Multimedia undertakes not to:
- (a) withdraw the access undertaking pursuant to section 152CA of the Act; or
  - (b) replace the access undertaking pursuant to section 152CB of the Act.
- 5.6 If the Commission rejects the access undertaking in the form of Schedule 1 under section 152BU(2)(b) of the Act, Telstra Multimedia will as soon as reasonably practicable but not later than 2 months of the Commission advising Telstra Multimedia of the reasons for the rejection, submit a varied access undertaking under section 152BS of the Act if the variations required by the Commission are acceptable to Telstra Multimedia, acting reasonably.
- 5.7 If the Commission rejects the access undertaking provided under section 152BU(2)(b) of the Act, or if Telstra Multimedia has provided a varied access undertaking under section 152BS of the Act and the Commission has rejected that varied access undertaking, Telstra Multimedia will make a commercial offer to supply up to 10 channels of 7 MHz each in respect of the Declared Analogue Service available on its HFC network in accordance with Schedule 1 or the varied Schedule 1 as the case may be.
- 5.8 The Commission acknowledges that the commercial offer in paragraph 5.7 will be made available to access seekers who are involved in arbitrations with Telstra Multimedia which have been commenced in accordance with Part XIC of the Act in relation to the Declared Analogue Service, but that Telstra Multimedia's commercial offer made pursuant to paragraph 5.7 will include a condition that the access seeker withdraw notification of the dispute(s) the subject of the arbitration.
- 5.9 If Telstra Multimedia has not commenced supplying a Digital Subscription Television Carriage Service when the access undertaking referred to paragraphs 5.2 or 5.6 or the commercial offer referred to in paragraph 5.7 (as the case may be) expires, Telstra Multimedia undertakes to provide a further access undertaking under section 152BS of the Act in relation to the Declared Analogue

Service. The further access undertaking will be based on the access undertaking referred to in paragraphs 5.2 or 5.6 or the commercial offer referred to in paragraph 5.7 (as the case may be), but may involve reasonable changes, including to price and channel availability.

- 5.10 If an access seeker requests information or assistance from Telstra or Telstra Multimedia to enable it to obtain access (including the provision of information in relation to channel numbering), Telstra or Telstra Multimedia will use their reasonable endeavours to provide that information or assistance (subject to the access seeker's request for assistance being reasonable and any information limited to relevant information) provided always that the access seeker agrees to pay Telstra's or Telstra Multimedia's reasonable costs of providing that information or assistance.

## **6 Investment in Digital Subscription Television Carriage Service**

- 6.1 So long as the Revised Legislation commences prior to 31 December 2003 and there is no Regulatory Change, Telstra Multimedia undertakes to commence supplying a Digital Subscription Television Carriage Service no later than 12 months after the later of the date on which:
- (a) FOXTEL obtains a Final Order in relation to a digital cable and a digital satellite subscription television service for the duration of FOXTEL's undertaking to supply a commercial retail digital cable subscription television service and a commercial retail digital satellite subscription television service (including any period of continuation of the FOXTEL undertaking) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in Telstra Multimedia's reasonable opinion, would not have a material adverse effect on the financial or operational assumptions on which any decision of Telstra Multimedia or FOXTEL to give the commitment to commence supplying the relevant service was made or on the extent of the exemption obtained under the Revised Legislation; and
  - (b) Telstra Multimedia obtains a Final Order in relation to a Digital Subscription Television Carriage Service for the duration of Telstra Multimedia's undertaking referred to in paragraph 6.1 (including any period of continuation of the undertaking pursuant to paragraph 7.3) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in Telstra Multimedia's reasonable opinion, would not have a material adverse effect on the financial or operational assumptions on which any decision of Telstra Multimedia or FOXTEL to give the commitment to commence supplying the relevant service was made or on the extent of the exemption obtained under the Revised Legislation,
- but in any event not before 23 October 2003.
- 6.2 Telstra Multimedia undertakes to apply for a Final Order in relation to a Digital Subscription Television Carriage Service for the purposes of paragraph 6.1 within 28 days of the Revised Legislation commencing.
- 6.3 If Telstra Multimedia's application for a Final Order is rejected, Telstra Multimedia will as soon as reasonably practicable but not later than 2 months of

the Commission advising Telstra Multimedia of the reasons for the rejection, make a fresh application for a Final Order and a variation of this undertaking under subsection 87B(2) of the Act based on a revised Schedule 2, if the variations required to Schedule 2 are acceptable to Telstra Multimedia, acting reasonably.

