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**UNDERTAKING  
TO THE  
AUSTRALIAN COMPETITION & CONSUMER COMMISSION  
BY  
FOXTEL MANAGEMENT PTY LTD  
(FOR AND ON BEHALF OF THE FOXTEL PARTNERSHIP)  
AND  
FOXTEL CABLE TELEVISION PTY LIMITED**

**NOVEMBER 2002**

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**PUBLIC VERSION**

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# Section 87B Undertaking

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## UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION

### PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974

BY

**FOXTEL MANAGEMENT PTY LIMITED  
(FOR AND ON BEHALF OF THE FOXTEL PARTNERSHIP)**

AND

**FOXTEL CABLE TELEVISION PTY LIMITED**

## 1. Background

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- 1.1 These undertakings are given by FOXTEL Management Pty Limited (ACN 068 671 938) for and on behalf of the FOXTEL Partnership (which is the partnership established between Telstra Media and Sky Cable) and FOXTEL Cable Television Pty Limited (ACN 069 008 797) (together **FOXTEL**).
- 1.2 FOXTEL Management Pty Ltd has all necessary authorities to act for the FOXTEL Partnership in the giving of these undertakings.
- 1.3 FOXTEL is in the business of supplying a Subscription Television Service and, for that purpose, is also in the business of acquiring subscription television channels, and acquiring and compiling subscription television programming to include as part of its Subscription Television Service.
- 1.4 Optus is in the business of supplying a Subscription Television Service and, for that purpose, is also in the business of acquiring subscription television channels, and acquiring and compiling subscription television programming to include as part of its Subscription Television Service. Optus is also in the business of supplying telecommunications services to consumers.
- 1.5 FOXTEL and Optus entered into the CSA which is conditional on the Commission notifying the parties in writing that it does not intend to intervene in the transactions contemplated by the CSA.
- 1.6 The Commission has made extensive market enquiries and substantial material has been submitted to the Commission by third parties. The Commission has expressed the view that Part IV of the Act is likely to be contravened should effect be given to the CSA. The main issues that the Commission sees arising from the CSA that are of concern to the Commission are:
- (a) a reduction in the competitive tension between FOXTEL and Optus in relation to competition for subscription television content;
  - (b) restrictions placed upon Optus and the resultant reduction in the level of independence and extent of rivalry between Optus and FOXTEL in the provision of retail Subscription Television Services;

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- (c) FOXTEL's enhanced market power which will enable it to exert considerable influence over the availability and terms of supply for a large range of programming;
  - (d) barriers to entry being heightened for third parties who wish to supply Subscription Television Services to consumers;
  - (e) FOXTEL's ability to leverage its market power into a number of telecommunication markets and adversely impact on competition for related telecommunication services; and
  - (f) the first and last rights of refusal over certain of Optus' assets granted to FOXTEL.
- 1.7 FOXTEL has agreed to give these undertakings to overcome those concerns.
- 1.8 FOXTEL is providing the Digital Access Undertaking in reasonable anticipation that the Government will enact the Revised Legislation.
- 1.9 FOXTEL will rely on the Digital Access Undertaking in any application to the relevant statutory body under the Revised Legislation for an order exempting FOXTEL from the obligations that would apply to it if Digital Set Top Unit Services, or services of a substantially similar nature, were subject to a statutory access regime.
- 1.10 FOXTEL will rely, subject to the Revised Legislation, on the relevant statutory body having regard to the Digital Access Undertaking if the relevant statutory body makes a Final Order under the Revised Legislation in relation to FOXTEL's application for an exemption.
- 1.11 FOXTEL offered to give to the Commission an undertaking that it would make capacity available as part of its digital cable and expanded digital satellite Subscription Television Service to be used to broadcast one channel devoted to general community programming and one channel devoted to educational programming, free of carriage and set-top unit charges. FOXTEL believed that such an undertaking would promote diversity of voice and ensure that not-for-profit organisations are represented regardless of their inability to meet the cost of access. However, as the Commission did not consider that the undertaking addressed its competition concerns to any significant extent the Commission declined to accept it. FOXTEL has represented to the Commission that it still intends to make capacity available for these two channels. It should not be inferred from the Commission not accepting the undertaking that it is opposed to FOXTEL doing so.
- 1.12 This undertaking refers to particular statutory processes that are to be undertaken by the Commission in respect of certain services that are the subject of the undertaking, being the consideration of an undertaking that is to be offered under Part XIC of the Act in connection with 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. FOXTEL 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

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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. Interpretations and Definitions

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2.1 A reference to “these undertakings” is a reference to all the provisions of this document, the annexures and schedules.

2.2 In these undertakings, the singular includes the plural and vice versa.

2.3 In these undertakings, unless the context otherwise requires:

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

**ADSL Network** means:

- a telecommunications network in Australia;
- which uses, in part, Communications Wire which forms part of a Public Switched Telephone Network (**PSTN**) between the boundary of the relevant PSTN at an end-user’s premises and a point on the PSTN that is a potential point of interconnection located at, or associated with, a customer access module and located on the end-user side of the customer access module; and
- which Communications Wire is used, or immediately capable of being used, in the provision of broadband services.

**Analogue Access Undertaking** means the access undertaking to be given pursuant to Clause 3.

**Austar** means Austar United Communications Limited (ACN 087 695 707) and its Related Parties.

**Australian Programs** means a Program which has been made wholly or substantially in Australia.

**Australian Space Object** has the meaning given to it under section 5 of the *Radiocommunications Act 1992*.

**Basic Package** means the programming tier offered by FOXTEL from time to time to all subscribers which has the highest number of subscribers of any programming tier offered by FOXTEL at that time.

**BSA** means the *Broadcasting Services Act 1992* (Cth).

**Business Day** means a day on which banks are open for general banking business in Sydney and Melbourne (not being a Saturday, Sunday or public holiday in those places).

**Cable Access Network** means a broadband telecommunications network in Australia for carrying communications to Infrastructure Set Top Units (which Infrastructure Set Top Units form part of the network) and having either optical fibre as the delivery medium to the kerb (and either fibre, co-axial cable or copper to the customer premises) or a hybrid of optical fibre and co-axial cable to the customer premises, which network is capable of connection to at least 8,000 premises in Australia (excluding any part or parts of any Cable Access

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Network owned, controlled or operated by Telstra or Optus or their Related Parties or respective assigns).

**Commercial retail digital cable Subscription Television Service** means a retail digital Subscription Television Service supplied using the Telstra HFC network in Australia but does not include a trial or test service.

**Commercial retail digital satellite Subscription Television Service** means a retail digital satellite Subscription Television Service provided in Australia which uses 12 or more transponders but does not include a trial or test service.

**Commercial Television Broadcasting Licence** has the meaning given to it under the *Broadcasting Services Act 1992*.

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

**Communications Wire** means a copper or aluminium based wire forming part of a Public Switched Telephone Network.

**Conditional Access (CA) Services** means services that allow a service provider to determine whether a subscriber is able to receive a particular service through an STU.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**CPI** means the Weighted Average All Groups Eight Capital Cities Consumer Price Index published on a quarterly basis by the Australian Bureau of Statistics. The CPI base for the purposes of this Agreement is the September quarter 2002.

**CSA** means the Content Supply Agreement executed by FOXTEL and Optus on 5 March 2002.

**Declared Analogue Service** means the analogue subscription television broadcast carriage service via line links gazetted by the Commission on 8 September 1999.

**Digital Access Undertaking** means the undertakings given in Clause 4.

**Digital Set Top Unit Services** means:

- (a) use of digital Set Top Units and customer cabling (as defined in the Telecommunications Act) controlled and used by FOXTEL, for the purpose of provision of a Subscription Television Service or Related Service; and
- (b) the provision of Conditional Access Services; and
- (c) the provision of Service Information Services; and
- (d) the provision of smartcard authorisation verification information reasonably necessary for the access seeker to invoice its customers but limited to that information that can reasonably be produced by the Conditional Access system.

For the avoidance of doubt, (a), (b), (c) and (d) must be taken together.

**Expend** means expending in acquiring, producing or investing in a Program and includes Pre-production Expenditure.

**Final Order** means:

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- (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.

**Foreign Space Object** has the meaning given to it under section 5 of the *Radiocommunications Act 1992*.

**FOXTEL** means FOXTEL Management Pty Limited (ACN 068 671 938) for and on behalf of the FOXTEL Partnership (which is the partnership established between Telstra Media and Sky Cable), FOXTEL Cable Television Pty Limited (ACN 069 008 797).

**FOXTEL Related Party** means:

- (a) any person, company or entity that is controlled by FOXTEL, where 'control' means:
  - (i) control of the composition of the board of directors in the meaning of section 4A of the Act;
  - (ii) being in a position to cast or control the casting of more than one half of the maximum number of votes that might be cast at a general meeting; or
  - (iii) holding more than one half of the allotted share capital;
- (b) all subsidiary companies of FOXTEL in the meaning of section 4A of the Act.

