

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given for
the purposes of section 87B

by

Nissan Motor Co (Australia) Pty Ltd
ACN 004 663 156

Persons giving this undertaking

- (1) This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Nissan Motor Co (Australia) Pty Ltd ACN 004 663 156 (**Nissan**) of 260-284 Frankston-Dandenong Road, Dandenong South, Victoria 3175 for the purposes of section 87B of the *Competition and Consumer Act 2010* (**the Act**).
- (2) Nissan is a subsidiary of the Japanese motor vehicle manufacturer Nissan Motor Co. Limited. It is incorporated under the *Corporations Act 2001* and is registered in Victoria.
- (3) Nissan engages principally in the sale and distribution of motor vehicles and spare parts, and uses television and print advertising to promote its vehicles.

Conduct

- (4) Between 7 August 2011 and 10 April 2012, Nissan caused to be published an advertisement for the Nissan DUALIS vehicle. The advertisement, broadcast in 15 second and 30 second versions, featured a Nissan DUALIS driving through a number of 'obstacles' in the form of paintballs being directed at the vehicle (**the paintball advertisement**).
- (5) The paintball advertisement depicted both a silver Ti AWD grade DUALIS (**the Silver DUALIS**) and a red ST Manual Hatch grade DUALIS (**the Red DUALIS**).
- (6) The Silver DUALIS was the primary focus for a significant portion of the paintball advertisement, and several images of both the interior and exterior of the vehicle were shown. These images depicted various features of the Silver DUALIS, including (but not limited to) metallic paint, panoramic sunroof, and leather seats and trim.
- (7) At the conclusion of the paintball advertisement, the Silver DUALIS drove across the screen and out of view so that it was no longer visible. Text then appeared alongside an image of a stationary Red DUALIS, in the form of a driveway price and disclaimer.
- (8) The driveway price stated in large prominent font:

"From \$25,990 Driveway"* (**the driveway price**).
- (9) The disclaimer read:

"Rec. price for ST Manual Hatch as shown. Metallic paint \$495 extra" (**the disclaimer**).

- (10) The driveaway price was the minimum price for the supply of a Red DUALIS as depicted in the paintball advertisement. The minimum price for a Silver DUALIS, as depicted in the paintball advertisement, was considerably greater as that vehicle:
- a. was a Ti AWD grade DUALIS (a superior grade or class of the DUALIS); and
 - b. included optional extras such as metallic paint, panoramic sunroof, and leather seats and trim.
- (11) The paintball advertisement did not specify the minimum price for a Silver DUALIS as depicted.

Publication

- (12) Between 7 August 2011 and 10 April 2012, Nissan caused the paintball advertisement to be published or broadcast as follows:
- a. on its website (www.nissan.com.au) in a 15-second format between 7 August 2011 and 5 April 2012;
 - b. on Foxtel's *Lifestyle Channel* in a 15-second format between 1 October 2011 and 7 April 2012; and
 - c. on social video sharing website YouTube in both a 15-second and 30-second format between 7 August 2011 and 10 April 2012.
- (13) The paintball advertisement was also:
- a. part of in-centre displays at shopping centres in major Australian capital cities in November 2011 and January 2012 for approximately 16 days; and
 - b. shown in cinemas between 3 November 2011 and 22 December 2011.

Relevant Provisions

- (14) Section 18 of the Australian Consumer Law (**ACL**), contained in Schedule 2 to the Act, provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or that is likely to mislead or deceive.
- (15) Section 29(1)(i) of the ACL provides that a person must not, in trade or commerce, make a false or misleading representation with respect to the price of goods or services.

Contraventions

- (16) The ACCC considers that, by publishing the paintball advertisement, Nissan contravened sections 18 and 29(1)(i) of the ACL by:
- a. representing that the driveaway price related to both the Silver DUALIS and the Red DUALIS as depicted in the paintball advertisement;
- when in fact,
- b. the driveaway price related to the Red DUALIS only in circumstances where the minimum price for the supply of a Silver DUALIS was, for the reasons outlined at paragraph 10 above, a considerably greater amount.

- (17) Nissan:
- a. admits that it contravened sections 18 and 29(1)(i) of the ACL for the reasons outlined above; and
 - b. says that it had compliance systems in place to ensure compliance with the ACL at the time of the relevant conduct, however these systems were not effective in the instance to prevent the admitted contraventions of the ACL by the paintball advertisement.
- (18) By letter dated 5 April 2012, the ACCC raised with Nissan its concerns about the paintball advertisement. Upon being made aware of the ACCC's concerns, Nissan:
- a. ceased publishing the paintball advertisement on its website on 5 April 2012;
 - b. ceased broadcasting the paintball advertisement on television on 7 April 2012;
 - c. ceased publishing the paintball advertisement on YouTube on 10 April 2012; and
 - d. co-operated with the ACCC and indicated a willingness to resolve the matter by the provision of an undertaking under section 87B of the Act and by the payment of three (3) Infringement Notices totaling \$19,800 issued by the ACCC under section 134A of the Act for alleged contraventions of section 29(1)(i) of the ACL by publication of each of:
 - (i) the 15-second advertisement on television;
 - (ii) the 15-second advertisement online; and
 - (iii) the 30-second advertisement online.

