

TRADE PRACTICES ACT 1974

UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B

BY

HUTCHISON 3G AUSTRALIA PTY LIMITED
ACN. 096 304 620

PERSON GIVING UNDERTAKING

1. This undertaking is given to the Australian Competition and Consumer Commission (“**the Commission**”) by **Hutchison 3G Australia Pty Limited (ACN. 096 304 620) (“Hutchison”)**, Building A, 207 Pacific Highway, St Leonards, the State of New South Wales, under section 87B of the *Trade Practices Act 1974* (Cth) (“the Act”).

BACKGROUND

2. Hutchison sells third generation telecommunications products and services in New South Wales, Victoria, Queensland, South Australia and Western Australia.

\$99 Talk Cap and Free 10

3. At various times between April 2003 and January 2004, Hutchison offered mobile phone plans titled “First on 3”, “Business First”, “Business on 3” and “Hot for 3” (“the Plans”). The Plans included a **\$99 Talk Cap** and a **Free 10** call offer.
4. The \$99 Talk Cap allowed customers on the Plans to make unlimited national mobile and landline calls (“national calls”) for \$99 a month, subject to the Fair Use Policy. The Fair Use Policy:
 - (a) initially allowed customers on “First on 3” to make up to 1000 minutes of national calls a month, which was increased to 3000 minutes a month from July 2003; and
 - (b) allowed customers on “Business First” and “Business on 3” to make 3000 minutes of national calls per month.
5. The Free 10 minute calls offer allowed customers:
 - (a) on “First on 3”, “Business First” and “Business on 3” customers to make an unlimited amount of 10 minute calls to other “3” and “Orange” customers free of charge; and
 - (b) on the “Hot for 3” plan to make an unlimited amount of 10 minute calls to other “3” customers.

6. In August 2003, Hutchison introduced the “Rate Guarantee”, which appeared in a small proportion of Hutchison's advertising to the public via price brochures, the press, the radio, the “3” website, in store advertising and displays. It was also included in the customer magazine “Fresh on 3” and a customer letter. The Rate Guarantee provided that the rate offered on the Plans would not be increased for 2 years from the date the customer connected to one of the Plans.
7. Hutchison also referred to prices being guaranteed in a customer newsletter and a customer letter that was sent to a small number of existing customers from 22 August 2003 to late October 2003.
8. In June 2004, in respect of the \$99 Talk Cap, Hutchison varied the Fair Use Policy from 3000 minutes to \$500 worth of calls a month for customers on “First on 3”, “Business First” and “Business on 3” (the “new Fair Use Policy”).
9. Also in June 2004, Hutchison introduced a “Fair Use Limit” of 500 minutes a month on the amount of Free 10 calls that could be made by customers on the Plans.
10. On 11 June 2004, the Commission wrote to Hutchison advising the Commission had received complaints from consumers concerning the variation to the Fair Use Policy and the Fair Use Limit.
11. On 22 June 2004, Hutchison provided the Commission with details of the changes it had made, the number of customers who had a history of making calls in excess of the new Fair Use Policy or the Fair Use Limit and the considerable restitutionary benefits that it had provided to consumers as part of the process of making the changes.
12. Hutchison provided the Commission with details of the process undertaken by Hutchison in implementing the changes:
 - (a) Prior to making the changes, Hutchison examined the call patterns of its customers on the Plans. Hutchison found that:
 - i. only 9% of customers to whom the changes would apply had a history of making a volume of calls above the volume of calls included in the new Fair Use Policy;
 - ii. only 3% of customers to whom the new Fair Use Limit would apply had a history of making calls above the Fair Use Limit; and
 - iii. only a further 3% of customers had a history of making a volume of calls within 10% of the new Fair Use Policy or the Fair Use Limit.
 - (b) As part of the process of making the changes, Hutchison contacted all customers affected by the changes and provided customers who may have been adversely affected by the changes with a variety of forms of restitution. These forms of restitution included:

- i. Customers who had a history of making a volume of calls above the amount included in the new Fair Use Policy (9 per cent of customers) or the Fair Use Limit (3 per cent of customers) were informed that if they wished to terminate their service before the end of July 2004, they would not be required to pay any remaining handset instalments. They were also offered a free upgrade to a new handset worth \$456 dollars if they remained connected to Hutchison for a further 12 months, or the waiver of any remaining handset instalments if they indicated they did not wish to upgrade their handset.
 - ii. Customers who had a history of making a volume of calls within 10% of the new Fair Use Policy or the Fair Use Limit (approximately 3 per cent of customers) were informed that if they wished to terminate their service before the end of July 2004, they would not be required to pay any remaining handset instalments. They were also offered a range of handset upgrade offers if they remained connected for a further 12 months, or the waiver of any remaining handset instalments if they indicated they did not wish to upgrade their handset.
 - iii. Other customers were offered the opportunity of an early handset upgrade at a \$300 discount, as long as they had not already accepted a handset upgrade offer.
 - (c) The Plans did not have a minimum term, with the exception of the "Business on 3" Plan. Hutchison waived the cancellation fee for customers on the "Business on 3" plan; and
 - (d) Hutchison gave consideration to any claim made by a customer in relation to the changes and provided other benefits such as waivers of handset repayments, goodwill credits and free accessories.
13. The value of the restitution provided by Hutchison to its customers was \$6.6 million by 10 September 2004.
 14. On 29 June 2004, the Commission wrote to Hutchison advising that it considered the variation to the Fair Use Policy in conjunction with the Rate Guarantee as a feature of the "3" service may constitute a breach of sections 52 and 53(e) of the Act.
 15. Hutchison's view is that the Rate Guarantee applied to call rates or events charges, not to a variation of the Fair Use Limit or the introduction of a limit on a free usage offers.
 16. On 22 July 2004, the Commission reached the view that in representing its rates or prices as guaranteed for two years, when Hutchison subsequently varied its Fair Use Policy and imposed a Fair Use Limit, Hutchison had contravened sections 52, 53(e) and 53(g) of the Act.
 17. In the Commission's view, in respect of the \$99 Talk Cap, changes made by Hutchison to the Fair Use Policy affected the *value* of the talk cap. In the circumstances of the Rate Guarantee, the Commission's view is that

Hutchison represented to consumers that limitations on the talk cap were part of the pricing policy, which was guaranteed for two years.

18. In the Commission's view, in respect of Free 10, the introduction of the Fair Use Limit affected how much a consumer would pay each month depending on *usage* of certain types of calls. In the circumstances of the Rate Guarantee, the Commission's view is that Hutchison represented to consumers that the amount they would pay for a certain level of telephone usage of certain types of calls would not change.
19. Accordingly, the Commission is of the view that in representing its rates or prices as guaranteed for two years, when Hutchison varied the Fair Use Policy for the \$99 Talk Cap and imposed a Fair Use Limit on the Free 10 offers, Hutchison has:
 - (a) engaged in misleading or deceptive conduct in breach of section 52 of the Act;
 - (b) made false or misleading representations with respect to the price of goods or services in breach of section 53(e) of the Act; and
 - (c) made false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee or right in breach of section 53(g) of the Act.
20. Hutchison accepts that in making the Rate Guarantee and subsequently varying its fair use policies and introducing limits on offers, it is possible it may have contravened 52, 53(e) and/or 53(g).
21. In response to the Commission's concerns, Hutchison has offered to give the Undertaking in the terms set out below to the Commission under section 87B of the Act. The Commission has agreed to accept the Undertaking under section 87B of the Act.

Handset Upgrade letter

22. In July 2004, Hutchison sent a letter to approximately 10,900 existing Hutchison customers offering those customers an upgrade to a new LG U8110 mobile telephone (the ***upgrade letter***).
23. The upgrade letter stated in part that customers were able to use their pre-existing \$300 handset upgrade credit to purchase a new mobile phone from Hutchison. The letter also stated that the customers could "upgrade to the new LG U8110 right now, free of charge – even if you haven't been with us for 12 months."
24. On 11 August 2004, the Commission wrote to Hutchison advising the Commission had received complaints from Hutchison customers who stated that they had contacted Hutchison to take up the upgrade offer but had been informed by Hutchison call centre staff that to avail themselves of the new LG U8110 mobile telephone being offered they were, in fact, required to pay approximately \$160.00 in addition to redeeming the \$300 handset upgrade credit.