**FOXTEL Subscription Television Service** means the Subscription Television Service supplied by FOXTEL to its subscribers from time to time.

**Infrastructure Operator** means:

- (a) the owner, controller or operator (including an entity controlled (as that term is defined in section 50AA of the Corporations Act) by or which controls that owner, controller or operator) of a Cable Access Network who is also the owner or controller of all Infrastructure Set Top Units to which the Infrastructure Operator's Subscription Television Services are carried by that Cable Access Network (other than Telstra, Optus and Austar, or a person in which any of them has, directly or

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- indirectly, an interest of more than 25%, or who is controlled (as that term is defined in section 50AA of the Corporations Act) by any of them); or
- (b) the owner or controller (including an entity controlled (as that term is defined in section 50AA of the Corporations Act) by or which controls that owner or controller) of a Satellite Network (excluding the Australian Space Object or Foreign Space Object included in that network) who is also both the owner, controller or user (under a licence, lease or services agreement) of satellite capacity on the Australian Space Object or Foreign Space Object included in that network who is also the owner or controller of all Infrastructure Set Top Units to which the Infrastructure Operator's Subscription Television Services are carried by that Satellite Network (other than Austar or Telstra, or a person in which any of them has, directly or indirectly, an interest of more than 25%, or who is controlled (as that term is defined in section 50AA of the Corporations Act) by any of them); or
- (c) the owner, controller or operator (including an entity controlled (as that term is defined in section 50AA of the Corporations Act) by or which controls that owner, controller or operator) of an MDS System who is also the owner or controller of all Infrastructure Set Top Units to which the Infrastructure Operator's Subscription Television Services are carried by that MDS System (other than Austar or Telstra, or a person in which any of them has, directly or indirectly, an interest of more than 25%, or who is controlled (as that term is defined in section 50AA of the Corporations Act) by any of them).

**Infrastructure Set Top Units** means conditional access customer equipment (as defined in Part XIC of the Act) used for receiving a Subscription Television Service.

**MDS System** means a system in Australia for carrying communications on a frequency or frequencies within the frequency band from 2300 Megahertz up to and including 2400 Megahertz to Infrastructure Set Top Units (which Infrastructure Set Top Units form part of the system) and which system is capable of connection to at least 8,000 premises in Australia (excluding any part or parts of any MDS System owned, controlled or operated by Austar, its Related Parties or its assigns).

**MN Agreement** means the channel supply agreement between FOXTEL and The Movie Network Channels Pty Ltd dated 2 September 2002.

**MN Channels** means the channels Movie One, Movie Extra and Movie Greats supplied by The Movie Network Channels Pty Ltd pursuant to the MN Agreement.

**News** means The News Corporation Limited (ACN 007 910 330).

**Optus** means Singapore Telecommunications Limited (ARBN 096 701 567) and its Related Parties.

**PBL** means Publishing and Broadcasting Limited (ACN 009 071 671).

**PMP Agreement** means the channel supply agreement between FOXTEL and the Premium Movie Partnership dated 25 February 1998.

**PMP Channels** means Showtime, Showtime 2 and Encore.

**Pre-production Expenditure** in relation to a Program means:

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- (a) expenditure incurred in developing the Program; or
- (b) any other expenditure incurred by way of pre-production costs for the Program.

**Program** has the meaning given by the BSA.

**Public Switched Telephone Network (PSTN)** means a telephone network accessible by the public providing switching and transmission facilities utilising analogue and digital technologies.

**Rate Card** means the access seeker rate card referred to in the Digital Access Undertaking.

**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 is controlled by the first party, where 'control' means:
  - (iv) control of the composition of the board of directors in the meaning of section 4A of the Act;
  - (v) being in a position to cast or control the casting of more than one half of the maximum number of votes that might be cast at a general meeting; or
  - (vi) holding more than one half of the allotted share capital;
- (b) all holding companies, subsidiary companies and subsidiaries of holding companies of the first party (where the first party is a company) in the meaning of section 4A of the Act; 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).

**Related Service** means a service that is related to a Subscription Television Service that delivers content where the sole purpose of the transmission of the content is to enhance a television program, but does not include an interactive service.

**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 connection with that service if that service were subject to a



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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 of the undertaking.

**Satellite Network** means a space satellite telecommunications network, including an uplink to an Australian Space Object or Foreign Space Object as the case may be and downlinks to satellite dishes, for carrying communications to Infrastructure Set Top Units in Australia (which Infrastructure Set Top Units form part of the network) (excluding any part or parts of any Satellite Network owned, controlled or operated by Austar, its Related Parties or its assigns or used by FOXTEL to provide the FOXTEL Subscription Television Service).

**Service Information (SI) Services** means the processing of information necessary to be received by a Set Top Unit which, in addition to Conditional Access information, permits the reception of a Subscription Television Service but does not include the content which forms the Subscription Television Service.

**Set Top Unit (STU)** means conditional access customer equipment (as defined in Part XIC of the Act) controlled and used by FOXTEL for receiving a Subscription Television Service or Related Service in analogue or digital mode and includes digital cable or digital satellite set top units, and, in the case of digital satellite set top units, includes associated downlink equipment.

**Shared Channels** means the channels Antenna, BBC World, Cartoon Network, CNBC, CNN, Disney, National Geographic, RAI, Sky News, Sky Racing, TCM, TVSN, World Movies and ESPN International.

**Simulcast Period** means the period from the date that FOXTEL has deployed a minimum of 100,000 cable Digital STUs to the date that FOXTEL ceases to supply an analogue cable Subscription Television Service to Subscribers.

**Sky Cable** means Sky Cable Pty Limited (ACN 069 799 640).

**Standard FOXTEL Retail Price** means the published retail price for the relevant tier that FOXTEL is charging in the relevant territory as set out in its packaging and pricing guide. Where FOXTEL has a satellite service and a cable service in the relevant territory, the standard FOXTEL retail price will be calculated on the basis of a price which is weighted on the basis of the proportion of subscribers and potential subscribers able to receive FOXTEL's satellite service but not its cable service and the proportion of subscribers and potential subscribers able to receive FOXTEL's cable service.

**Subscriber** means a person who receives FOXTEL's Subscription Television Service.

**Subscription Television Service** means a content service that provides television programs to consumers in Australia where the service is:

- (a) a subscription broadcasting service; or
- (b) a subscription narrowcasting service.

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**Subscription broadcasting service, subscription narrowcasting service and television programs** have the meanings given by the BSA from time to time.

**Telecommunications Act** means the *Telecommunications Act 1997* (Cth).

**Telstra** means Telstra Corporation Limited (ACN 051 775 556).

**Telstra Media** means Telstra Media Pty Limited (ACN 069 279 027).

**Telstra Multimedia** means Telstra Multimedia Pty Limited (ACN 669 279 072).

**Transitional Period** means the period from the date that FOXTEL commences supplying a Commercial retail digital cable Subscription Television Service to either the date that FOXTEL has deployed a minimum of 100,000 cable Digital STUs to Subscribers for use in receiving the FOXTEL digital Subscription Television Service or the expiry of 6 months from that date, whichever is earlier.

**Transitional Digital Set Top Unit Services** means the limited Digital Set Top Unit Services provided to an analogue access seeker during the Transitional Period pursuant to Schedules 1 and 2.

**Ultimate Shareholders** means Telstra, Telstra Media, Sky Cable, News and PBL.

### 3. Analogue Access Undertaking

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- 3.1 Within 7 days of the date these undertakings take effect, FOXTEL will give to the Commission a written access undertaking in relation to the Declared Analogue Service under s152BS of the Act in the form of Schedule 1 which specifies the terms and conditions of access to analogue cable STUs for 10 analogue channels.
- 3.2 The access undertaking to be given pursuant to Clause 3.1 will also contain the terms and conditions on which the access seeker will be transitioned from use of analogue STUs to the Digital Set Top Unit Services (except for the purpose of providing Related Services) in the event that FOXTEL commences supplying a Commercial retail digital cable Subscription Television Service.
- 3.3 If the Commission accepts the access undertaking under section 152BU(2)(a) of the Act, FOXTEL undertakes not to:
  - (a) withdraw the access undertaking pursuant to section 152CA of the Act; or
  - (b) replace the undertaking pursuant to section 152CB of the Act.
- 3.4 If the Commission rejects the access undertaking in the form of Schedule 1 under section 152BU(2)(b) of the Act, FOXTEL will, as soon as reasonably practicable but no later than two months of the Commission advising FOXTEL 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 FOXTEL, acting reasonably.
- 3.5 If the Commission rejects the access undertaking provided under Clause 3.1 or, if FOXTEL has provided a varied access undertaking under Clause 3.4, the Commission has rejected that varied access undertaking, FOXTEL will make a commercial offer to supply access

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seekers with access to analogue cable STUs for up to 10 channels in accordance with Schedule 1 or the varied Schedule 1 as the case may be.