Commencement of undertaking

- (19) This Undertaking comes into effect when:
- a. the Undertaking is executed by Nissan; and
 - b. the ACCC accepts the Undertaking so executed.
- (20) Upon the commencement of this Undertaking, Nissan undertakes to assume the obligations set out in paragraphs 21 to 23 below for a period of three (3) years from the date the Undertaking comes into effect.

Undertakings

- (21) Nissan undertakes for the purposes of section 87B of the Act that, in respect of all future television advertisements (**TVCs**) for Nissan vehicles that it publishes, causes to publish or approves or authorises to be published (including online TVCs), where the TVC includes:
- a. a depiction of a vehicle that is a superior grade or class of that model of vehicle and/or includes optional extras (the **Superior Vehicle**); and
 - b. a statement or specification of an amount that constitutes, or is represented to constitute, the consideration for the supply of a vehicle of a lower price (**the Lower Amount**),

it will ensure that the TVC does not make a representation to the effect that the Lower Amount is the driveaway price, or is otherwise the minimum quantifiable consideration, for the Superior Vehicle.

Corrective Notice

(22) Nissan undertakes for the purposes of section 87B of the Act, that it will, at its own expense and within fourteen (14) days of this Undertaking coming into effect, publish the corrective notice set out in **Annexure A** in an edition of:

- a. *The Australian* newspaper;

and shall ensure that the advertisement:

- b. is of a size no less than 12cm wide by 16cm long;
- c. has a bold type heading in at least 18 point type and the body in type no less than 10 point Times New Roman font and right and left justified; and
- d. is placed within the first five pages of the newspaper.

Trade Practices Compliance Review

(23) Nissan undertakes for the purposes of section 87B of the Act, that it will, at its own expense:

- a. within one (1) month of the date of this Undertaking coming into effect, instruct a law firm with competition and consumer law expertise or another suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**), to undertake a review of Nissan's procedures, as they relate to the application of the sections 18 and 29(1)(i) of the ACL to Nissan's advertising and promotional strategies;
- b. within four (4) months of the date of this Undertaking coming into effect, confirm to the ACCC in writing that the review referred to in paragraph 23(a) above has been completed; and
- c. implement, as soon as reasonably practicable, any reasonable and appropriate recommendation made by the Reviewer arising from the review described in paragraph 23(a) above.

Acknowledgments

(24) Nissan acknowledges that:

- a. the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of s. 87B undertakings on its website;
- b. the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications; and
- c. this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

EXECUTED BY

Nissan Motor Co (Australia) Pty Ltd ACN 004 663 156 pursuant to section 127(1) of the *Corporations Act 2001*.


.....
Secretary/Director


.....
Director

This 23 day of Oct 2012

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE *COMPETITION AND
CONSUMER ACT 2010*.**


.....

Rodney Graham Sims

Chairman

This 28th day of 11 2012

ANNEXURE A

Newspaper Notice

CORRECTIVE ADVERTISEMENT

[Nissan Logo]

At various times between 7 August 2011 and 10 April 2012, Nissan published on Foxtel's *Lifestyle* channel, in cinemas, in shopping centres, on its website and on YouTube, an advertisement for the Nissan DUALIS vehicle known colloquially as the 'Dualis Paintball' advertisement.

The advertisement featured a Red DUALIS and a Silver DUALIS (which was a superior grade DUALIS and included optional extras such as metallic paint, panoramic sunroof and leather seats and trim). The advertisement displayed a driveaway price which in fact only applied to the Red DUALIS featured in the advertisement. The actual driveaway price for the Silver DUALIS was considerably greater than the driveaway price displayed.

Following concerns raised by the Australian Competition and Consumer Commission about this advertisement, Nissan accepts that it contravened the Australian Consumer Law by misleading consumers with respect to the relevance of the stated driveaway price to the Silver DUALIS.

Nissan has paid three Infringement Notices in the amount of \$19,800 and provided a court enforceable undertaking to the ACCC to ensure that similar conduct will not occur again.



**Australian
Competition &
Consumer
Commission**

*Corrective Notice placed and paid for by Nissan pursuant to an undertaking accepted
by the ACCC*