- 6.4 Telstra Multimedia undertakes to supply a Digital Subscription Television Carriage Service in accordance with the terms in Schedule 2 to this undertaking if it commences supplying a Digital Subscription Television Carriage Service, other than a test or trial service.
- 6.5 Telstra Multimedia undertakes to notify the Commission 3 months before it commences supplying a Digital Subscription Television Carriage Service, other than a test or trial service.
- 6.6 Telstra Multimedia is able to vary Schedule 2 (other than in respect of price) at any time on the provision of 1 months' notice to the Commission that includes an amended Schedule 2 in circumstances where Telstra Multimedia reasonably considers that:
  - (a) a technical or related problem necessitates a change to the terms and conditions upon which the services described in Schedule 2 are supplied, provided always that the amendment only amends Schedule 2 to the extent necessary to address the technical or related problem; or
  - (b) it is necessary to make a technical change to the services described in Schedule 2 provided always that the amendment only amends Schedule 2 to the extent necessary to address the technical change.
- 6.7 If an access seeker requests information or assistance from Telstra or Telstra Multimedia to enable it to obtain access (including the provision of information in relation to channel numbering), Telstra or Telstra Multimedia will use its reasonable endeavours to provide that information or assistance (subject to the access seeker's request for assistance being reasonable and any information limited to relevant information) provided always that the access seeker agrees to pay Telstra's or Telstra Multimedia's reasonable costs of providing that information or assistance.
- 6.8 Telstra Multimedia undertakes that the design and equipment of that part of its HFC network used to provide a Digital Subscription Television Carriage Service will facilitate access to Telstra Multimedia's HFC network by access seekers wishing to provide a digital subscription television service by accommodating multiple access seekers without the need for significant additional network enhancements.
- 6.9 Telstra Multimedia undertakes that it will not enter into any arrangements or vary existing arrangements with suppliers for the supply of equipment, software or other relevant rights for its HFC network if those arrangements will require Telstra Multimedia to seek any further consents from those suppliers to permit access seekers wishing to gain access to its HFC network to provide a digital subscription television service.

## **7 Duration of this Undertaking**

- 7.1 The undertakings referred to in paragraphs 5 and 6 will terminate on the earlier of expiry of the CSA (31 December 2010) or earlier termination of the CSA.
- 7.2 Telstra Multimedia's undertaking referred to paragraph 6.4 will expire on 31 December 2007.
- 7.3 Notwithstanding paragraph 7.2, at any time between 1 October 2006 and 31 December 2006, Telstra Multimedia may give notice that it intends to continue its undertaking referred to in paragraph 6.4 past 31 December 2007 until 31 December 2015. If Telstra Multimedia gives that notice, the undertaking referred to paragraph 6.4 will continue on its then terms after 31 December 2007 until 31 December 2015 unless it is terminated before 31 December 2015 by Telstra Multimedia giving 12 months' notice to the Commission of its intention to terminate the undertaking.
- 7.4 Notwithstanding paragraphs 7.2 and 7.3, Telstra Multimedia can withdraw the undertakings referred to in paragraph 6 at any time if:
- (a) the Final Order granted to Telstra Multimedia is varied (and such variation has a material adverse effect on the Telstra Multimedia's business), revoked or abrogated; or
  - (b) the Final Order granted to FOXTEL is varied (and such variation has a material adverse effect on FOXTEL's business), revoked or abrogated and FOXTEL has withdrawn its digital access undertaking given at the date of these undertakings pursuant to section 87B of the Act.

## **8 Variation or Review of this Undertaking**

- 8.1 If Telstra or Telstra Multimedia is unable to comply with its obligations in this undertaking, or believes it is necessary to seek some modification to this undertaking due to changed circumstances, Telstra, Telstra Multimedia and the Commission agree that they will review this undertaking and negotiate in good faith a variation or revocation of this undertaking pursuant to subsection 87B(2) of the Act.

## **9 Force Majeure**

- 9.1 Telstra or Telstra Multimedia will not be liable for any failure to perform any obligation in this undertaking if the failure is due to Force Majeure.
- 9.2 If Telstra or Telstra Multimedia is, by reason of Force Majeure, unable to perform an obligation in this undertaking, Telstra or Telstra Multimedia (whichever the case may be) will:
- (a) as soon as practicable, and in any event within 10 business days, notify the Commission of the cause and extent of non-performance and the date of commencement of Force Majeure; and
  - (b) negotiate in good faith with the Commission a means to satisfy Telstra and Telstra Multimedia's obligations in this undertaking.