- 3.6 The Commission acknowledges that the commercial offer in paragraph 3.5 will be made to an access seeker who is involved in an arbitration with FOXTEL which has been commenced in accordance with Part XIC, but that FOXTEL's commercial offer made pursuant to paragraph 3.5 will include a condition that the access seeker must withdraw notification of the dispute(s) the subject of the arbitration.
- 3.7 If an access seeker requests information or assistance from FOXTEL to enable it to obtain access (including the provision of information in relation to channel numbering), FOXTEL 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 FOXTEL's reasonable costs of providing that information or assistance.
- 3.8 At the expiration of the original Analogue Access Undertaking provided pursuant to Clauses 3.1 or 3.4, FOXTEL will give to the Commission another written access undertaking in relation to the Declared Analogue Service under s152BS of the Act in the form of Schedule 1 in the event that and only for so long as FOXTEL continues to supply the Declared Analogue Service to itself.

### **4. Digital Access Regime**

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- 4.1 Subject to this Clause 4, FOXTEL undertakes to supply Digital Set Top Unit Services in accordance with the terms in Schedule 2 to these undertakings from the date it commences supplying Commercial retail digital cable Subscription Television Services and to make available at least the following amount of capacity for such supply:
- (a) 15% of the total capacity of FOXTEL to supply Digital Set Top Unit Services during the Simulcast Period; or
  - (b) 35% of the total capacity of FOXTEL to supply Digital Set Top Unit Services after the Simulcast Period,
- based on the quantity of digital cable or digital satellite capacity that addresses the relevant STU. It is the responsibility of the access seeker to obtain an equivalent volume of digital cable or satellite carriage capacity as the case may be.
- 4.2 FOXTEL has no obligation to negotiate the supply of Digital Set Top Unit Services with an access seeker unless:
- (a) the access seeker has arranged for the carriage of its digital Subscription Television Services and Related Services; or
  - (b) the access seeker has provided:
    - (i) where the access seeker's digital Subscription Television Service and Related Services are to be transmitted using Telstra's network:

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- (A) an application to Telstra for carriage of its digital Subscription Television Services and Related Services (which application has been accepted by Telstra); and
  - (B) a bank guarantee to Telstra as required pursuant to the application to Telstra for carriage of its digital Subscription Television Services and Related Services (which bank guarantee is acceptable to Telstra);
- (ii) a confidentiality agreement to FOXTEL in the form of Annexure C;
  - (iii) a bank guarantee to FOXTEL as required pursuant to Schedule 2; and
  - (iv) a deposit of \$50,000, in cleared funds, to FOXTEL which will be applied towards the access seeker's fees once it commences acquiring the Digital Set Top Unit Services or, if the access seeker does not commence acquiring the Digital Set Top Unit Services and asks FOXTEL to terminate negotiations, will be refundable to the access seeker with interest after FOXTEL deducts any reasonable costs incurred by FOXTEL,
- and the access seeker has provided to FOXTEL, if requested, such proof of the access seeker's compliance with Clauses 4.2(a) or 4.2(b)(i) (as the case may be), as FOXTEL may require.
- 4.3 FOXTEL undertakes to notify the Commission three months before it commences supplying a Commercial retail digital cable Subscription Television Service. However, in the event that FOXTEL and Telstra have received Final Orders in accordance with Clause 5.1, nothing in this Clause 4.3 will prevent FOXTEL from commencing a Commercial retail digital cable Subscription Television Service prior to the expiry of the notice period, if it so wishes.
- 4.4 FOXTEL will publish and provide to the Commission the technical specifications of the Digital Set Top Unit Services and any other technical requirements not specified in Schedule 2 at the time it gives the notice referred to in Clause 4.3, and can change these on 3 months' notice or as otherwise specified in Schedule 2. Any published technical specifications clearly marked as forming part of Schedule 2 and provided to the Commission will be deemed to form part of Schedule 2 and, if not so marked, will not form part of Schedule 2.
- 4.5 FOXTEL will arrange for the calculations made pursuant to the Digital Access Undertaking used to prepare the Rate Card to be independently audited after the first 12 months and thereafter every 3 years and will provide a copy of the audit report to the Commission.
- 4.6 FOXTEL is under no obligation to supply Digital Set Top Unit Services (except the Transitional Digital Set Top Unit Services) to an access seeker unless and until either FOXTEL has deployed a minimum of 100,000 cable Digital STUs to Subscribers for use by them in receiving the FOXTEL digital Subscription Television Service or the expiry of 6 months from the date that FOXTEL commences supplying a Commercial retail digital cable Subscription Television Service, whichever is earlier. However, an access seeker can commence to negotiate an agreement with FOXTEL relating to the supply of Digital Set

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Top Unit Services even though that threshold has not yet been met, provided the access seeker has met the requirements of Clause 4.2.

- 4.7 FOXTEL is able to vary Schedule 2 (other than in respect of price) on the provision of one month's notice to the Commission that includes an amended Schedule 2, where:

FOXTEL wishes to vary the services it provides to Subscribers using the Digital STUs in circumstances where FOXTEL reasonably considers that:

- (a) a technical or related problem necessitates a change to the terms and conditions upon which the Digital Set Top Unit Service is 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 Digital Set Top Unit Service provided always that the amendment only amends Schedule 2 to the extent necessary to address the technical change; or
- (c) there has been a change in the way in which Digital Set Top Unit Services or Subscription Television Services are supplied by local or international subscription television operators, and that means that Schedule 2 no longer reflects the common market practice,

provided that:

- (i) the amendment only amends Schedule 2 to the extent necessary to address the technical or related problem, technical change or market practice; and
- (ii) the Digital Set Top Unit Service supplied to an access seeker is supplied to the same standard as FOXTEL supplies to itself.

- 4.8 If an access seeker requests information or assistance from FOXTEL to enable it to obtain access, FOXTEL will use its reasonable and necessary 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). The access seeker must pay FOXTEL's reasonable and necessary costs of providing that information or assistance.

- 4.9 FOXTEL undertakes that the design and equipment of that part of the digital network used to provide any Commercial retail digital cable Subscription Television Service and any Commercial retail digital satellite Subscription Television Service (the STS network) will facilitate access to the STS Network by access seekers wishing to provide a Subscription Television Service by accommodating multiple access seekers without the need for significant additional network enhancements.

- 4.10 FOXTEL undertakes that from the date on which it commences to supply any Commercial retail digital cable Subscription Television Service and any Commercial retail digital satellite Subscription Television Service the STS Network will include an active customer smartcard database which is designed to support at least 25 access seekers.

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- 4.11 FOXTEL undertakes that it will not enter into any arrangements or vary existing arrangements with suppliers for the supply of the equipment, software or other relevant rights for the STS Network if those arrangements will require FOXTEL to seek any further consents from those suppliers to permit access seekers wishing to gain access to the STS Network to provide a Subscription Television Service.

### **5. Commitment to Digital**

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- 5.1 So long as the Revised Legislation commences prior to 31 December 2003 and there has been no Regulatory Change, FOXTEL will commence supplying a Commercial retail digital cable Subscription Television Service and a Commercial retail digital satellite Subscription Television Service no later than 12 months after the latter of the date on which:
- (a) FOXTEL obtains a Final Order relating to its proposed digital cable and a digital satellite Subscription Television Service for the duration of FOXTEL's Digital Access Undertaking (including any period of continuation of the Digital Access Undertaking pursuant to Clause 15.4) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in FOXTEL's reasonable opinion, not having a material adverse effect on the financial or operational assumptions on which the decision of either FOXTEL or Telstra 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 relating to its proposed digital cable subscription television carriage service for the duration of Telstra Multimedia's undertaking in relation to that service (including any period of continuation of Telstra Multimedia's undertaking) and, if the Final Order is subject to a condition or conditions, such condition or conditions, in FOXTEL's reasonable opinion, not having a material adverse effect on the financial or operational assumptions on which the decision of either FOXTEL or Telstra Multimedia 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.
- 5.2 FOXTEL undertakes to apply to the relevant statutory body for a Final Order for exemption relating to the digital cable and digital satellite Subscription Television Services under the Revised Legislation for the purposes of Clause 5.1 within 28 days of the Revised Legislation commencing.
- 5.3 If FOXTEL's application for a Final Order is rejected, FOXTEL will, as soon as reasonably practicable but no later than 2 months of the Commission advising FOXTEL of the reasons for the rejection, make a further application for a Final Order and a variation of the 87B undertaking pursuant to s87B(2) based on a revised Schedule 2, if the variations required to Schedule 2 are acceptable to FOXTEL, acting reasonably.

