

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B
by LivingSocial Pty
Ltd ACN 141 684
684

Persons giving this undertaking

- 1 This Undertaking is given to the Australian Competition and Consumer Commission (the **ACCC**) by LivingSocial Pty Ltd (ACN 141 684 684) (**LivingSocial**) of Level 11, 37 Pitt Street, Sydney in the State of New South Wales, for the purposes of section 87B of the *Competition and Consumer Act 2010* (the **Act**).

Background

- 2 LivingSocial is duly incorporated pursuant to the Corporations Act 2001 (Cth) and is registered in New South Wales.
- 3 During the period from at least 1 January 2011 to the date of this undertaking (the **relevant period**), LivingSocial carried on business in Australia, in trade or commerce, trading under the business name:
 - (a) prior to August 2012, 'Jump On It'; and
 - (b) from August 2012, 'LivingSocial'.
- 4 During the relevant period, LivingSocial supplied services to consumers, by supplying vouchers at discounted prices (**vouchers**) which could be redeemed for goods or services from third party suppliers (**deals**).
- 5 During the relevant period, LivingSocial advertised the deals by promoting them:
 - (a) in emails sent to consumers who were subscribed to receive particular deals from LivingSocial (**promotional emails**); and
 - (b) on the website www.jumponit.com.au and/or www.livingsocial.com.au (the **LivingSocial website**) accessible to the public, including consumers who were not registered as LivingSocial members, for a limited period of time.
- 6 Consumers who purchased a voucher from LivingSocial (**voucher purchasers**) were entitled to redeem the voucher for specified goods or services supplied by a specified supplier, usually limited to redemption within a specified validity period.
- 7 During the relevant period, LivingSocial published on the LivingSocial website terms and conditions relevant to the purchase of deals and the redemption of vouchers.

Conduct of concern

Refund rights

- 8 In the ACCC's view, during 2011 and 2012 LivingSocial made false or misleading representations to voucher purchasers concerning the existence or effect of a condition, guarantee, right or remedy by making representations to voucher purchasers to the effect that they were not entitled to a refund, because:

- (a) the relevant merchant could not, or did not, honour the vouchers for relevant deals;
- (b) deals were 'subject to availability'; and/or
- (c) the voucher purchaser contacted LivingSocial too close to the end of, or outside of, the voucher's validity period;

in circumstances where these voucher purchasers were entitled to a refund under:

- (d) LivingSocial's own refund policy contained in its terms and conditions during the relevant period; and/or
- (e) the consumer guarantee provisions of the Australian Consumer Law (ACL), being Schedule 2 to the Act.

Price of voucher deals

- 9 In the ACCC's view, during the relevant period, LivingSocial:
- (a) made false or misleading representations about the price of certain deals on the LivingSocial website, by:
 - (i) advertising a headline price (for a number of different deals offered by a single supplier) that did not apply to all available goods or services advertised;
 - (ii) making unsubstantiated comparisons between LivingSocial's price and the recommended retail price; and/or
 - (b) engaged in misleading or deceptive conduct by failing to adequately disclose that voucher purchasers would be required to pay an extra fee to the supplier in order to redeem their voucher.

Unfair contract term

- 10 In the ACCC's view, from at least 1 January 2012 to November 2014, LivingSocial's terms and conditions contained an unfair contract term that permitted LivingSocial to make changes to its terms and conditions without notifying consumers or voucher purchasers as follows:

"We may change the terms of this Agreement from time to time on a going-forward basis, and any such modifications become effective immediately upon being posted to LivingSocial. It is your sole responsibility to check LivingSocial from time to time to view any such changes in the Agreement. If you do not agree to any changes, if and when such changes may be made to the Agreement, you must stop using LivingSocial and the Services."

Relevant provisions

- 11 Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive;
- 12 Section 23 of the ACL provides that a term of a consumer contract is void if the term is unfair (as defined by section 24);
- 13 Section 29(1)(i) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation with respect to the price of goods or services; and
- 14 Section 29(1)(m) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under the ACL).

