

Competition and Consumer Act 2010

Section 87B Undertaking

to Australian Competition and Consumer Commission

by **Utel Networks Pty Ltd** ACN 147 032 755



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Part A – Persons giving this undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Utel Networks Pty Ltd ACN 147 032 755 (**Utel**) of 801 Glenferrie Road, Hawthorn VIC 3122 for the purposes of section 87B of the Competition and Consumer Act 2010 (**the Act**).

Part B – Background

2. Utel supplies telecommunications services, including mobile, fixed phone line and data services, to Australian businesses and consumers. Utel also provides additional services to its business customers including the installation and operation of multiple lines and the provision of hardware.
3. One method used by Utel to promote and supply its services is by direct telephone marketing (**telemarketing**) to customers.
4. Utel has exclusive control over its telemarketing activities, which are carried out by its subsidiary company, Utel Services Philippines Inc.

Part C – The conduct

5. The ACCC received a number of complaints about Utel's telemarketing between at least June 2011 and November 2012. As a result of these complaints, the ACCC considers that Utel has made representations to the effect that:
 - (a) Utel was affiliated or associated with the customer's existing telecommunications provider; and
 - (b) the quality of the customer's existing telecommunications service would not change by transferring to Utel (including any existing contractual or billing arrangements)when this was not the case, and thereby Utel, in trade or commerce, in connection with the supply of services:
 - (c) has made representations that it had affiliations it did not have, in contravention of section 29(1)(h) of the Australian Consumer Law (contained in Schedule 2 to the Act) (**ACL**); and
 - (d) has made false representations regarding the quality of its telecommunications service, in contravention of section 29(1)(b) of the ACL.
6. As a result of Utel's telemarketing, Utel negotiated and made agreements with consumers for Utel to provide telecommunications services to them. The agreements were unsolicited consumer agreements in accordance with section

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69(1) of the ACL. Following the making of each unsolicited consumer agreement, Utel sent a document to customers by email that contained information about Utel's services, its terms and conditions and Utel's contact details (**Welcome Pack**). The Welcome Pack was an agreement document for the purpose of section 79 of the ACL. The ACCC considers that Utel contravened:

- (a) section 79(b)(i) of the ACL by failing to state on the front page of the Welcome Pack the consumer's right to terminate their contract with Utel; and
 - (b) section 79(b)(ii) of the ACL by failing to state on the front page of the Welcome Pack the following text:
 - (i) 'Important Notice to the Consumer';
 - (ii) 'You have a right to cancel this agreement within 10 business days from and including the day after you signed or received this agreement';
 - (iii) 'Details about your additional rights to cancel this agreement are set out in the information attached to his agreement'.
7. Utel admits that its conduct outlined at paragraphs 5 and 6 contravened sections:
- (a) 29(1)(b) and 29(1)(h) (**Pre-Sales ACL Provisions**); and
 - (b) 79(b)(i) and 79(b)(ii) (**Post-Sales ACL Provisions**) –
of the ACL.
8. Since being made aware of the ACCC'S concerns, Utel has made changes to its quality assurance processes and has amended its Welcome Pack.

Part D – Commencement of Undertaking

9. This Undertaking comes into effect when:
- (a) the Undertaking is executed by Utel; and
 - (b) the ACCC accepts the Undertaking so executed.
10. Upon the commencement of this Undertaking, Utel undertakes to assume the obligations set out in Part E below.