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### 6. 3G Rights, Internet and High-Speed Broadband Rights

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- 6.1 If FOXTEL or any FOXTEL Related Party acquires any Australian third generation (3G), internet or high-speed broadband content rights together with Subscription Television Service rights, FOXTEL undertakes that it and the FOXTEL Related Parties will not license the 3G, Internet or high-speed broadband content rights to its Ultimate Shareholders, their Related Parties or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (except entities that are FOXTEL Related Parties), on an exclusive basis.
- 6.2 FOXTEL undertakes that it and the FOXTEL Related Parties will not bid jointly with its Ultimate Shareholders, their Related Parties or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (except entities that are FOXTEL Related Parties), for Australian 3G, Internet or high-speed broadband content rights together with Subscription Television Service rights.
- 6.3 FOXTEL undertakes that it and the FOXTEL Related Parties will not make a bid for Subscription Television Service rights conditional on the grant of rights, or the grant of rights on particular terms to any one or more of its Ultimate Shareholders, their Related Parties or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (except entities that are FOXTEL Related Parties), for Australian 3G, Internet or high-speed broadband content rights being accepted.
- 6.4 If FOXTEL or the FOXTEL Related Parties acquire any Australian 3G, Internet or high-speed broadband content rights and FOXTEL or the FOXTEL Related Parties sublicenses those rights on a non-exclusive basis to any person (other than to an end-user), then FOXTEL and the FOXTEL Related Parties will offer to sublicense those rights to all third parties on terms and conditions which do not discriminate unfairly between different third parties. For the avoidance of doubt, this does not imply that the terms and conditions will be the same, and differences in the terms and conditions based on the risks, benefits or cost of supply including but not limited to volume, duration of agreements, risk sharing, collateral benefits and creditworthiness, are differences which do not discriminate unfairly between different third parties.
- 6.5 Where the Ultimate Shareholders, their Related Parties or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (except entities that are FOXTEL Related Parties) have acquired Subscription Television Service rights bundled with 3G, Internet or high speed broadband rights in the same content outside of the ordinary course of their business where the primary territory acquired is Australia, the entity primarily acquired the Subscription Television Service rights to advantage its prospects of also acquiring the 3G, Internet or high-speed broadband rights and the entity intends to retain and exploit the 3G, Internet and high-speed broadband rights itself, FOXTEL undertakes not to acquire those Subscription Television Service rights from that entity or the Ultimate Shareholders, their Related Parties and any entities the only shareholders in which are FOXTEL, the Ultimate Shareholders or their Related Parties. For the avoidance

## Section 87B Undertaking

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of doubt, where the licensor of the rights offers the rights for acquisition only as a bundle, then an acquisition of bundled rights will not be in breach of this clause.

- 6.6 Any dispute relating to the terms and conditions on which Australian 3G, Internet or high-speed broadband rights are to be licensed by FOXTEL and the FOXTEL Related Parties under Clause 6.4 to third parties shall be determined by Expert Determination in accordance with paragraphs (e) to (h) of Clause 6 of Annexure A to these undertakings.

### **7. Exclusive Acquisition of Channels**

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- 7.1 So long as Optus is bound by an undertaking under s87B not to acquire the Subscription Television Service rights to the Shared Channels on an exclusive basis, FOXTEL undertakes, to the same extent that Optus also undertakes, that it will not acquire the Subscription Television Service rights to the Shared Channels on an exclusive basis. Nothing in this clause will require FOXTEL to give an undertaking more onerous than the undertaking given by it pursuant to this Clause as at the date of these undertakings.
- 7.2 FOXTEL undertakes that it will not terminate or consent to the termination of the MN Agreement in circumstances where FOXTEL or a FOXTEL Related Party will subsequently acquire the MN Channels exclusively unless:
- (a) that agreement (as it currently stands) would give FOXTEL an express right to terminate; and
  - (b) the licensor is not an Ultimate Shareholder, a Related Party of an Ultimate Shareholder, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties; and either:
    - (i) it is an express requirement of the licensor that those channels are only to be acquired on an exclusive basis; or
    - (ii) an exclusive bid has been made for the MN Channels by a competing bidder that is not a Related Party of FOXTEL, an Ultimate Shareholder or a Related Party, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties.
- 7.3 FOXTEL undertakes that it and the FOXTEL Related Parties will not acquire the MN Channels on an exclusive basis unless:
- (a) the MN Agreement has been terminated; and
  - (b) the licensor is not an Ultimate Shareholder, a Related Party of an Ultimate Shareholder, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties; and either:
    - (i) it is an express requirement of the licensor that those channels are only to be acquired on an exclusive basis; or
    - (ii) an exclusive bid has been made for the MN Channels by a competing bidder that is not a Related Party of FOXTEL, an Ultimate Shareholder or a



## Section 87B Undertaking

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Related Party, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties.

- 7.4 Following the termination of the PMP Agreement, FOXTEL undertakes that it and the FOXTEL Related Parties will not acquire the PMP Channels on an exclusive basis unless the licensor is not an Ultimate Shareholder, a Related Party of an Ultimate Shareholder, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (but membership by such a person of a licensor that is a partnership or a joint venture, where the person does not control that partnership or joint venture will be disregarded for this purpose) and either:
- (a) it is an express requirement of the licensor that those channels are only to be acquired on an exclusive basis; or
  - (b) an exclusive bid has been made for the PMP Channels by a competing bidder that is not a Related Party of FOXTEL, an Ultimate Shareholder or a Related Party, or an entity the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties.

## 8. Supply of FOXTEL Subscription Television Service

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- 8.1 FOXTEL will enter into an agreement with any Infrastructure Operator who requests to be supplied with the FOXTEL Subscription Television Service on the terms set out in Schedule 3 subject to this Clause 8 and FOXTEL having the rights itself to supply all of the FOXTEL Subscription Television Service in the area(s) where the Infrastructure Operator wishes to supply the FOXTEL Subscription Television Service.
- 8.2 The Infrastructure Operator can only supply the FOXTEL Subscription Television Service in Australia over the Cable Access Network, Satellite Network or MDS System and to the Infrastructure Set Top Units, in both cases, by which the Infrastructure Operator satisfies the definition of an Infrastructure Operator.
- 8.3 The process that will be followed in entering into agreements with Infrastructure Operators pursuant to Clause 8.1 is set out in Annexure A to these undertakings.
- 8.4 If any Infrastructure Operator operates in both an area in which FOXTEL has the rights itself to supply all of the FOXTEL Subscription Television Service (the **FOXTEL area**) and an area in which Austar has the rights itself to supply all of the Austar Subscription Television Service (the **Austar area**), then FOXTEL undertakes to enter into good faith negotiations with Austar to ensure that the Infrastructure Operator receives a sub-license of the FOXTEL Subscription Television Services (in FOXTEL areas) or the Austar Subscription Television Service (in Austar areas) to ensure that the Infrastructure Operator can provide a Subscription Television Service to its subscribers in all areas serviced by the Infrastructure Operator.
- 8.5 If FOXTEL commences supplying a commercial retail Subscription Television Service to subscribers using a point-to-multi-point ADSL Network which is capable of connection to at least 8,000 premises in Australia, FOXTEL will, subject to the provisos below, supply that

## Section 87B Undertaking

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FOXTEL Subscription Television Service to any owner, controller or operator of a point-to-multi-point ADSL Network (the **Requesting Party**) in the same manner and on equivalent terms (having regard to such things as differences in technologies) as it undertakes to supply Infrastructure Operators pursuant to these undertakings.

This clause does not require FOXTEL to supply the FOXTEL Subscription Television Service to a Requesting Party:

- (a) if the Requesting Party is Telstra or Optus or any of their respective Related Parties or assigns;
- (b) to the extent that more than 25% of the DSLAMs in the Requesting Party's ADSL Network are owned, controlled or operated by Telstra or Optus or any of their respective Related Parties or assigns;
- (c) if the Requesting Party uses, or intends using, any part of an ADSL Network used by FOXTEL; or
- (d) if the Requesting Party is not the owner, controller or operator of all Infrastructure Set Top Units and modems to which the requesting party's Subscription television Services are carried by that ADSL Network.

8.6 At the time that these undertakings come into effect, the discount from FOXTEL's retail rates which FOXTEL gives Telstra ('the Telstra Discount') will be no greater than as provided in the Telstra Resale Term Sheet dated 20 February 2002 as amended by FOXTEL / Telstra Resale Term Sheet Amendment Sheet and the Amending Agreement each dated 5 March 2002.

8.7 FOXTEL undertakes that prior to any increase being made to the Telstra Discount, it will increase the discount at which it is then supplying each Infrastructure Operator by the same amount as the proposed increase to the Telstra Discount. FOXTEL will also make prior application to the Commission to increase each of the percentages that are specified at paragraph (i) of clause 6 to Annexure A to these undertakings by the same amount as the proposed increase to the Telstra Discount.

### **9. Amendment to CSA**

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9.1 Prior to entering into these undertakings, FOXTEL and Optus amended 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.

## Section 87B Undertaking

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- 9.2 An explanation by the parties of the amendments made to the CSA since 5 March 2002 is contained in the document entitled 'Summary of amendments to the CSA'.