Contraventions

- 15 LivingSocial acknowledges that the conduct described at paragraphs 8 to 10 above may have contravened sections 18, 29(1)(i) and 29(1)(m) of the ACL. LivingSocial further acknowledges that the term in its consumer contracts specified in paragraph 10 above was likely to have been unfair within the meaning of section 24 of the ACL.
- 16 While LivingSocial had ACL compliance systems in place at the time of the conduct, the systems were not effective in these instances to prevent the conduct which LivingSocial acknowledges may have contravened the ACL from occurring.
- 17 Upon being made aware of the ACCC's concerns, LivingSocial:
 - (a) indicated a willingness to resolve the matter by the provision of an undertaking under section 87B of the Act; and
 - (b) took steps to review its compliance systems to prevent the conduct of concern to the ACCC from reoccurring.

Commencement of undertaking

- 18 This undertaking commences when:
 - (a) the undertaking is executed by LivingSocial; and
 - (b) the ACCC accepts the executed undertaking.
- 19 Upon the commencement of this undertaking, LivingSocial undertakes for the purposes of section 87B of the Act to comply with the obligations set out in paragraphs 20 to 24 below.

Undertakings

- 20 LivingSocial undertakes that, for three years from the date of this undertaking commencing, it will:
- (a) give voucher purchasers refunds in all circumstances where they are entitled to a refund in accordance with LivingSocial's terms and conditions and/or the consumer guarantee provisions of the ACL;
 - (b) display prices of deals in promotional emails and on its website that are inclusive of all mandatory additional fees except for delivery fees, the minimum charge for which will otherwise be specified if known at the time of publication;
 - (c) use only those comparison pricing statements in LivingSocial's promotional emails or on its website that, to LivingSocial's knowledge, are accurate in representing the savings that could be achieved; and
 - (d) in connection with the supply or possible supply of goods or services, not make false or misleading representation with respect to the price of goods or services, or concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under the ACL).
- 21 LivingSocial undertakes that, for three years from the date of this undertaking commencing, it will send emails to all LivingSocial subscribers when substantive updates affecting their rights and obligations are made to its terms and conditions on its website, advising of the content of the updates.
- 22 LivingSocial undertakes that, at its own expense, it will, within 28 days of the date of this undertaking commencing, send via email to all its current Australian subscribers, a notice in the form and terms of the Annexure to this undertaking and ensure that:
- (a) the notice shall:
 - (i) have a bold type heading in at least 16 point type and the body of the notice shall be in a type not less than 11 point, Times New Roman font;
 - (ii) include the business logo of LivingSocial at the top as appearing on LivingSocial letterhead;
 - (b) the subject line for any email containing the notice is 'Important Message from LivingSocial'; and
 - (c) any email containing the notice shall not contain any content other than the notice.

Consumer Law Compliance Review

- 23 LivingSocial undertakes that it will, at its own expense and within 90 days of this undertaking commencing, develop and implement a compliance program, being an enhancement of LivingSocial's existing compliance guidelines, procedures or programs that is designed to minimise the risk of LivingSocial engaging in conduct that contravenes sections 18 and 29 of the ACL (the **Compliance Program**) by:
- (a) conducting a review of LivingSocial's existing compliance guidelines, procedures or programs to implement improvements with particular reference to the areas where LivingSocial is at risk of contravening sections 18 and 29 of the ACL;
 - (b) maintaining the appointment of an appropriately qualified Compliance Officer who is to be a Director or Senior Manager of LivingSocial, whose responsibilities must include the development, implementation and

maintenance of the Compliance Program, reviewing all scripts and instructions provided to call centre staff and other officers, employees, contractors, representatives and agents of LivingSocial dealing with consumers in connection with the supply or possible supply of goods or services by LivingSocial, developing and maintaining policies relating to the publication of promotional materials or on behalf of LivingSocial, and who must report directly to LivingSocial's Board of Directors (the Board) or governing body on a quarterly basis on the Compliance Program, as well as on complaints received by LivingSocial about refunds, redemption of vouchers and price advertising;

