

COMPETITION AND CONSUMER ACT 2010

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

by

Danoz Direct Pty Ltd (ACN 112 314 271)

Person giving the Undertaking

1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Danoz Direct Pty Ltd (ACN 112 314 271) (**Danoz Direct**) of Unit 7, 149-163 Mitchell Road, Alexandria, New South Wales for the purposes of section 87B of the Competition and Consumer Act 2010 (**CCA**).

Background

2. Danoz Direct is a direct marketing company. It is duly incorporated pursuant to the *Corporations Act 2001* (Cth) and is registered in New South Wales.
3. Since at least January 2005, Danoz Direct has promoted and sold a range of products to consumers in Australia through the use of online and television marketing.
4. During the period from at least 1 August 2013 to 30 September 2014 (**the relevant period**), one of the products that was promoted and sold by Danoz Direct to consumers in Australia was the Abtronic X2 Fitness System (**Abtronic X2**).
5. The Abtronic X2 is a device that is worn around a person's midsection and releases an electric current that is designed to provide electrical stimulation to surrounding muscles.
6. During the relevant period, Danoz Direct caused a series of versions of infomercials promoting the Abtronic X2 to be broadcast on at least five free-to-air television channels (**the Infomercials**).

Conduct of Concern

7. During the relevant period, Danoz Direct made a number of misleading representations to consumers in the Infomercials regarding the effectiveness and benefits of the Abtronic X2 as a weight loss and fitness device, including that:
 - a) use of the Abtronic X2, without any other exercise or dietary modifications, will produce weight loss;
 - b) use of the Abtronic X2, without any other exercise or dietary modifications, will produce firm, flat abdominal muscles;
 - c) use of the Abtronic X2, without any other exercise or dietary modifications, will tighten, tone, sculpt and flatten the stomach;
 - d) one minute of use of the Abtronic X2 has the same effect as up to 400 sit ups; and

- e) the Abtronic X2 provides an intense workout, even when a person is sitting down, working at their computer or watching television.
8. Some of the Infomercials also included visual and verbal testimonials in the form of 'before and after' footage of people who had purportedly used the Abtronic X2, without any other exercise or dietary modifications, with successful weight loss and toning results.
9. At the time of making the misleading representations, and displaying the footage, referred to in paragraphs 7 and 8 above, Danoz Direct did not have reasonable grounds for asserting that:
- a) use of the Abtronic X2, without any other exercise or dietary modifications, would:
 - (i) produce weight loss;
 - (ii) produce firm, flat abdominal muscles; or
 - (iii) tighten, tone, sculpt and flatten the stomach;
 - b) use of the Abtronic X2 for one minute would have the same effect as up to 400 sit ups; and
 - c) use of the Abtronic X2 would provide an intense workout.

Relevant Provisions

10. Section 4 of the Australian Consumer Law (**ACL**), being Schedule 2 to the CCA, provides that if a person makes a representation with respect to any future matter and the person does not have reasonable grounds for making the representations, the representation is taken, for the purposes of the ACL, to be misleading.
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 that is likely to mislead or deceive.
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12. Section 29(1)(g) of the ACL provides that a person must not make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits.

Contraventions

13. The ACCC considers, and Danoz Direct acknowledges, that by making the representations, and engaging in the conduct, described in paragraphs 7 and 8, above, in the circumstances referred to in paragraph 9, above, Danoz Direct:
- a) engaged in conduct, in trade or commerce, which was likely to mislead or deceive in contravention of section 18 of the ACL; and
 - b) made, in trade or commerce, false or misleading representations with respect to the performance characteristics and benefits of goods in contravention of section 29(1)(g) of the ACL.
14. Upon being made aware of the ACCC's concerns, Danoz Direct:

- a) amended its Infomercials;
- b) indicated a willingness to resolve the matter by the provision of an undertaking under section 87B of the CCA; and
- c) took steps to review its compliance systems to prevent the conduct of concern to the ACCC from reoccurring.

Commencement of this Undertaking

15. This Undertaking comes into effect when:

- a) this Undertaking is executed by Danoz Direct, and
- b) the ACCC accepts the Undertaking so executed (**the Commencement Date**).