### 10. AFL

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- 10.1 For so long as FOXTEL has the exclusive Subscription Television Service rights to AFL match coverage and/or produces the Fox Footy Channel or an equivalent AFL-dedicated channel, FOXTEL undertakes to sub-license that match coverage or if it is producing an AFL-dedicated channel that channel to persons wishing to supply retail Subscription Television Services (other than Optus, Telstra, its Related Parties or Austar) on terms and conditions which do not discriminate unfairly between persons so sub-licensed on a similar basis (supply as a stand alone channel and supply as part of a FOXTEL package are different bases).
- 10.2 FOXTEL undertakes that it will only sub-license AFL match coverage or if it is producing an AFL-dedicated channel an AFL-dedicated channel from its Ultimate Shareholders, their Related Parties or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties (except entities that are FOXTEL Related Parties) (where the licensor holds exclusive Subscription Television Service AFL rights) if either FOXTEL or the relevant licensor agrees to sub-license that match coverage or that channel to persons wishing to supply retail Subscription Television Services (other than Optus, Telstra, its Related Parties or Austar) on terms and conditions which do not discriminate unfairly between persons so sub-licensed on a similar basis (supply as a stand alone channel and supply as part of a FOXTEL package are different bases). For the avoidance of doubt, in clauses 10.1 and 10.2 the undertaking not to discriminate unfairly between different purchasers does not imply that the terms and conditions will be the same, and differences in the terms and conditions based on the risks, benefits or cost of supply, including but not limited to volume, duration of agreements, risk sharing, collateral benefits and creditworthiness, are differences which do not discriminate unfairly between persons so sub-licensed on a similar basis (supply as a stand alone channel and supply as part of a FOXTEL package are different bases).
- 10.3 Any dispute relating to the terms and conditions on which AFL match coverage or an AFL dedicated channel are to be sub-licensed by FOXTEL under Clause 10.1 to persons wishing to supply retail Subscription Television Services (other than Optus, Telstra, its Related Parties or Austar), shall be determined by Expert Determination in accordance with paragraphs (e) to (h) of clause 6 of Annexure A.

### 11. Local Content

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- 11.1 FOXTEL undertakes that it will commit to Expend a minimum of \$3 million per financial year (adjusted for CPI) on Australian Programs:
- (a) that have been produced by third parties that are independent of FOXTEL, its Ultimate Shareholders, or any of their Related Parties; and

## Section 87B Undertaking

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- (b) the whole or a substantial part of which has not been televised in Australia on a broadcasting service.
- 11.2 FOXTEL undertakes that as at the end of each financial year the cumulative amount that it will have expended in connection with the commitments it has made pursuant to Clause 11.1 will not be less than X - \$3 million, where: X is the cumulative amount that FOXTEL is by then required to have committed to expend.
- 11.3 Within 6 months of the termination or expiry of the undertakings, FOXTEL must ensure that the total amount it has expended pursuant to this Clause is equal to the total commitments it was required to have made under Clause 11.1.
- 11.4 For the avoidance of doubt, expenditure in relation to a Program that has not been televised in Australia on a broadcasting service will count for the purposes of Clauses 11.1 and 11.2 notwithstanding that other programs that form part of the same series as the Program have been previously so televised.
- 11.5 A third party is not independent for the purposes of Clause 11.1 if an equity interest in it is held by FOXTEL, its Ultimate Shareholders, any of their Related Parties, or any entity the only shareholders in which are FOXTEL, its Ultimate Shareholders, or any of their Related Parties. The fact that any of those entities may finance some or all of the production on the basis that they will share in profits that are earned in respect of it will not mean that the third party is not independent.
- 11.6 FOXTEL undertakes that, within 60 days of the end of each financial year, it will provide a written report that has been independently audited by FOXTEL's external auditors in respect of the expenditures and commitments that it has made pursuant to Clauses 11.1 and 11.2 within that year. The report will identify the third party producer and the total amount expended or committed within the year for each production for which a relevant expenditure or commitment is made.
- 11.7 For the purposes of this Clause 11, Australian Programs does not include sport transmissions, advertising or sponsorship.

## 12. Non Affiliated Channels

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- 12.1 FOXTEL undertakes that at least 30% of the subscription television video channels in its Basic Package (not including the open broadcast re-transmission, the electronic program guide or radio channels) will be comprised of non-affiliated channels.

## Section 87B Undertaking

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- 12.2 For the purposes of Clause 12.1, “**affiliated**” channels are channels in which FOXTEL, its Ultimate Shareholders, their wholly-owned subsidiaries or holding companies or entities the only shareholders of which are FOXTEL, the Ultimate Shareholders or their Related Parties hold any shares in the share capital of the operator of that channel, or otherwise have management control or control over the programming decisions.

### 13. Price of FOXTEL’s Basic Package

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For a period of 3 years from the date these undertakings take effect, the price of the FOXTEL Basic Package on FOXTEL’s cable and satellite service will not exceed the price calculated in accordance with the following formula:

Year 1	\$47.95 plus CPI ( <del>\$X</del> )
Year 2	\$X plus CPI ( <del>\$Y</del> )
Year 3	\$Y plus CPI.

### 14. Effective Date

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- 14.1 These undertakings come into effect when:
- (a) these undertakings are executed by FOXTEL; and
  - (b) are accepted by the Commission.

### 15. Duration of Undertakings

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- 15.1 The undertakings in Clauses 3, 4.9, 6, 7, 8, 10, 11 and 12 will terminate on the earlier of the expiry of the CSA (31 December 2010) or earlier termination of the CSA.
- 15.2 Subject to Clause 15.4, the Digital Access Undertaking will be in force until 31 December 2007.
- 15.3 Notwithstanding Clause 15.2 and subject to Clause 15.4, at any time between 1 October 2006 and 31 December 2006 FOXTEL may give a notice that it intends to continue its Digital Access Undertaking as it relates to a satellite service and/or as it relates to a cable service past 31 December 2007 until 31 December 2015. If FOXTEL gives that notice the relevant Digital Access Undertaking continues on its then terms after 31 December 2007 until 31 December 2015 unless it is terminated before 31 December 2015 by FOXTEL giving 12 months’ notice to the Commission of its intention to terminate the Digital Access Undertaking either as it relates to a satellite service and/or as it relates to a cable service.
- 15.4 Notwithstanding Clauses 15.2 and 15.3, FOXTEL can withdraw the Digital Access Undertaking at any time if:
- (a) the Final Order granted to FOXTEL is varied (and such variation has a material adverse effect on the FOXTEL business), revoked or abrogated; or

## Section 87B Undertaking

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- (b) the Final Order granted to Telstra is varied (and such variation has a material adverse effect on the Telstra business), revoked or abrogated and Telstra has withdrawn its digital access undertakings pursuant to section 87B of the Act given at the date of these undertakings.

### 16. Variation or Review of Undertakings

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- 16.1 If FOXTEL is unable to comply with its obligations in these undertakings, or believes it is necessary to seek some modification due to changed circumstances, then FOXTEL and the Commission agree that they will review these undertakings and negotiate in good faith the variation or revocation of all or any of the undertakings pursuant to s87B(2) of the Act.

### 17. Provision of Information

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- 17.1 To assist the Commission in monitoring compliance with these undertakings, FOXTEL will advise the Commission in writing within 10 Business Days of the following events occurring:
- (a) FOXTEL entering into an agreement with an Infrastructure Operator pursuant to these undertakings;
  - (b) the FOXTEL Board approving a resolution that FOXTEL commence to invest in a digital cable Subscription Television Service; and
  - (c) FOXTEL commencing to supply a Commercial retail digital cable Subscription Television Service and a Commercial retail digital satellite Subscription Television Service;
  - (d) FOXTEL commencing to supply Digital Set Top Unit Services in connection with a Commercial retail digital cable Subscription Television Service;
  - (e) FOXTEL deploying 100,000 Digital STU's to Subscribers as contemplated by Clause 4.6;
  - (f) FOXTEL ceasing to supply an analogue Subscription Television Service; and
  - (g) FOXTEL changing the price of its basic package on FOXTEL's cable or satellite service.
- 17.2 To assist the Commission in monitoring compliance with these undertakings, FOXTEL will provide the Commission annually on the date of these undertakings a schedule which lists changes during the year to the channels within the Basic Package, the date on which such change took place, and, to the extent known by FOXTEL, any change during the year to the ownership of each channel in the Basic Package.
- 17.3 The Commission will not, save for the purposes of enforcement action under section 87B of the Act, or any other legal obligation, publish or disclose confidential information provided to it by FOXTEL pursuant to Clause 17.1.

## Section 87B Undertaking

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- 17.4 The Commission may at any time during the undertaking period request information from FOXTEL that the Commission reasonably requires for the purpose of monitoring these undertakings, including in connection with an 87B(2) application. FOXTEL 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.

### **18. Force Majeure**

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- 18.1 FOXTEL will not be liable for any failure to perform any obligation under these undertakings if the failure is due to Force Majeure.
- 18.2 If FOXTEL is, by reason of Force Majeure, unable to perform an obligation under these undertakings, FOXTEL 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 FOXTEL's obligations under these undertakings.