Part E – Undertakings

11. Future conduct
- 11.1 Utel undertakes for the purposes of section 87B of the Act that it will not, for a period of 3 years from the date of this Undertaking, whether by itself, its directors, servants or agents or otherwise howsoever, in trade or commerce, make a representation to the effect that:
- (a) a customer is being contacted on behalf of his or her existing telecommunications provider unless Utel is the customer's existing telecommunications provider;
 - (b) Utel is affiliated with any other telecommunications providers; or
 - (c) the quality of the customer's existing telecommunications service will not change by transferring to Utel (including any existing contractual or billing arrangements),
- when this is not the case.
- 11.2 Utel undertakes for the purposes of section 87B of the Act that it will, for a period of 3 years from the date of this Undertaking, whether by itself, its directors, servants or agents or otherwise howsoever, in trade or commerce:
- (a) ensure that all telemarketing sales representatives inform consumers that Utel is not affiliated with any other telecommunications provider (unless Utel is affiliated with another telecommunications provider); and
 - (b) cause a report to be provided on 1 July, 1 September, 1 December and 1 March to Utel's Compliance Officer referred to in Annexure A, reporting on the conduct of telemarketing sales representatives in terms of their compliance with the Pre-Sales ACL Provisions.
12. Trade Practices Compliance Program
- Utel undertakes for the purposes of section 87B of the Act that it will:
- (a) implement a Trade Practices Compliance Program (**Compliance Program**) to ensure it meets the requirements set out in Annexure A for the employees or other persons involved in Utel's business, being a program desired to:
 - (i) minimise Utel's risk of breaches of the following provisions of the ACL:
 - (A) Part 2-1 (Misleading or deceptive conduct), in particular section 18 ;
 - (B) Part 3-1, Division 1 (False or misleading representations), in particular section 29, and
 - (C) Part 3-2, Division 2 (Unsolicited consumer agreement), in particular section 79.

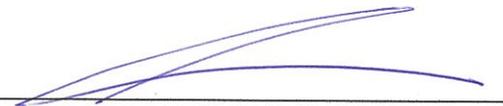
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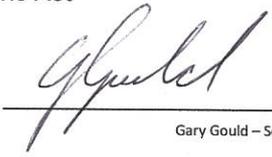
- (ii) ensure Utel is aware of its responsibilities and obligations in relation to the above provisions of the ACL;
- (b) maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this Undertaking coming into effect; and
- (c) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure A.

Part F – Acknowledgments

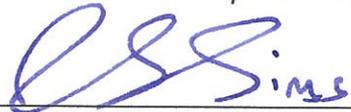
13. Utel acknowledges that:
- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC'S public register of section 87B undertakings on its website;
 - (b) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications;
 - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and
 - (d) a summary of the ACCC Compliance Program Review reports referred to in Annexure A of the Undertaking may be held with this Undertaking on the public register.

Executed by **Utel Networks Pty Ltd ACN 147 032 755** in accordance with section 127 of the Corporations Act


Matthew Rutter – Director
08/05/13
Date


Gary Gould – Secretary

Accepted by the **Australian Competition and Consumer Commission** pursuant to section 87B of the *Competition and Consumer Act 2010*


Rodney Graham Sims – Chairman
7/6/13
Date

Annexure A – Trade Practices Compliance Program Requirements

Utel will establish a Trade Practices Compliance Program (**Compliance Program**) that complies with each of the following requirements:

1. Appointments

- (a) Within 14 days of the date of this Undertaking coming into effect Utel will appoint a Director or a Senior Manager whose responsibilities are to include the development, implementation and maintenance of the Compliance Program, and who reports directly to the company Board or governing body (**Compliance Officer**).
- (b) Utel shall appoint a qualified and suitable external compliance professional with expertise in trade practices issues (**Compliance Advisor**) within 14 days of the date of this Undertaking coming into effect, for the purposes set out in paragraph 2.
- (c) If the Compliance Officer does not have, as at the date of appointment under clause 1(a), suitable training, qualifications or experience in corporate compliance with the Australian Consumer Law (comprising Schedule 2 to the Competition and Consumer Act 2010) (**ACL**), Utel will ensure that, within 28 days of the date of this Undertaking coming into effect, the Compliance Officer attends practical training focusing on corporate compliance and sections 18, 29 and 79 of the ACL, to be administered by the Compliance Advisor.

2. Risk assessment

Utel shall instruct the Compliance Advisor to conduct a risk assessment (**Risk Assessment**) in accordance with clauses 2(a) to 2(d) below:

- (a) identify the areas where Utel is at risk of breaching the following Parts of the Australian Consumer Law (comprising Schedule 2 to the Competition and Consumer Act 2010) (**ACL**):
 - (i) Part 2-1 (Misleading or deceptive conduct);
 - (ii) Part 3-1 (Unfair practices); and
 - (iii) Part 3-2 (Consumer transactions) –
in relation to its:
 - (iv) website and other written marketing materials;
 - (v) telemarketing scripts including sales verifications;
 - (vi) Welcome Pack (as defined in the Undertaking to which this Annexure is attached); and
 - (vii) customer transfer processes –

which assessment shall include, without limitation, a review of a selection of telemarketing and sales verification recordings;

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- (b) assess the likelihood of these risks occurring and the consequences of the risks to the business operations of Utel should they occur;
- (c) identify where there may be gaps in Utel's existing procedures for managing these risks; and
- (d) provide recommendations for action having regard to the assessment.

