

**ENFORCEABLE UNDERTAKING TO THE
AUSTRALIAN COMMUNICATIONS
AND MEDIA AUTHORITY
GIVEN FOR THE PURPOSES OF
SECTION 38 OF THE SPAM ACT 2003**

The commitments in this undertaking are given to
the Australian Communications and Media Authority (ACMA)
pursuant to section 38 of the Spam Act 2003 (**Spam Act**) by:

Oxygen8 Communications Australia Pty Ltd

ACN 111 902 982

of

Suite 307, The Biztek Building, 20 Dale Street

Brookvale NSW 2100

1. Background

- (a) Oxygen8 Communications Australia Pty Limited (**the Company**) formerly known as Opera Telecom Pty Limited, is registered in New South Wales under the *Corporations Act 2001* with the Australian Company Number 111 902 982. The Company changed its name on 7 September 2008.
- (b) The Company acts as an aggregator to content providers in the Australian mobile telephone market in relation to mobile premium services.
- (c) The matters giving rise to this Undertaking are as follows-
 - (i) At times during 2007 and 2008, ACMA received a number of complaints about commercial electronic messages (**CEMs**) sent using the Company's technology and systems. The complaints alleged that the CEMs were sent in breach of sections 16, 17 and 18 of the Spam Act.
 - (ii) Investigations into the CEMs by ACMA confirmed that they were sent using the Company's technology and systems.
- (d) In response to ACMA's concerns, and to assist ACMA in relation to its current and future investigations, the Company has offered to give, and the ACMA has agreed to accept, this Undertaking under section 38 of the Spam Act in connection with the matters referred to at 1(c), above.

2. Definitions and Interpretation

2.1 Definitions

In this Undertaking:

terms that are defined in the Spam Act have the same meaning in this Undertaking as in that Act;

terms that are defined in the *Telecommunications Act 1997* have the same meaning in this Undertaking as in that Act;

business day means a day in Sydney excluding a Saturday, Sunday, public holiday or bank holiday;

CEM means commercial electronic message;

content provider means a person who acquires the aggregating services provided by the Company for the purposes of providing, or promoting or advertising the provision of, mobile premium services;

mobile premium service has the same meaning as in the *Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No. 1)*;

services has the same meaning as in the *Trade Practices Act 1974*;

shortcode means a number between 6 and 8 digits long, which enables the charging of fees for content as part of a mobile premium service;

Spam Act means the *Spam Act 2003*;

this Undertaking means all the provisions of this document.

2.2 Interpretation

Unless expressed to the contrary, in this Undertaking:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined, its other grammatical forms have corresponding meanings;
- (c) “includes” means includes without limitation;
- (d) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and

- (e) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns, and persons substituted by novation; and
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced.

2.3 Headings

Headings do not affect the interpretation of this Undertaking.

3. Commencement of this Undertaking

3.1 This Undertaking commences when:

- (a) it has been executed by the Company; and
- (b) so executed, it has been accepted by ACMA and written notification of that acceptance has been given to the Company.

4. Expiration of this Undertaking

4.1 This Undertaking continues until withdrawn, or varied on the matter of expiration, with the consent of ACMA in accordance with subsection 38(2) of the Spam Act.

5. Undertakings

5.1 The Company undertakes to do, and to cause its employees and agents to do, the following:

- (a) inform a content provider about suspected contraventions of any or all of sections 16, 17 or 18 of the Spam Act, as soon as practicable after becoming aware of the facts giving rise to the likely contraventions;

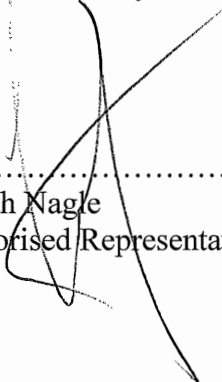
- (b) if the Company reasonably believes that there has been a likely contravention of any or all of sections 16, 17 or 18 of the Spam Act – to suspend the use of the shortcode that was used to send the CEM giving rise to the likely contravention by any person (whether or not the person was involved in the likely contravention) for 7 days, and to notify ACMA of the fact of any suspension as soon as practicable;
- (c) to conduct a monthly audit of the CEMs sent using the Company’s shortcodes on the following basis:
 - (i) the audit will be of one twelfth of the Company’s customers who are content providers;
 - (ii) the customers audited must include any content provider about which the Company has received notice of a complaint about contraventions of the Spam Act (whether the complaint was received by ACMA or the Company) in the past 6 months; and
 - (iii) if the customers covered by (c)(ii) comprise more than one twelfth of the Company’s total customer base, then the audit must be of the greater number of customers;
- (d) to establish and maintain a complaints handling policy which complies with AS ISO 10002-2006: Guidelines for complaints handling in organisations;
- (e) to comply with C628:2007 Telecommunications Consumer Protections Code;
- (f) to provide annual training, approved by ACMA, to directors, employees, agents and customers about the provisions of the Spam Act;
- (g) if the Company enters a contract, arrangement or understanding with a person after the commencement of this Undertaking whereby the Company will make its technology and systems available to the person for the purpose sending CEMs – to make express provision in that contract, arrangement or understanding that the Company may cancel or suspend the provision of services under the contract, arrangement or understanding without notice where the person has been involved in a likely contravention of any or all of sections 16, 17 or 18 of the Spam Act; and
- (h) to provide quarterly reports to ACMA on the outcome of all audits to be conducted under this Undertaking, with the first report to be provided on 1 April 2009.

- 5.2 The Company will ensure that all its employees and agents:
- (a) are provided with a copy of this Undertaking and instructed to:
 - (i) comply with the Undertaking as if it applied to them personally; and
 - (ii) take such action, or avoid taking such action, to ensure that the Company complies with the Undertaking;
 - (b) are instructed to inform it of any conduct or proposed conduct which the employee or agent believes is or may be in breach on this Undertaking.
- 5.3 The Company will otherwise do all things incidental or reasonably necessary to give effect to this Undertaking.
- 5.4 The Company will notify the ACMA in writing within 14 business days if there is a change in the identity of any holding company of the Company, including the ultimate holding company of the Company. In this clause, “holding company” and “ultimate holding company” have the same meaning as in the *Corporations Act 2001*.

6. Acknowledgements


- 6.1 The Company acknowledges that:
- (a) ACMA may make this Undertaking available for public inspection; and
 - (b) ACMA may make public any information regarding this Undertaking.
- 6.2 The Company also acknowledges that this Undertaking in no way derogates from the rights and remedies against the Company available to any person including ACMA, and notwithstanding this Undertaking ACMA is entitled to take such action as it sees fit (including legal action in a court of competent jurisdiction) in relation to any contravention or suspected contravention of the Spam Act.

The Undertaking is signed on behalf of **Oxygen8 Communications Australia Pty Ltd**
ACN 111 902 982 by its authorised representative:


.....
Gareth Nagle
Authorised Representative and Managing Director

in the presence of

SUSIE THOMPSON
.....
(Name of Witness)


.....
(Signature of Witness)

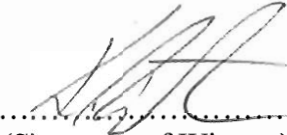
this 12th day of December 2008

The Undertaking offered by **Oxygen8 Communications Australia Pty Ltd**
ACN 111 902 982 is accepted by the Australian Communications and Media Authority
pursuant to section 38 of the *Spam Act 2003*:


.....
Julia Cornwell McKean
Delegate of the Australian Communications and Media Authority

in the presence of

Krissy Rappaport
.....
(Name of Witness)


.....
(Signature of Witness)

this 15th day of December 2008