### **19. Acknowledgments**

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- 19.1 Subject to Clause 20.1, FOXTEL acknowledges that the Commission will make these undertakings available for public inspection.
- 19.2 FOXTEL acknowledges that the Commission may issue a media release about these undertakings and may from time to time publicly refer to these undertakings, except for paragraph 6(i) of Annexure A to these undertakings.
- 19.3 FOXTEL acknowledges and accepts that this undertaking in no way derogates from the rights and remedies available to any person other than FOXTEL arising from the transactions contemplated by the CSA.
- 19.4 Each of FOXTEL Management Pty Ltd and FOXTEL Cable Television Pty Ltd will be jointly and severally liable for FOXTEL's performance of these undertakings.

### **20. Confidentiality**

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- 20.1 The Commission will only make paragraph 6(i) of Annexure A to these undertakings available for public inspection by persons whom FOXTEL has approved in writing and who have signed a confidentiality deed in the form of Annexure B.
- 20.2 The Commission will not, save for the purposes of enforcement action under section 87B of the Act or any legal obligation, publish or disclose paragraph 6(i) of Annexure A to these undertakings or any other confidential information provided to it by FOXTEL in connection with these undertakings.

## Section 87B Undertaking

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- 20.3 For the avoidance of doubt, where the Commission publishes or discloses, pursuant to Clause 20.2, paragraph 6(i) of Annexure A to these undertakings or any other confidential information provided to it by FOXTEL, it is not intended that the Commission would be required to first obtain undertakings pursuant to Clause 20.1.

### 21. Enforcement

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

- (a) during the period of these undertakings; or
- (b) after the period of these undertakings,

in respect of any breach by FOXTEL of a term of these undertakings or the Act.

### 22. Notices

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Any notice, demand, consent or other communication (a **Notice**) given or made under these undertakings:

- (a) must be in writing or by electronic mail;
- (b) must be signed by a person duly authorised by the sender, which signature may be digital if the digital signature complies with any guidelines for the use of digital signature which may be agreed by the parties;
- (c) must refer to these undertakings and state the clause under which the notice is given;
- (d) must be delivered to the intended recipient by prepaid post, by hand or fax or by email to the address, fax number or email address below or the address, fax number or email address last notified by the intended recipient to the sender:

- (i) to FOXTEL: FOXTEL Management Pty Ltd  
Wharf 8  
Pyrmont NSW 2000  
Attention: Director of Legal Affairs  
Fax No: 9200 1010

- (ii) to the Commission: Australian Competition & Consumer Commission  
GPO Box 520J  
Melbourne VIC 3001  
Attention: General Manager  
Telecommunications  
Fax No: (03) 9663 3699

- (e) will be taken to be duly given or made:
  - (i) in the case of delivery in person, when delivered;



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- (ii) in the case of delivery by post, two Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country);
- (iii) in the case of fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number or name of recipient and indicating that the transmission has been made without error; and
- (iv) in the case of electronic mail, on receipt by the sender of an electronic acknowledgement that the electronic mail has been read by the intended recipient,

but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent or is later than 4.00pm (local time) it will be taken to have been duly given or made at the commencement of business on the next Business Day in that place.

### **23. Procurement**

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- 23.1 FOXTEL is required to do all things incidental or reasonably necessary to give effect to the undertakings, including procuring any FOXTEL Related Party to do such incidental or reasonably necessary things.
- 23.2 FOXTEL undertakes to consent to an access seeker connecting to, adapting or altering the FOXTEL equipment installation in order for the access seeker to install its set top unit and associated equipment provided that:
  - (a) the access seeker agrees to comply with FOXTEL's reasonable and legitimate business requirements regarding safety, signal quality, network integrity and interference;
  - (b) the access seeker gives appropriate and commensurate warranties and indemnities; and
  - (c) FOXTEL obtains any necessary consent from the third party lessor of the set top unit equipment.

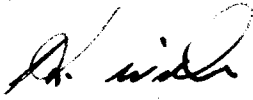
# Section 87B Undertaking

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**EXECUTED** on

by

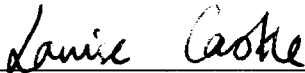
FOXTEL Management Pty Limited (for and on behalf of the FOXTEL Partnership)



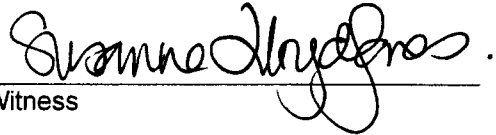
Kim Williams  
Director



Sankar Narayan  
Secretary



Witness



Witness

FOXTEL Cable Television Pty Limited



Kim Williams  
Director



Sankar Narayan  
Secretary

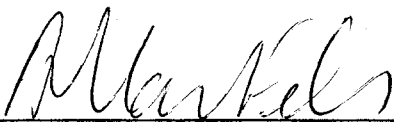


Witness



Witness

Accepted by the Australian Competition & Consumer Commission



Professor Allan Fels  
Chairman  
Australian Competition & Consumer Commission

Dated:

Nov 21, 2002

### Annexure A

#### 1. **FOXTEL Officer**

FOXTEL will nominate a person to be the initial contact point for Infrastructure Operators (*the FOXTEL officer*) and FOXTEL will notify the ACCC of the FOXTEL officer's identity and contact details.

#### 2. **Application**

An Infrastructure Operator may make an application to FOXTEL for a licence of the FOXTEL Subscription Television Service. An application must be accompanied by a deposit of \$50,000. The deposit:

- (a) will be applied towards the Infrastructure Operator's fees payable under clause 10 of Schedule 3 once it commences supplying the FOXTEL Subscription Television Service; or
- (b) if the Infrastructure Operator does not commence supplying the FOXTEL Subscription Television Service and asks FOXTEL to terminate negotiations, the deposit will be refundable to the Infrastructure Operator with interest after FOXTEL deducts any reasonable costs incurred by FOXTEL.

#### 3. **Commencement of Negotiation**

- 3.1 Within 14 days of FOXTEL receiving the deposit from an Infrastructure Operator, FOXTEL will meet with the Infrastructure Operator to negotiate the fees payable under clause 10 of Schedule 3, the transfer fee referred to in clause 9 of Schedule 3 and the terms on which the FOXTEL Magazine are to be provided referred to in clause 22 of Schedule 3.
- 3.2 FOXTEL is obliged to negotiate with potential applicants pursuant to the provisions of Annexure A unless there are reasonable grounds to believe that the supply of the FOXTEL Subscription Television Service by the applicant will not commence within 12 months of the commencement of negotiations.

#### 4. **Confidentiality Deed**

Prior to commencing negotiations, the Infrastructure Operator will be required to execute a confidentiality deed in the form of Annexure C. FOXTEL will also execute a confidentiality deed in the form of Annexure C.

#### 5. **Negotiation on Licence Fee**

FOXTEL will negotiate the fees payable under clause 10 of Schedule 3, a fair commercial rate of any package or tier which has services excluded from it due to lack of consent referred to in clause 3.5 of Schedule 3, the transfer fee referred to in clause 9 of Schedule 3, the terms on which the FOXTEL Magazine are to be provided referred to in clause 22 of Schedule 3 and other limitations referred to in clause 27 of Schedule 3 in good faith with the Infrastructure Operator.

#### 6. **Dispute Resolution Mechanism**

If any dispute arises in the course of the negotiation of the fees payable under clause 10 of Schedule 3, a fair commercial rate of any package or tier which has services excluded from

## Section 87B Undertaking

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it due to lack of consent referred to in clause 3.5 of Schedule 3, the transfer fee referred to in clause 9 of Schedule 3, the terms on which the FOXTEL Magazine are to be provided referred to in clause 22 of Schedule 3 and other limitations referred to in clause 27 of Schedule 3, the dispute must be resolved as follows:

- (a) If there is still a dispute 21 days after negotiations have commenced, either party may give to the other party notice in writing specifying the dispute and requiring it to be dealt with in the manner set out in this clause (the **Dispute Notice**).
- (b) A mediator is to be appointed by agreement of the parties or, if they fail to agree within 7 days, a mediator is to be appointed by the Australian Commercial Disputes Centre (**ACDC**) acting on the request of either party. The mediation is to commence within 14 days of the mediator being appointed.
- (c) Unless the parties otherwise agree:
  - (i) each party may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (ii) each party will bear their own costs relating to the preparation for and attendance at the mediation;
  - (iii) the costs of the mediator will be borne equally by both the parties; and
  - (iv) otherwise, the mediation shall be conducted by the mediator under the ACDC Mediation Guidelines.
- (d) At any time after the appointment of the mediator under this clause, either party or the mediator may, by notice in writing to the parties, terminate the mediation and notify the parties that the first party or the mediator believe the dispute in relation to the licence fee should be determined by Expert Determination (the **Expert Determination Notice**).
- (e) If any party or the mediator gives an Expert Determination Notice:
  - (i) the parties will, within 14 days of giving or receiving the Expert Determination Notice, appoint an independent expert to determine the licence fee; or
  - (ii) if the parties cannot agree on an independent expert within 14 days, an expert must be appointed by the ACDC,  
(the **expert**).
- (f) The Expert Determination is to be administered by the ACDC and the following procedures apply:
  - (i) each party may appoint a person, including a legally qualified person, to represent it or assist it in the Expert Determination;
  - (ii) each party will bear their own costs relating to the preparation for and attendance at the Expert Determination;
  - (iii) the costs of the expert will be borne equally by both the parties; and