3. Compliance Policy

Utel will, within 2 months of this Undertaking coming into effect, issue a policy statement outlining Utel's commitment to trade practices compliance (**Compliance Policy**). Utel will ensure that the Compliance Policy:

- (a) is written in plain language;
- (b) contains a statement of commitment to compliance with the Act;
- (c) contains a strategic outline of how commitment to trade practices compliance will be realised within Utel;
- (d) contains a requirement for all staff to report any Compliance Program related issues and trade practices compliance concerns to the Compliance Officer;
- (e) contains a guarantee that whistleblowers will not be prosecuted or disadvantaged in any way and that their reports will be kept confidential and secure; and
- (f) contains a clear statement that Utel will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Act and will not indemnify them.

4. Complaints Handling System

- (a) Utel will ensure that the Compliance Program includes a trade practices complaints handling system. Utel shall use its best endeavours to ensure this system is consistent with AS/ISO 10002:2006 Customer satisfaction - Guidelines for complaints handling in organizations, though tailored to Utel's circumstances.
- (b) Utel is deemed to have complied with clause 4(a) if:
 - (i) Utel implements a complaint handling system that complies with Chapter 8 of the Telecommunications Consumer Protections Code C628:2012 (**TCP Code**); and
 - (ii) that complaint handling system applies to trade practices complaints.
- (c) Utel will ensure that staff and customers are made aware of the complaints handling system.
- (d) Utel will ensure that the Compliance Program includes whistleblower protection mechanisms to protect those coming forward with trade practices complaints. Utel shall use its best endeavours to ensure that these mechanisms are consistent with *Australian Standard 8004:2003*

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Whistleblower Protection Programs for Entities, though tailored to Utel's circumstances.

5. Reports to Board/Senior Management

Utel will ensure that the Compliance Officer reports to the Board every 3 months on the continuing effectiveness of the Compliance Program.

6. Training

- (a) Utel will ensure that the Compliance Program provides for regular (at least once a year) and practical training for all directors, officers, employees, representatives and agents of Utel, whose duties could result in them being concerned with conduct that may contravene Part 2-1, Part 3-1 and Part 3-2 of the ACL.
- (b) The training program will be designed to ensure that all directors, officers, employees, representatives and agents of Utel are aware of their responsibilities and obligations in relation to Part 2-1, Part 3-1 and Part 3-2 of the ACL and which are relevant to their duties and role in Utel.
- (c) Utel must ensure that a suitably qualified compliance professional or legal practitioner with expertise conducts the training in trade practices law (which may consist of multimedia training materials).
- (d) Utel will ensure that the Compliance Program includes a requirement that awareness of trade practices compliance issues forms part of the induction of all new directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct that may contravene Part 2-1, Part 3-1 and Part 3-2 of the ACL.

7. Call recordings

Utel will ensure that it will retain for at least 12 months the recordings of all sale calls and third party verification calls made to consumers where a sale was made as a result of these calls and retain these recordings.

8. Supply of Compliance Program Documents to the ACCC

Utel 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 ACCC copies of each of the documents constituting the Compliance Program and implement promptly and with due diligence any recommendations that the ACCC may make that are reasonably necessary to ensure that Utel maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.

9. Review

Utel shall, at its own expense, cause annual Reviews, from the date of this Undertaking, of the Compliance Program (**Reviews**) to be carried out in accordance with each of the following requirements:

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9.1 Scope of the Reviews

The Reviews should be broad and rigorous enough to provide Utel and the ACCC with a supportable verification that Utel has in place a program that complies with each of the requirements detailed in paragraphs 1 - 8 above and to provide the Review reports and opinions detailed at point 11 below;

9.2 Independence of Reviewer

Utel shall ensure that a suitably qualified, independent compliance professional with expertise carries out the Reviews in trade practices law (**Reviewer**). The Reviewer will qualify as independent on the basis that he or she:

- (a) did not design or implement the Compliance Program;
- (b) is not a present or past staff member or director of Utel;
- (c) has not acted and does not act for Utel in any trade practices related matters;
- (d) has not and does not act for or consult to Utel or provide other service on trade practices related matters other than Compliance Program reviewing; and
- (e) has no significant shareholding or other interests in Utel.

