



TRADE PRACTICES ACT 1974

**UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER
COMMISSION GIVEN PURSUANT TO SECTION 87B OF THE TRADE
PRACTICES ACT 1974**

BY

**AMERICAN GOLF SUPPLIES PTY LTD
ACN 000 653 869**

AND

PAUL ANDREW ROSER

BACKGROUND

1. American Golf Supplies Pty Ltd ("AGS") is a company incorporated in New South Wales. Paul Andrew Roser ("Mr Roser") is the managing director of AGS.
2. AGS is the sole Australian distributor of the PING brand of golfing products. AGS distributes PING products throughout Australia. AGS has six full-time employees and two commission sales representatives.
3. On or about 26 June 2000 AGS began distributing to certain of its retailer customers a contract entitled "Memorandum of Trading Terms for Ping Fitting Accounts" ("the Memorandum"). The Memorandum contained a clause ("the relevant clause") which states:

"Fitting accounts can advertise PING products in print, radio or television, but agree not to advertise prices other than suggested retail prices."
4. AGS required each of the retailer customers to agree to and execute the Memorandum. Those customers that agreed to execute the Memorandum were to be known by AGS as "fitting accounts". Any retailer customer who refused to execute the Memorandum would be denied, by AGS, the various benefits described in the Memorandum, including a 6% discount off the usual AGS wholesale prices for PING product.

5. On 1 December 2000 the Commission wrote to AGS informing it that the Commission was concerned that AGS may be in breach of section 48 of the *Trade Practices Act 1974* ("the Act"). In particular, the Commission advised AGS of its concerns that the relevant clause may have constituted an act of resale price maintenance pursuant to sections 96(3) and (7) of the Act.
6. By letter dated 15 December 2000 solicitors acting for AGS wrote to the Commission and advised:
 - (i) The Memorandum, including the relevant clause, was drafted and approved by Mr Roser.
 - (ii) Mr Roser was unaware that entering into an agreement, or offering to enter into an agreement, that contains as a term the relevant clause may have constituted an infringement of the Act.
 - (iii) Mr Roser became fully aware of the trade practices implications of the relevant clause after he received Counsel's advice on 10 November 2000.
 - (iv) On 11 December 2000 AGS sent a letter to all retailer customers who had executed the Memorandum to the effect that they were to regard the relevant clause to be of no force or effect and that it must be totally ignored.
 - (v) On 11 December 2000 AGS sent a letter to all retailer customers who had not executed the Memorandum stating that AGS did not want such customers to sign the memorandum and that the relevant clause must be totally ignored.
7. AGS and Mr Roser agree that AGS has breached section 48 of the Act by entering into an agreement, or offering to enter into an agreement, with its retailer customers in the form of the Memorandum containing the relevant clause.

In order to address the Commission's concerns, AGS and Mr Roser have agreed to give the Commission undertakings pursuant to section 87B of the Act, which are set out below.

UNDERTAKINGS

1. AGS and Mr Roser undertake that they will not engage in conduct that constitutes resale price maintenance in contravention of section 48 of the Act. AGS will not require of its retailer customers, who purchase PING products from AGS, that they not sell or advertise the PING products at prices other than the AGS suggested retail prices.
2. AGS undertakes that within 14 days of the date hereof it will send to each of its retailer customers a letter in the form set out in Annexure A.
3.
 - (i) AGS and Mr Roser will engage the services of a firm of solicitors or compliance professionals with expertise in trade practices law to conduct a training seminar on Parts IV and V of the Act for Mr Roser and the staff of AGS. This training will be completed within 3 months hereof.
 - (ii) AGS and Mr Roser shall retain the firm for the purpose of providing the Commission with a report confirming the attendance of Mr Roser and the staff of AGS at the seminar and detailing the content of the seminar. Such report shall be provided to the Commission within 4 months of the date hereof.
4.
 - (i) AGS and Mr Roser will, at their own expense, place corrective advertisements (in the publications described in sub-clause (ii)) in the size and form set out in Annexure B to these undertakings
 - (a) to be placed within the first 10 pages of each publication; and
 - (b) with respect to newspaper advertisements, to be published on a Wednesday and a Saturday in each newspaper within 14 days of the date hereof and, with respect to any other publication, on any day within 1 month of the date hereof.
 - (ii) The publications referred to in (i) are as follows:
 - (a) one major daily newspaper in each capital city in each State and Territory of Australia;
 - (b) Australian Golfing Digest; and
 - (c) NSW Golfer.
5. AGS will, within 2 months of the date hereof, advise the Commission of the date, and name of the publication, in which each corrective advertisement pursuant to Undertaking 4 was published and provide the Commission with a copy of each advertisement.