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- (iv) otherwise, the Expert Determination shall be conducted in accordance with ACDC Expert Determination Guidelines.
- (g) The expert must have the following skills or expertise:
  - (i) a well-developed professional understanding of the subscription television industry in Australia, the United Kingdom or the United States; and
  - (ii) business, accounting or economics qualifications or substantial operational experience.
- (h) The parties will agree to be bound by the determination of the expert.
- (i) **[CONFIDENTIAL]**

# Confidentiality Deed Poll

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## Annexure B

### Confidentiality Deed Poll

[Receiving Party]

**[Date]**

# Confidentiality Deed Poll

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<b>Date</b>	
<b>By</b>	This Deed Poll is made by:
1	[Recipient] (ACN [*]) of [*] (the <b>Receiving Party</b> ) in favour of FOXTEL Management Pty Ltd (ACN 068 671 938) of Wharf 8, Pyrmont, Sydney, New South Wales ( <b>FOXTEL</b> ).
<b>Recitals</b>	
A	FOXTEL has certain information which the Receiving Party acknowledges as being confidential to FOXTEL.
B	The Commission will make available the Confidential Information to the Receiving Party for the Permitted Purpose subject to and in consideration for the Receiving Party entering into this Deed with FOXTEL and the Commission.
C	The Receiving Party agrees to keep the Confidential Information strictly confidential in accordance with this Deed.

---

**It is agreed** as follows.

## 1. Definitions and Interpretation

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### 1.1 Definitions

In this Deed (including the Recitals) the following definitions apply unless the context requires otherwise.

**People** of a party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives.

**Commission** means Australian Competition and Consumer Commission.

**Confidential Information** means clause 6(i) of Annexure A of the Undertaking.

**Party** means a party to this Deed.

**Permitted Purpose** means [\*].

**Undertaking** means the undertaking to the Australian Competition and Consumer Commission pursuant to section 87B of the Trade Practices Act 1974 by FOXTEL dated November 2002.

### 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The **singular** includes the plural and conversely.

# Confidentiality Deed Poll

---

- (b) A **gender** includes all genders.
- (c) If a **word** or **phrase** is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a **person**, corporation, trust, partnership, unincorporated body or other entity includes any of the foregoing.
- (e) A reference to any **party** to this Deed or another agreement or document includes the party's successors, permitted substitutes and assigns (and, if applicable, the party's legal personal representatives).
- (f) A reference to any **agreement** or **document** (including, without limitation, a reference to this Deed) is to the agreement or document as amended, varied, supplemented, novated or replaced from time to time except to the extent prohibited by this Deed or that other agreement or document.

## 2. Confidentiality

---

### 2.1 Receiving Party's covenants

The Receiving Party covenants and agrees with FOXTEL and the Commission that it:

- (a) shall hold all Confidential Information in strict confidence and shall not disclose any of it to any person except in accordance with this Deed or otherwise as permitted or directed in writing by FOXTEL;
- (b) will not cause or allow any Confidential Information to be photocopied, reproduced or recorded in any manner except as reasonably necessary for the Permitted Purpose;
- (c) will not make any use of the Confidential Information or any part of it except for the Permitted Purpose, and will not make any use of the Confidential Information or any part of it to the competitive disadvantage of any of FOXTEL;
- (d) will refer to the Confidential Information as 'Confidential' in any submissions, correspondence or other documentation provided to the Commission in relation to the Permitted Purpose;
- (e) will establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use; and
- (f) will immediately notify FOXTEL and the Commission of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

### 2.2 Exceptions

This Deed does not prevent the Receiving Party from using and disclosing Confidential Information which:

- (i) at the time of the first disclosure by the Commission was already in the lawful possession of the Receiving Party in written form;
- (ii) is generally available to the public otherwise than by disclosure in breach of the terms of this Deed; or



# Confidentiality Deed Poll

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- (iii) becomes available to the Receiving Party from a third person legally entitled to possess the information and provide it to the Receiving Party, if the use or disclosure accords with the right or permission largely granted to the Receiving Party by that third person.

## **2.3 Extent binding**

Clause 2 of this Deed extends to and binds the Receiving Party and all of its People and extends to and also operates in respect of any note, calculation, conclusion, summary or other material derived or produced partly or wholly from any Confidential Information.

## **3. Access to Confidential Information**

---

The Receiving Party shall limit access to the Confidential Information to:

- (a) its People who reasonably require access to the Confidential Information in order that the Permitted Purpose may be achieved and who are obliged to treat the Confidential Information as confidential in the same manner and to the same extent as is provided under this Deed, and
- (b) any third parties which FOXTEL may approve in writing as persons to whom disclosure may be made, which approval may be refused or granted (with or without conditions) and withdrawn at any time.

## **4. Re-Delivery**

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The Receiving Party shall return to FOXTEL all Confidential Information held by it or which is under its control when the Confidential Information is no longer required for the Permitted Purpose or on the demand of FOXTEL if the Receiving Party is in breach of this Deed.

**EXECUTED** and delivered as a Deed Poll.

Annexure C

Confidentiality Deed

FOXTEL Management Pty Ltd  
[Infrastructure Operator / Access Seeker]

[Date]

# Confidentiality Deed

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<b>Date</b>	
<b>Parties</b>	
1.	[FOXTEL Management Pty Ltd (ACN 068 671 938) of Wharf 8, Pyrmont, Sydney, New South Wales, for and on behalf of the FOXTEL Partnership] (the <b>Disclosing Party</b> )
2.	[Infrastructure Operator / Access Seeker] (ACN [*]) of [*] (the <b>Receiving Party</b> )
<b>Recitals</b>	
A	The Disclosing Party has certain Confidential Information which the Receiving Party acknowledges as being of significant commercial value to the Disclosing Party.
B	The Disclosing Party will make available the Confidential Information to the receiving Party for the Permitted Purpose subject to and in consideration for the Receiving Party entering into this Deed with the Disclosing Party, which is necessary to protect the valuable commercial interests of the Disclosing Party.

**It is agreed** as follows.

## 1. Definitions and Interpretation

---

### 1.1 Definitions

The following definitions apply unless the context requires otherwise.

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

**Confidential Information** means information which is provided to the Receiving Party on a confidential basis (or the Receiving Party ought reasonably to have known was confidential to the Disclosing Party) that:

- (a) is disclosed to the Receiving Party by or on behalf of the Disclosing Party;
- (b) is acquired by the Receiving Party directly or indirectly from the Disclosing Party; or
- (c) otherwise comes to the knowledge of the Receiving Party,

whether the information is in oral, visual or written form or is recorded or embodied in any other medium.

**FOXTEL** means FOXTEL Management Pty Ltd (ACN 068 671 938) for and on behalf of the FOXTEL Partnership.

# Confidentiality Deed

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**FOXTEL Partnership** means the partnership established between Telstra Media Pty Ltd (ACN 069 279 072) and Sky Cable Pty Limited (ACN 069 799 640).

**Party** means a party to this Deed.

**People** of a party means each of that party's directors, officers and employees.

**Permitted Purpose** means FOXTEL and the [Infrastructure Operator / Access Seeker] negotiating and performing [an Infrastructure Operator Content Supply Agreement pursuant to clause 8 of the Undertaking / an Analogue Access Agreement pursuant to Schedule 1 of the Undertaking / a Digital Access Agreement pursuant to Schedule 2 of the Undertaking].

**Third Party** means a party's agents, contractors, advisers and representatives.

**Undertaking** means the undertaking to the Australian Competition and Consumer Commission pursuant to section 87B of the Trade Practices Act 1974 by FOXTEL dated November 2002.

## 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The **singular** includes the plural and conversely.
- (b) A **gender** includes all genders.
- (c) If a **word** or **phrase** is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a **person**, corporation, trust, partnership, unincorporated body or other entity includes any of the foregoing.
- (e) A reference to a **clause** or **schedule** is a reference to a clause or a schedule to, this Deed.
- (f) A reference to any **party** to this Deed or another agreement or document includes the party's successors, permitted substitutes and assigns (and, if applicable, the party's legal personal representatives).
- (g) A reference to any **agreement** or **document** (including, without limitation, a reference to this Deed) is to the agreement or document as amended, varied, supplemented, novated or replaced from time to time except to the extent prohibited by this Deed or that other agreement or document.
- (h) A reference to any **legislation** or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (i) A reference to **conduct** includes, without limitation, an omission, statement and undertaking, whether or not in writing.
- (j) A reference to an **agreement** includes any undertaking, deed, agreement and legally enforceable arrangement whether or not in writing and a reference to a

# Confidentiality Deed

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document includes an agreement (as so defined) in writing, and any certificate, notice, instrument or document of any kind.