9.3 Evidence

Utel shall use its best endeavours to ensure that the Reviews are conducted on the basis that the Reviewer has access to all relevant sources of information in Utel's possession or control, including without limitation:

- (a) enquiries of any officers, employees, representatives, agents and stakeholders of Utel;
- (b) Utel's records, including audio recordings of calls with consumers, scripts used in telemarketing sales, the company's complaints register/reports and any documents relevant to Utel's training or induction program; and
- (c) documents created by Utel's consultants and legal practitioners for use in Utel's Compliance Program.

10. Utel shall ensure that the first Review is completed within one year and one month of this Undertaking coming into effect and that each subsequent Review is completed within one year thereafter.

11. Reporting

Utel shall use its best endeavours to ensure the Reviewer sets out the findings of the Review in two separate reports as set out below:

11.1 Company Compliance Program Review Report (to be provided to Utel)

- (a) Utel's Company Compliance Program Review Report will provide particular and specific information regarding the performance of the Compliance Program to the corporation including:

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- (i) if, and to what extent, the Compliance Program of Utel includes all the elements detailed in paragraphs 1 to 10 above;
- (ii) if, and to what extent, the Compliance Program adequately covers the parties and areas identified in the initial Risk Assessment;
- (iii) if, and to what extent, the trade practices training is effective;
- (iv) if, and to what extent, Utel's complaints handling system is effective;
- (v) if, and to what extent, Utel is able to provide confidentiality and security to whistleblowers, and staff are aware of the whistleblower protection mechanisms; and
- (vi) recommendations for rectifying deficiencies in 11.1(a)(i) to 11.1(a)(v) above that the Reviewer thinks are reasonable necessary to ensure that Utel maintains and continues to implement the Compliance Program in accordance with the requirements of the Undertaking.

11.2 ACCC Compliance Program Review Report (to be provided to ACCC)

- (a) The ACCC Compliance Program Review Report will provide particular and specific information regarding the scope of the Review and the effectiveness of the Compliance Program including:
 - (i) details of the evidence gathered and examined during the Review;
 - (ii) the name and relevant qualifications, experience and training of the person appointed as the company Compliance Officer;
 - (iii) the Reviewer's opinion on whether Utel has in place a Compliance Program that complies with the requirements detailed in paragraph 1 to 8 above;
 - (iv) actions recommended by the Reviewer to ensure the continuing effectiveness of Utel's Compliance Program;
 - (v) confirmation that any actual and potential inadequacies in Utel's Compliance Program have been brought to the attention of the Compliance Officer and the Board or governing body;
 - (vi) confirmation that the Reviewer has revisited any actual and potential inadequacies in Utel's Compliance Program identified in any previous Company Compliance Program Review Report, and assessed how they have been addressed by Utel;
 - (vii) any reservations that the Reviewer might have about the reliability and completeness of the information to which the Reviewer had access in the conduct and reporting of the Review; and
 - (viii) any comments or qualifications concerning the Review process that the Reviewer, in his or her professional opinion, considers necessary.

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- 11.3 Utel will use its best efforts to ensure that the Review Reports are completed and provided to Utel within two months of each Review.
- 11.4 Utel will retain the Company Compliance Program Review Report and cause the ACCC Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.
- 11.5 Utel acknowledges that a brief statement regarding the ACCC Compliance Program Review Report may be included in the ACCC'S 87B public register.
12. Recommendations
Utel shall implement promptly and with due diligence any recommendations made by the Reviewer or required by the ACCC that are reasonably necessary to ensure that Utel maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.
13. Utel shall, at its own expense, if requested by the ACCC, provide to the ACCC copies of documents and information in respect of matters that are the subject of the Compliance Program.
14. In the event the ACCC has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Utel shall, at its own expense and if requested by the ACCC, cause an interim or additional Review to be conducted and cause the resulting ACCC Review Report to be provided to the ACCC.