Undertakings

16. Danoz Direct undertakes for the purposes of section 87B of the CCA that it will:

- a) not make any representations of the kind referred to in paragraph 7 above unless it:
 - (i) has obtained written advice from an appropriately qualified expert that the Abtronic X2 has produced the represented results, has the represented effect or provides the represented benefits to users; and
 - (ii) prominently discloses any qualifications or limitations applicable to the circumstances in which the Abtronic X2 has produced the represented results, has the represented effect or provides the represented benefits to users;
- b) establish and implement a Competition and Consumer Compliance Program (**Compliance Program**) in accordance with the requirements set out in "Annexure A", being a program designed to minimise Danoz Direct's risk of future breaches of the CCA, and to ensure its awareness of the responsibilities and obligations in relation to the requirements of the ACL within three (3) months of the Commencement Date;
- c) maintain and continue to implement the Compliance Program for a period of three (3) years from the Commencement Date;
- d) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure A;
- e) ensure that all existing and future advertising and promotional material for the Abtronic X2 is reviewed personally by the Chief Executive Officer and the Compliance Officer (referred to in the Compliance Program) before being published and/or broadcasted;
- f) within 28 days of the Commencement Date, publish or cause to be published, the Corrective Notice in the form and terms of "Annexure B" to this undertaking on the home page of its website (www.danozdirect.com.au) and allow that notice to remain on the website for no less than 28 days. 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 Danoz Direct at the top; and
 - (iii) will remain stagnant on the website homepage and not appear as a 'pop-up'.

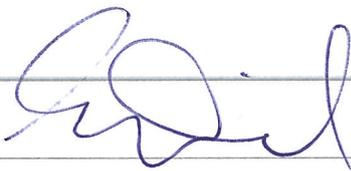
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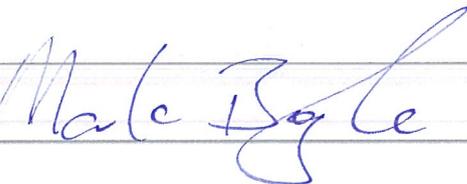
17. Danoz Direct acknowledges that:

- 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 this 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 this Undertaking may be held with this Undertaking in the public register.

Executed as an Undertaking

Executed by Danoz Direct Pty Ltd (ACN 112 314 271) pursuant to section 127(1) of the Corporations Act 2001 by:

Signature  Signature 

Name  Name ELIZABETH DILES

Date 21/8/15 Date 21/8/15

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

 Mr
Rodney Graham Sims
Chairman
This 2nd day of September 2015

Annexure A

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

LEVEL 3

Danoz Direct will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within 3 months of the Undertaking coming into effect, Danoz Direct will appoint a director or a senior manager of the business as a compliance officer, with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained (**the Compliance Officer**).
2. Within 3 months of this Undertaking coming into effect, Danoz Direct will appoint a suitably qualified, internal or external, compliance professional with expertise in competition and consumer law (**the Compliance Advisor**).
3. Danoz Direct will instruct the Compliance Advisor to conduct a competition and consumer law risk assessment within 3 months of being appointed as the Compliance Advisor (**the Risk Assessment**).
4. Danoz Direct will use its best endeavours to ensure that the Risk Assessment covers the following matters, to be recorded in a written report (**Risk Assessment Report**):
 - 4.1. identifies the areas where Danoz Direct is at risk of breaching the Competition and Consumer Act (**CCA**), and in particular, sections 18 and 29 of the Australian Consumer Law (**ACL**);
 - 4.2. assesses the likelihood of these risks occurring;
 - 4.3. identifies where there may be gaps in Danoz Direct's existing procedures for managing these risks; and
 - 4.4. provides recommendations for any action to be taken by Danoz Direct having regard to the above assessment.

Compliance Policy

5. Danoz Direct will, within 28 days of the Undertaking coming into effect, issue a policy statement outlining Danoz Direct's commitment to compliance with the CCA (**the Compliance Policy**).
6. Danoz Direct will ensure the Compliance Policy:

- 6.1 contains a statement of commitment to compliance with the CCA;
- 6.2 contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and
- 6.3 contains a clear statement that Danoz Direct will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings in respect of that contravention.

Complaints Handling System

7. Danoz Direct will ensure the Compliance Program includes a competition and consumer law complaints handling system capable of identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

Staff Training

8. Danoz Direct will ensure that the Compliance Program includes a requirement for regular (at least once a year) training for all employees of Danoz Direct whose duties could result in them being concerned with conduct that may contravene sections 18 and 29 of the ACL.
9. Danoz Direct will ensure that the staff training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
10. Danoz Direct will ensure that the Compliance Program includes a requirement that awareness of competition and consumer compliance issues forms part of the induction of all new directors, officers and employees whose duties could result in them being concerned with conduct that may contravene sections 18 and 29 of the ACL.

Reports to Board/Senior Management

11. Danoz Direct will ensure that the Compliance Officer reports to the Board and/or senior management every 3 months on the continuing effectiveness of the Compliance Program.

Compliance Review

12. Danoz Direct will, at its own expense, cause an annual review of the Compliance Program (**the Review**) to be carried out in accordance with each of the following requirements:
 - 12.1. **Scope of Review** - the Review should be broad and rigorous enough to provide Danoz Direct and the ACCC with:
 - 12.1.1. a verification that Danoz Direct has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1 to 11 above; and
 - 12.1.2. the Compliance Reports detailed at paragraph 13 below.