## **2. Provision of Confidential Information**

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### **2.1 Availability**

Subject to Clause 2.2 and the other terms of this Deed, the Disclosing Party shall make the Confidential Information available to the Receiving Party for the Permitted Purpose.

### **2.2 Cessation of Supply of Confidential Information**

The Disclosing Party may at any time cease to supply the Confidential Information to the Receiving Party if the Receiving Party is in breach of this Deed and in particular, but without limitation, if the Receiving Party uses, or the Disclosing Party believes in good faith it will use, or will be likely to use, the Confidential Information for other than the Permitted Purpose.

## **3. Confidentiality**

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### **3.1 Receiving Party's covenants**

The Receiving Party covenants and agrees with the Disclosing Party that it:

- (a) shall hold all Confidential Information in strict confidence and shall not disclose any of it to any person except in accordance with this Deed or otherwise as permitted or directed in writing by the Disclosing Party;
- (b) will not cause or allow any Confidential Information to be photocopied, reproduced or recorded in any manner except as reasonably necessary for the Permitted Purpose;
- (c) will not make any use of the Confidential Information or any part of it except for the Permitted Purpose, and will not make any use of the Confidential Information or any part of it to the competitive disadvantage of any of the Disclosing Party;
- (d) will establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use; and
- (e) immediately notify the Disclosing Party of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

### **3.2 Exceptions**

This Deed does not prevent the Receiving Party from using and disclosing Confidential Information which:

- (i) at the time of the first disclosure by the Disclosing Party was already in the lawful possession of the Receiving Party in written form;
- (ii) is generally available to the public otherwise than by disclosure in breach of the terms of this Deed; or

# Confidentiality Deed

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- (iii) becomes available to the Receiving Party from a third person legally entitled to possess the information and provide it to the Receiving Party, if the use or disclosure accords with the right or permission largely granted to the Receiving Party by that third person.

### **3.3 Extent binding**

Clause 3.1 extends to and binds the Receiving Party and all of its People and extends to and also operates in respect of any note, calculation, conclusion, summary or other material derived or produced partly or wholly from any Confidential Information.

### **3.4 Computer secrecy**

Neither the Receiving Party nor any of its People may permit or cause any of the Confidential Information to be entered into a computer or Confidential Information base not solely operated and controlled by the Receiving Party.

## **4. Permitted confidential disclosure by Receiving Party**

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### **4.1 Disclosure to People**

The Receiving Party may disclose Confidential Information to any of its People if the disclosure is necessary solely for the Permitted Purpose and if, before any Confidential Information is disclosed, the People agree to keep that Confidential Information confidential.

### **4.2 Disclosure to Third Parties**

The Receiving Party may disclose Confidential Information to a Third Party if the disclosure is necessary solely for the Permitted Purpose and if, before any Confidential Information is disclosed:

- (a) the Disclosing Party is notified of the identity of the Third Party; and
- (b) the Third Party agrees to keep that Confidential Information confidential by delivering to the Receiving Party a properly executed Confidentiality Deed.

### **4.3 Responsibility for acts of People and Third Parties**

Without limiting the obligations and responsibilities of the Receiving Party under this Agreement or otherwise, the Receiving Party is liable to the Disclosing Party for any misuse (including unauthorised disclosure) of the Confidential Information by:

- (a) the Receiving Party's People; or
- (b) any Third Parties to whom the Receiving Party disclosed the Confidential Information.

## **5. Access to Confidential Information**

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The Receiving Party shall limit access to the Confidential Information to:

# Confidentiality Deed

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- (a) its People who reasonably require access to the Confidential Information in order that the Permitted Purpose may be achieved and who are obliged to treat the Confidential Information as confidential in the same manner and to the same extent as is provided under this Deed, and
- (b) any third parties which the Disclosing Party may approve in writing as persons to whom disclosure may be made, which approval may be refused or granted (with or without conditions) and withdrawn at any time.

## 6. Disclaimer

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### 6.1 The Disclosing Party not liable

The Receiving Party acknowledges that it is making an independent assessment of the Confidential Information and will verify all information on which it intends to rely to its own satisfaction and that, subject to the Confidential Information being provided in good faith, the Disclosing Party does not and will not give any warranty as to the truth, accuracy, relevance or usefulness of any of the Confidential Information and does not accept any responsibility for any falsity, inaccuracy or misleading information or for any omission in the Confidential Information provided.

### 6.2 Receiving Party's conclusions its own

The Disclosing Party accepts no responsibility for any interpretation, opinion or conclusion that the Receiving Party may form as a result of examining the Confidential Information.

## 7. Re-Delivery

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The Receiving Party shall immediately re-deliver to the Disclosing Party (or destroy, where delivery is not physically possible) all Confidential Information held by it or which is under its control, and all notes, calculations or summaries or other material derived or produced partly or wholly from any of the Confidential Information and any or all computer records (including copies, reproductions and recordings of them) derived or produced partly or wholly from any of the Confidential Information, and shall provide to the Disclosing Party a Statutory Declaration from a duly authorised senior officer of the Receiving Party that to his or her personal knowledge all such records have been delivered, erased or destroyed in the following circumstances:

- (a) when the Confidential Information is no longer required for the Permitted Purpose;
- (b) when the Confidential Information is generally available to the public otherwise than through a breach by the Receiving Party of this Deed;
- (c) on the demand of the Disclosing Party if the Receiving Party is in breach of this Deed; or
- (d) if ordered by a court.

# Confidentiality Deed

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## 8. Other Disclosure by Disclosing Party

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The Receiving Party acknowledges that the Disclosing Party is free to disclose any Confidential Information to any other person, should it so desire, and in those circumstances would not be under any obligation to notify the Receiving Party.

## 9. Termination

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The provisions of this Deed binding on the Receiving Party will continue for a period of [\*].

## 10. Remedies

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The Receiving Party acknowledges that any unauthorised use or disclosure of the Confidential Information or any part of it in breach of this Deed will cause material damage to the Disclosing Party. Consequently, each of the Disclosing Party have the right, in addition to any other remedies available at law or in equity, to seek injunctive relief against the Receiving Party and any of its People in respect of any breach of this Deed by the Receiving Party or any of its People.

## 11. Indemnity

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The Receiving Party indemnifies the Disclosing Party from all claims, costs, expenses, losses and liabilities (including legal costs on a solicitor and own client basis) suffered or incurred by any of them (including, without limitation, in connection with the enforcement of this Deed) as a result of or in connection with any breach of this Deed by the Receiving Party or any of its People.

## 12. Notices

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Any notice given under this Deed:

(a) [\*] must be in writing addressed to the intended recipient at the address shown below

[\*]

Attention: [\*]

Fax: [\*]

[\*]

Attention: [\*]

Fax: [\*]

- (b) must be signed by a person duly authorised by the sender,
- (c) will be taken to have been given when delivered, received or left at the above address. If delivery or receipt occurs on a day when business is not generally carried on in the place to which the notice is sent, or is later than 4 pm (local time),



# Confidentiality Deed

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it will be taken to have been duly given at the commencement of business on the next day when business is generally carried on in that place.

## **13. Entire Agreement**

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This Deed contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

## **14. Amendment**

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This Deed may be amended only by another deed executed by all parties.

## **15. Assignment**

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The rights and obligations of each party under this Deed are personal. They cannot be assigned, charged or otherwise dealt with, and no party shall attempt or purport to do so, without the prior written consent of all the parties.

## **16. No Waiver**

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No failure to exercise and no delay in exercising any right, power or remedy under this Deed will operate as a waiver. Nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.

## **17. Further Assurances**

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Each party shall take all steps, execute all documents and do everything reasonably required by any other party to give effect to any of the transactions contemplated by this Deed.

## **18. Stamp Duty and Costs**

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Each party shall bear its own costs arising out of the preparation of this Deed. All Stamp duty (including fines and penalties) chargeable on this Deed, on any instruments entered into under this Deed, and in respect of a transaction evidenced by this Deed shall be borne by the Receiving Party. The Receiving Party shall indemnify the Disclosing Party on demand against any liability for that stamp duty (including fines and penalties).

## **19. Governing Law**

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This Deed is governed by the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

# Confidentiality Deed

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## 20. Counterparts

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This Deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

**EXECUTED** and delivered as a deed in New South Wales.

**Signed Sealed and Delivered by FOXTEL  
Management Pty Limited:**

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Director Signature

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Director/Secretary Signature

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Print Name

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Print Name

**Signed Sealed and Delivered by  
[Receiving Party]:**

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Director Signature

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Director/Secretary Signature

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Print Name

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Print Name