- (c) issuing a written policy statement, outlining its commitment to compliance with the ACL, to all staff of LivingSocial from the Board, which is written in plain language, contains a requirement of all staff to report any Compliance Program related issues or concerns to the Compliance Officer and contains a clear statement that LivingSocial will take action internally against any person who is knowingly or recklessly involved in a contravention of the ACL and will not indemnify them (**the Compliance Policy**);
- (d) implementing regular and practical training (at least annually) for all directors, officers, employees, contractors, representatives and agents of LivingSocial (including call centre staff), whose duties may involve them in making representations to consumers in connection with the supply or possible supply of goods or services;
- (e) ensuring that the Compliance Program includes a requirement that awareness of consumer law compliance issues forms part of the induction for all new directors, officers, employees, contractors, representatives and agents of LivingSocial (including call centre staff), whose duties may involve them in making representations to consumers in connection with the supply or possible supply of goods or services;
- (f) maintaining the Compliance Program for a period of 3 years from the Commencement Date (**the Compliance Period**);
- (g) maintaining for the duration of the Compliance Period a record of and storing all documents relating to or constituting the Compliance Program and all scripts and written instructions provided to call centre staff and other officers, employees, contractors, representatives and agents of LivingSocial who deal with consumers in connection with the supply or possible supply of goods or services by LivingSocial;
- (h) providing to the ACCC on request copies of all documents constituting the Compliance Program, including:
 - (i) the Compliance Policy;
 - (ii) an outline of LivingSocial's Complaints Handling System;
 - (iii) competition and consumer law training materials and induction materials;
 - (iv) all scripts and instructions provided to call centre staff and other officers, employees, contractors, representatives and agents of LivingSocial dealing with consumers in connection with the supply or possible supply of goods or services by LivingSocial; and
 - (v) details of complaints received by LivingSocial from consumers about refunds, redemption of vouchers and price advertising.

Acknowledgments

- 24 LivingSocial 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 may, from time to time, make public reference to this undertaking, including in media statements and in ACCC publications; and
- this undertaking in no way derogates from the rights and remedies available to any other person, including voucher purchasers, arising from the alleged conduct.

Executed by

LivingSocial Pty Ltd (ACN 141 684 684) and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.

.....
Secretary/Director

.....
Director

This 17th day of DECEMBER 2014

OR

The Common Seal of LivingSocial Pty Ltd
(ACN 141 684 684) was affixed in the presence of:

.....
Secretary/Director

.....
Director

This.....day of.....2014

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

.....
Rodney Graham Sims
Chairman

This 18th day of December 2014

ANNEXURE

CORRECTIVE NOTICE



LivingSocial has provided a court enforceable undertaking under section 87B of the *Competition and Consumer Act 2010* to the Australian Competition and Consumer Commission (ACCC).

LivingSocial has acknowledged to the ACCC that, during the period from 2011 to 2012, it did not always deal with consumers' requests for refunds in accordance with the Australian Consumer Law (ACL), and may have contravened sections 18, 29(1)(i) and 29(1)(m) of the ACL.

LivingSocial has taken steps to address the conduct brought to the attention of LivingSocial by the ACCC, including by making improvements to its compliance program and its terms and conditions.

LivingSocial's terms and conditions previously contained a term permitting LivingSocial to update its terms and conditions without notifying consumers. The ACCC is of the view that this term was unfair within the meaning of section 24 of the ACL. LivingSocial will now send an email to all subscribers notifying them of substantive updates affecting their rights and obligations as they occur.

The consumer guarantees under the ACL provide that services, such as the LivingSocial voucher service, must:

- be provided with acceptable care and skill or technical knowledge and taking all necessary steps to avoid loss and damage;
- be fit for the purpose or give the results that you and the business had agreed to; and
- be delivered within a reasonable time when there is no agreed end date.

You are entitled to a refund where there is a major failure to comply with the consumer guarantees, including where a service:

- has a problem that would have stopped someone from buying it if they'd known about it; or
- is unfit for its common purpose and can't easily be fixed within a reasonable time.

Under LivingSocial's terms and conditions, you are also entitled to a refund where:

- you request a refund within 5 days of purchase (unless your voucher is redeemable on a specific date (for example, a concert) or where no voucher is provided and a product is provided instead);
- the deal provider (Partner) goes into liquidation;
- the Partner fails to provide the goods or services;
- the Partner does not have the capacity to fulfil the products or services within the validity period (provided you do not accept a booking or otherwise redeem your voucher outside the validity period);
- the goods or services are not as advertised;
- a product is damaged, defective or not to specification; or
- a product is not delivered within a reasonable time, or at all.

Full details of LivingSocial's terms and conditions are available at www.livingsocial.com/terms.