12.2. **Independent Reviewer** - Danoz Direct will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:

12.2.1. did not design or implement the Compliance Program;

12.2.2. is not a present or past staff member or director of Danoz Direct;

12.2.3. has not acted and does not act for, and does not consult and has not consulted to, Danoz Direct in any competition and consumer law matters, other than performing Reviews under this Undertaking; and

12.2.4. has no significant shareholding or other interests in Danoz Direct.

12.3. **Evidence** - Danoz Direct will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in Danoz Direct's possession or control, including without limitation:

12.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of Danoz Direct;

12.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;

12.3.3. documents relating to Danoz Direct's Compliance Program, including documents relevant to Danoz Direct's Compliance Policy, Complaints Handling System, Staff Training and induction program; and

12.3.4. any reports made by the Compliance Officer to the Board or senior management regarding Danoz Direct's Compliance Program.

12.4. Danoz Direct will ensure that a Review is completed within one year of this Undertaking coming into effect, and that a subsequent Review is completed within each year for 3 years.

Compliance Reports

13. Danoz Direct will use its best endeavours to ensure that within 28 days of a Review, the Reviewer includes the following findings of the Review in a report to Danoz Direct (**the Compliance Report**):

13.1. whether the Compliance Program of Danoz Direct includes all the elements detailed in paragraphs 1-11 above and if not, what elements need to be included or further developed;

13.2. whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;

- 13.3. whether the Staff Training and induction is effective, and if not, what aspects need to be further developed;
- 13.4. whether Danoz Direct's Complaints Handling System is effective, and if not, what aspects need to be further developed; and
- 13.5. whether there are any material deficiencies in Danoz Direct's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s.¹

Danoz Direct's response to Compliance Reports

14. Danoz Direct will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
 - 14.1. provides the Compliance Report to the Board or relevant governing body; and
 - 14.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the Board or relevant governing body identifying how Danoz Direct can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
15. Danoz Direct will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

Reporting Material Failures to the ACCC

16. Where a Material Failure has been identified by the Reviewer in the Compliance Report, Danoz Direct will:
 - 16.1. provide a copy of the Compliance Report to the ACCC within 28 days of the Board or relevant governing body receiving the Compliance Report; and
 - 16.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
 - 16.3. otherwise outline the steps Danoz Direct proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

Provision of Compliance Program documents to the ACCC

¹ Material failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to:

- Incorporate a requirement of the Undertaking in the design of the Compliance Program, for example, if a Complaints Handling System did not provide an mechanism for responding to complaints; or
- Comply with a fundamental obligation in the implementation of the Compliance Program, for example if no Staff Training has been conducted within the Annual Review period.

17. Danoz Direct will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than 5 years.
18. If requested by the ACCC during the period of 5 years following the Undertaking coming into effect Danoz Direct will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 18.1. the Compliance Policy;
 - 18.2. the Risk Assessment report;
 - 18.3. an outline of the Complaints Handling System;
 - 18.4. Staff Training materials and induction materials;
 - 18.5. all Compliance Reports that have been completed at the time of the request;
 - 18.6. copies of the reports to the Board and/or senior management referred to in paragraphs 11 and 16.

ACCC Recommendations

19. Danoz Direct will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that Danoz Direct maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.
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Annexure B

Corrective Notice

False, misleading or deceptive representations involving the Abtronic X2

Danoz Direct Pty Ltd has provided a court enforceable undertaking under section 87B of the *Competition and Consumer Act 2010* to the Australian Competition and Consumer Commission (ACCC) relating to the Abtronic X2 EMS Fitness Belt.

The ACCC was concerned that Danoz Direct made a number of representations to consumers in Infomercials regarding the effectiveness and benefits of the Abtronic X2 as a weight loss and fitness device, including that use of the Abtronic X2, without any other exercise or dietary modifications, will:

- produce weight loss;
- produce firm, flat abdominal muscles;
- tighten, tone, sculpt and flatten the stomach;
- provide an intense workout; and
- provide the same effect as doing 400 sit ups in just one minute.

Danoz Direct acknowledges that at the time of making the representations, it did not have reasonable grounds for asserting those claims, and this conduct is likely to have contravened sections 18, and 29(1)(g) of the Australian Consumer Law.

When contacted by the ACCC, Danoz Direct agreed to cooperate and took steps to address the ACCC's concerns. Danoz Direct has undertaken that it will not make any representations of the kind referred to above unless it has substantiation that supports those claims.

Danoz Direct has implemented a Compliance Program to ensure this conduct does not occur again and to ensure future compliance with provisions of the Australian Consumer Law.

The full undertaking from Danoz Direct is available at www.accc.gov.au.

If you have any questions, please contact Danoz Direct customer service on [insert contact details]