25. On 24 August 2004, Hutchison advised the Commission that the words “free of charge” in relation to the LG U8110 mobile telephone were inadvertently included in the letter but that the letter also stated customers would use their \$300 handset upgrade credit and would generally understand that they needed to pay an additional amount to purchase their handset. Hutchison advised the Commission that although the letter was unfortunately confusing, Hutchison had corrected the confusion when those customers called to accept the offer and so Hutchison’s conduct, when viewed as a whole, was not misleading or deceptive.
26. The Commission reached the view that Hutchison had contravened sections 52 and 53(e) of the Act in that it used the term “free of charge” in relation to the LG U8110 mobile telephone offer, when there was a charge associated for customers wishing to avail themselves of the offer.
27. Hutchison acknowledges the Commission’s concerns that by making the representation that customers could “upgrade to a new handset LG U8110 right now, free of charge” when in fact a charge of \$156 was payable, it may have misled some consumers such that the conduct may have contravened sections 52 and 53(e) of the Act.

COMMENCEMENT OF UNDERTAKINGS

28. This Undertaking comes into effect when:
 - (a) The Undertaking is executed by Hutchison; and
 - (b) The Commission accepts the undertaking so executed.
 - (c) Upon the commencement of this Undertaking, Hutchison undertakes to assume the obligations set out in paragraphs 29 to 32.

UNDERTAKINGS

\$99 Talk Cap and Free 10

29. Hutchison undertakes that:
 - a. It will withdraw and cease use of the term “rate guarantee”, “prices guaranteed” or similar terms from all Hutchison advertising and offers, including at the point of sale and at the time of contracting the customer, unless the term is appropriately specified, for example by prominently qualifying at the time of using the term that “rate” refers to a cents per minute plus flagfall call charge of the charge for a particular services such as sending an SMS;
 - b. Within 30 days of this undertaking coming into effect, Hutchison will cause a letter to be sent to each customer on the “First on 3”, “Business First” and “Business on 3” plans, except those customers:
 - (i) who have not been subject to the new Fair Use Policy;

- (ii) referred to in 12(b)(i) above;
- (iii) referred to in 12(b)(ii) above; or
- (iv) who have already received restitutionary benefits from Hutchison totalling at least \$156 per service

in the form set out in Annexure A stating that from a date which is approximately 8 weeks (excluding the Christmas holiday period, which is the period from 24 December 2004 to 4 January 2005) from this undertaking coming into effect until 2 years from the date the customer activated their service Plan:

- (v) any calls made by the customer in excess of the \$500 worth of calls included in the \$99 Talk Cap under the new Fair Use Policy and under the \$1000 worth of calls (3000 minutes) included in the old Fair Use Policy, will be subject to a discount of 20%, which equates to a reduced call rate of 12 cents per 30 seconds; and
 - (vi) any calls made to other "3" and Orange customers in excess of 500 minutes of 10 minutes calls included in the Free 10 offer under the Fair Use Limit will be subject to a discount of 20%, which equates to a reduced call rate of 12 cents per 30 seconds;
- c. within 30 days of this undertaking coming into effect, Hutchison will cause a letter to be sent to each customer on the "Hot for 3" plan who joined the plan prior to 7 June 2004, except those customers:
- (i) who have not been subject to the new Fair Use Policy
 - (ii) referred to in 12(b)(i) above;
 - (iii) referred to in 12(b)(ii) above; or
 - (iv) who have already received restitutionary benefits from Hutchison totalling at least \$156 per service
- in the form set out in Annexure B stating that from a date which is approximately 8 weeks (excluding the Christmas holiday period, which is the period from 24 December 2004 to 4 January 2005) from this undertaking coming into effect until 2 years from the date the customer activated their service Plan:
- (v) any calls made to other "3" customers in excess of 500 minutes of 10 minutes calls included in the Free 10 offer under the Fair Use Limit will be subject to a discount of 20%, which equates to a reduced call rate of 20 cents per 30 seconds.