ACKNOWLEDGEMENTS

- AGS and Mr Roser acknowledge that the Commission will make these undertakings available for public inspection.
- AGS and Mr Roser acknowledge that the Commission may issue a media release about this undertaking and may, from time to time, publicly refer to the undertaking.
- AGS and Mr Roser acknowledge that this undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct of AGS and Mr Roser infringing section 48 of the Act.

In Witness of this Undertaking the Common Seal
of **AMERICAN GOLF SUPPLIES PTY LTD** was
affixed hereunto by authority of the Board of
Directors in the presence of:



Paul Andrew Roser
.....
Director

Kim S Roser
.....
Secretary

Executed by **PAUL ANDREW ROSER**
in the presence of:

) *Paul Andrew Roser*
)
)

Harald R. Zapart
.....
Signature of witness

HARALD R. ZAPART
.....
Name of witness

Accepted by the **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**
PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974

Allan Fels
.....
Professor Allan Fels, Chairman

This *2ND* day of *MAY* 2001.

ANNEXURE A

**DRAFT LETTER TO BE RETYPED ON AGS LETTERHEAD AND TO BE SENT TO
ALL AGS RETAILER CUSTOMERS**

Dear [retailer/customer]

**American Golf Supplies Pty Ltd - Memorandum of Trading Terms for PING Fitting
Accounts**

I refer to my letter to you of 5 December 2000 in which I advised you that the following clause in American Golf Supplies' MEMORANDUM OF TRADING TERMS FOR PING FITTING ACCOUNTS, distributed to you prior to that date, was to be totally ignored:

“Fitting accounts can advertise PING products in print, radio or television, but agree not to advertise prices other than suggested retail prices.”

My letter to you followed concerns raised with American Golf Supplies by the Australian Competition and Consumer Commission (“the Commission”) that the above clause may constitute resale price maintenance and thereby breach section 48 of the *Trade Practices Act 1974* (“the Act”).

I have since agreed with the Commission that the above clause does in fact breach the Act. So as to satisfy the concerns raised by the Commission, American Golf Supplies and I have agreed to give certain court enforceable undertakings to the Commission in which, amongst others, we have agreed not to engage in resale price maintenance. I take this opportunity to remind you that, as a retailer of PING golfing equipment, you are free to advertise and sell PING product at whatever prices you wish, subject to the “loss leader” provisions contained in section 98(2) of the Act.

Yours faithfully,

Paul Roser
Director

ANNEXURE B

An Apology from American Golf Supplies Pty Ltd

Australian Distributor of PING Golfing Equipment

American Golf Supplies has recently held discussions with the Australian Competition and Consumer Commission about the supply of PING golfing products.

Its former contracts with retailers of PING golfing products required retailers not to advertise prices other than American Golf Supplies Pty Ltd's suggested retail prices. This clause breached section 48 of the Trade Practices Act 1974 relating to resale price maintenance.

American Golf Supplies Pty Ltd acknowledges that it engaged in conduct that constitutes resale price maintenance.

American Golf Supplies apologises for its actions and for any inconvenience or disadvantage this may have caused to retailers or purchasers of PING golfing equipment.

For further information please contact Paul Roser of American Golf Supplies Pty Ltd on (02) 9524 8233.



This corrective advertisement has been placed at the cost of American Golf Supplies Pty Ltd pursuant to undertakings given to the Australian Competition and Consumer Commission.