## **10 Confidentiality**

- 10.1 The Commission acknowledges that it will not, save for the purposes of enforcement action under section 87B of the Act or any legal obligation, publish or disclose confidential information provided to it by Telstra or Telstra Multimedia in connection with this undertaking.

## **11 Provision of information**

- 11.1 The Commission may at any time during the currency of this undertaking request information from Telstra Multimedia that the Commission reasonably requires for the purpose of monitoring this undertaking, including in connection with a subsection 87B(2) application. Telstra Multimedia will use its reasonable endeavours to comply with any such request within 10 business days of receipt or such other period of time as may be agreed to by the Commission.

## **12 Enforcement**

- 12.1 For the avoidance of doubt, the Commission may take enforcement action at any time during the limitation period whether:

- (a) during the period of this undertaking; or
- (b) after the period of this undertaking,

in respect of any breach by Telstra or Telstra Multimedia of a term of this undertaking or the Act.

## **13 Notices**

- 13.1 Any notice, demand, consent or other communication given or made under these undertakings:

- (a) must be in writing;
- (b) must be signed by a person duly authorised by the sender;
- (c) must refer to these undertakings and state the paragraph under which the Notice is given; and
- (d) must be delivered to the intended recipient by prepaid post, by hand or by facsimile to the address, or facsimile number below, or the address or facsimile number last notified by the intended recipient to the sender:

### **to Telstra and Telstra Multimedia:**

Telstra Multimedia Pty Limited  
Level 4  
400 George Street  
SYDNEY NSW 2000

Attention: Company Secretary

Fax: 02 9223 5294

with a copy being given to Peter de Jong at the time notice is provided; and

**to the Commission**

Australian Competition & Consumer Commission  
GPO Box 520J  
MELBOURNE VIC 3001

Attention: General Manager, Telecommunications

Fax: 03 9663 3699

**14 Acknowledgements**

- 14.1 Subject to Clause 10.1, Telstra and Telstra Multimedia acknowledge that the Commission will make this undertaking available for public inspection.
- 14.2 Telstra and Telstra Multimedia acknowledge that the Commission may issue a media release about this undertaking and may from time to time publicly refer to this undertaking.
- 14.3 Telstra and Telstra Multimedia acknowledge and accept that this undertaking in no way derogates from the rights and remedies available to any other person arising from giving effect to the CSA.

**IN WITNESS OF THIS UNDERTAKING AND ITS AGREEMENT:**

**SIGNED by BRUCE J AKHURST** )  
as authorised representative for )  
**TELSTRA MULTIMEDIA PTY** )  
**LIMITED (ACN 069 279 027)** in the )  
presence of: )

*PdeJong* )  
..... )  
Signature of witness )

*Peter de Jong* )  
..... )  
Name of witness (block letters) )

*Bruce Akhurst* )  
..... )

By executing this agreement the )  
signatory warrants that the signatory )  
is duly authorised to execute this )  
agreement on behalf of TELSTRA )  
MULTIMEDIA PTY LIMITED )

This *20th* day of *November* 2002

**IN WITNESS OF THIS UNDERTAKING AND ITS AGREEMENT:**

**SIGNED by BRUCE J AKHURST** )  
as authorised representative for )  
**TELSTRA CORPORATION** )  
**LIMITED (ABN 33 051 775 556)** in )  
the presence of: )

*PdeJong* )  
..... )  
Signature of witness )

*Peter de Jong* )  
..... )  
Name of witness (block letters) )

*Bruce Akhurst* )  
..... )

By executing this agreement the )  
signatory warrants that the signatory )  
is duly authorised to execute this )  
agreement on behalf of TELSTRA )  
CORPORATION LIMITED )

This *20th* day of *November* 2002

**ACCEPTED BY THE AUSTRALIAN COMPETITION & CONSUMER  
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES  
ACT 1974:**

*Allan Fels*

.....  
Professor Allan Fels  
Chairman

This *21<sup>st</sup>* day of *November* 2002

**SCHEDULE 1 - DECLARED ANALOGUE SERVICE ACCESS UNDERTAKING**