Handset upgrade letter

30. Hutchison undertakes that it will not for a period of 3 years make representations to the effect that any offer of specific goods and services is “free of charge” or any other derivative of the term that implies no charge to consumers when in fact there is a charge for those goods or services, but this will not prevent the use of the term “free” in respect of elements of offers where those elements are free and the free elements are appropriately specified or the elements of the offer which are not free are appropriately specified.
31. Hutchison undertakes it will:
 - (a) within 30 days of this Undertaking coming into effect, cause a letter to be sent, in the form set out in Annexure C, to all Hutchison customers who received the upgrade letter, but did not either contact Hutchison regarding the offer or did not accept the upgrade offer.
 - (b) within 30 days of this Undertaking coming into effect, cause a letter to be sent, in the form set out in Annexure D, to all Hutchison customers who received the upgrade letter, and accepted the upgrade offer.
 - (c) offer to all Hutchison customers who received the upgrade letter and accepted the LG U8110 upgrade offer, and who call or write to Hutchison alleging they had been misled about the initial offer, a refund equalling an amount which is the difference between the \$300 credit and the actual cost of the mobile phone.

General

32. Hutchison undertakes it will:
 - (a) within 3 months of the date of this Undertaking coming into effect, strengthen its existing corporate trade practices compliance program (the Compliance Program), in the manner and form described in Annexure E hereto;
 - (b) maintain and continue to implement the Compliance Program for a period of 3 years from the date of this Undertaking coming into effect; and
 - (c) for a period of 3 years from the date of this Undertaking coming into effect continue to audit the Compliance Program for the purpose of ensuring that the officers and employees of Hutchison are aware of their responsibilities and obligations under sections 52 and 53 of the Act.

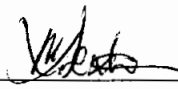
ACKNOWLEDGMENTS

33. Hutchison acknowledges that the Commission will make the undertaking available for public inspection.

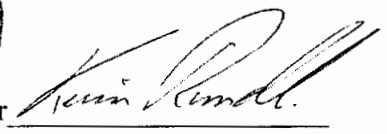
34. Hutchison further acknowledges that the Commission may from time to time publicly refer to this undertaking;
35. Hutchison further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

IN WITNESS of these undertakings
and its agreement the common seal of
Hutchison 3G Australia Pty Limited (ACN 096 304 620)
was hereunto affixed by authority of the
Board of Directors in the presence of:

Secretary/Director

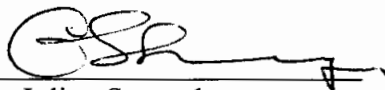


Director



This 21st day of December 2004

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



Graeme Julian Samuel
Chairman

This 23rd day of December 2004

Annexure A

Letter to customers for Free Talk and \$99 Talk Cap – customers on "First on 3", "Business First" and "Business on 3"

Dear [Name]

In June 2004 we wrote to you about changes to the Fair Use Policy on our \$99 Talk Cap offer and the introduction of a fair use limit on our Free 10 offer.

This refers to the following mobile services: [insert]

Unfortunately, we have found that the rate guarantee associated with your plan was confusing for some customers who assumed it meant we could not vary the \$99 Talk Cap or Free 10 offers. We apologise for any confusion caused and are pleased to announce that we are reducing the national voice call rate by 20% on all calls exceeding either the original Free 10 or \$99 Talk Cap limit.

This offer will come into effect for usage from 19 February 2005 and will remain in place until 2 years from the initial activation date of your service.

Reduction of national voice call rates for calls exceeding the \$99 Talk Cap

At present, national voice calls up to \$500 per month in value are included in the \$99 Talk Cap. Any additional calls will then be charged at our standard rate of 15 cents per 30 seconds.

However, for usage from 19 February 2005, additional national voice calls beyond the \$500 usage per month limit will be charged at the reduced rate of 12 cents per 30 seconds until you reach a total of 3,000 minutes per month. National voice calls in excess of 3,000 minutes will then be charged at 3's standard rate of 15 cents per 30 seconds.

Reduction of voice call rates for 3 to 3 and 3 to Orange calls exceeding the Free Talk limit

At present, you are entitled to make free 10 minute calls to other 3 and Orange customers up to a maximum of 500 minutes per month. At this point you would be charged 3's standard rate of 15 cents per 30 seconds. However, on usage from 19

February 2005, once you reach this limit any calls to other 3 and Orange customers will be charged at the reduced rate of 12 cents per 30 seconds.

If you have any questions in relation to this offer, please call us on 1300 xxx xxx (Mon – Fri: 9am – 5pm, ESDT, except public holidays).

Kind regards,

Katja Voegele
Head of Customer Marketing

Annexure B

Letter to customers for Free 10 – "Hot for 3" plan

Dear [name]

In June 2004 we wrote to you about changes to the Fair Use Policy and the introduction of a fair use limit on our Free 10 offer.

This refers to the following mobile services: [insert]

Unfortunately, we have found that the rate guarantee associated with your plan was confusing for some customers who assumed it meant we could not vary the Free 10 offer. We apologise for any confusion caused and are pleased to announce that we are reducing the national voice call rate by 20% on all calls exceeding the Free 10 limit.

This offer will come into effect for usage from 19 February 2005 and will remain in place until 2 years from the initial activation date of your service.

Reduction of voice call rates for 3 to 3 calls exceeding the Free Talk limit

At present, you are entitled to make free 10 minute calls to other 3 customers up to a maximum of 500 minutes per month. At this point you would be charged 3's standard rate of 25 cents per 30 seconds. However, on usage from 19 February 2005, once you reach this limit any calls to other 3 customers will be charged at the reduced rate of 20 cents per 30 seconds.

If you have any questions in relation to this, please call us on 1300 xxx xxx (Mon – Fri: 9am – 5pm, ESDT, except public holidays).

Kind regards,

Katja Voegele

Head of Customer Marketing

Annexure C

Letter to Customers who did not contact Hutchison or did not accept the upgrade offer

Dear Customer

In June 2004 we wrote to offer an upgrade to your handset. We said that you could use your \$300 credit to upgrade to the LG U8110 and also said you could “upgrade to the new LG U8110 right now, free of charge – even if you haven’t been with us for 12 months”.

Unfortunately those statements were contradictory, because after using the \$300 upgrade credit there was a cost of \$156 to upgrade to the LG U8110. We apologise for any confusion that this may have caused.

Kind regards.

XXXXXX XXXX
XXXXXXXXXXXX

Annexure D

Letter to customers who did accept the upgrade offer

Dear Customer

In June 2004 we wrote offering to upgrade your handset to the LG U8110.

In that letter we said that you could use your \$300 credit to upgrade to the LG U8110 and also said that you could “upgrade to the new LG U8110 right now, free of charge – even if you haven’t been with us for 12 months”.

Unfortunately those statements were contradictory because after using the \$300 upgrade credit there was a cost of \$156 to upgrade to the LG U8110. We apologise for any confusion that this may have caused.

If you feel you were misled because of our letter, please call us on XXXX XXX XXX before *[insert date]* to discuss this matter.

Kind regards

XXX XXXX
XXXXXXXXXX

Annexure E

CORPORATE TRADE PRACTICES COMPLIANCE PROGRAM

1. Hutchison 3G Australia Pty Limited (The Corporation) shall use its best endeavours to ensure that the corporate trade practices compliance program (the Compliance Program) is designed and implemented so as to comply with each of the following requirements:
 - (a) The Compliance Program is to cover all officers and employees of the Corporation who are engaged in senior executive, marketing or sales functions in Australia (Relevant Staff);
 - (b) The Compliance Program is to inform the Relevant Staff of the application of sections 52, 53(e) and 53(g) of the *Trade Practices Act 1974* (Cth) (the relevant provisions of the TPA) to the Corporation's business;
 - (c) The Compliance Program must require the appointment of a senior officer, within 3 months of the date of this Undertaking coming into effect, whose responsibilities are to include the maintenance and continuing implementation of the Compliance Program and who reports directly to the Board in relation to the Compliance Program (the Compliance Officer);
 - (d) The Compliance Program is to provide that the Relevant Staff may confidentially notify the Compliance Officer of potential breaches of the relevant provisions of the TPA and the Compliance Program by the Corporation;
 - (e) The Compliance Program is to include an appropriate complaints handling system consistent with Australian Standard AS 4269-1995;
 - (f) The Compliance Program must require the Compliance Officer to keep and maintain a register of potential breaches and/or complaints related to the relevant provisions of the TPA;
 - (g) The Compliance Program is to ensure that compliance with the relevant sections of the TPA is discussed at regular Board and/or senior management meetings;
 - (h) The Compliance Program is to ensure that compliance with the relevant sections of the TPA becomes part of normal business practice in the company;
 - (i) The Compliance Program must require the development of a disciplinary policy or code for those employees and agents who do not comply with the Compliance Program or the relevant provisions of the TPA;
 - (j) The Compliance Program is to provide for regular trade practices training (at least once a year), with particular reference to the relevant sections of the TPA of the Relevant Staff by internal legal counsel and/or a solicitor or compliance professional with expertise in trade practices law; and
 - (k) The Compliance Program is to provide for an induction program on trade practices compliance issues, with particular reference to the relevant sections of the TPA to be undertaken by all new officers, employees of the Corporation and Relevant Staff, within three months of his or her engagement.
2. The Corporation shall, at its own expense, within 4 months of the date of this Undertaking coming into effect, cause to be produced and provided to the Commission copies of each of the documents constituting the Compliance Program, together with a letter confirming that the

Compliance Program has been implemented in accordance with the requirements of this Undertaking.

3. In order to ensure that the Compliance Program complies with each of the requirements set out above, the Corporation shall retain an independent compliance professional with expertise in trade practices law (the Compliance Professional), for the purpose of assisting in developing the Compliance Program. The Compliance Professional will qualify as independent on that basis that he or she is not a present or past staff member or director of the Corporation and has no shareholding or other interest in the Corporation.
4. The Corporation shall, at its own expense and for the purpose of ensuring that the Corporation maintains and continues to implement the Compliance Program, cause annual audits of the Compliance Program (the Audits) to be carried out in accordance with each of the following requirements for 3 years:
 - a. The Corporation shall ensure that the Audits are carried out by an independent compliance professional with expertise in trade practices law (the Auditor). The Auditor will qualify as independent on the basis that he or she:
 - i. is not a present or past staff member or director of the Corporation;
 - ii. has not acted or does not act for the Corporation other than as an auditor;
 - iii. is not retained by the Corporation in any other capacity, either currently or in the past other than as an auditor;
 - iv. has not and does not provide consultancy or other services for the Corporation other than as an auditor; and
 - v. has no shareholding or other interests in the Corporation;
 - b. The Corporation shall use its best endeavours to ensure that the Auditor:
 - i. Conducts a critical review as to whether the Compliance Program has been implemented in compliance with each of the requirements of this Undertaking; and
 - ii. Makes such recommendations as he/she considers necessary to ensure that the Compliance Program complies with each of the requirements of this Undertaking;
 - c. The Corporation shall ensure that the Audits are able to be conducted by the Auditor on the basis of any relevant information in the Corporation's possession or control, including without limitation any of the following sources of information:
 - i. Investigations of any officers and employees of the Corporation to find out how compliance processes are implemented and understood;
 - ii. Enquiries of customers about their experience of the Corporation and its products/services;
 - iii. The Corporation's records, including the Corporation's complaints register and any documents relevant to the Corporation's training or induction program; and
 - iv. Documents created by the Corporation's consultants and solicitors for use in the Corporation's Compliance Program.

- d. The Corporation shall use its best endeavours to ensure that the first Audit is completed within one year and two months of this Undertaking coming into effect and that each subsequent Audit is completed within one year thereafter;
 - e. The Corporation shall use its best endeavours to ensure that the findings in relation to each of the Audits are set out in a written report (the Audit Reports) and provided to the Corporation within 14 days of the completion of each of the Audits. The Audit Reports are to include a record of any potential contraventions of relevant provisions of the TPA and the Compliance Program that were identified during the Audits and the action taken to address the potential contraventions.
- 5. The Corporation shall implement promptly and with due diligence the recommendation which the Auditor may make that are reasonably necessary to ensure that the Corporation maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.
 - 6. The Corporation shall, at its own expense, cause to be produced and provided to the Commission copies of each of the Audit Reports within 14 days of the Corporation Receiving them.
 - 7. The Corporation shall also, at its own expense, if requested by the Commission, provide copies of any other documents and information in respect of matters which are the subject of the Compliance Program.