

TRADE PRACTICES ACT 1974

UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER
COMMISSION GIVEN FOR THE PURPOSE OF
SECTION 87B

BY

TOYS 'R' US (AUSTRALIA) PTY LTD
ACN. 057 455 026**BACKGROUND**

1. Toys 'R' Us (Australia) Pty Ltd ("the Company") is incorporated in the State of New South Wales and its principal activities include the operation of children's specialty stores.
2. The Australian Competition & Consumer Commission ("the ACCC") has commenced proceedings against the Company in the Federal Court of Australia ("the proceedings"), by way of Statement of Claim (Annexure A hereto). The ACCC has alleged, in substance, that signs and stickers displayed in Toys R Us stores ("the refund policy signs and stickers") made false or misleading representations regarding consumers' statutory rights to a refund where goods, particularly video games and computer software, were not of merchantable quality, not fit for the purpose or did not match a sample or description.
3. The ACCC has alleged, in the proceedings, that the display of the refund policy signs and stickers :
 - (a) was conduct which was misleading or deceptive, or likely to mislead or deceive, in contravention of section 52 of the Trade Practices Act 1974 ("the Act"); and
 - (b) constituted the making of a false or misleading representation concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy, in contravention of section 53(g) of the Act.
4. The Company and the ACCC have agreed to resolve the proceedings by:
 - (a) the Company giving Undertakings to the Court in the terms of Annexure B hereto; and
 - (b) the Company giving and the Commission accepting undertakings for the purposes of section 87B of the Act, in the terms contained herein.

UNDERTAKING

5. The Company undertakes, for the purposes of section 87B of the Act, that it will implement a Trade Practices Compliance Program ("the Program"), which will be conducted as set out below. The Program will commence within 2 calendar months of the acceptance of this Undertaking and will continue until 30 November 2000. The Program will have the following features:
- (i) The Company will place responsibility for the implementation of the Program with its Merchandise Director, who shall act as Trade Practices Compliance Officer. The Trade Practices Compliance Officer may delegate his or her responsibilities to an employee of the Company under his or her supervision.
 - (ii) The Company will, effective immediately, require the Trade Practices Compliance Officer to, either personally or through his/her delegate, review all product labelling, product information notices and non-product specific marketing material which is created or produced by the Company ("Proposed Toys 'R' Us In Store Material") prior to its first display in any Toys "R" Us store to monitor its compliance with ss. 52, 53(g) and Part V of the *Trade Practices Act 1974* (Cth) ("the Act").
 - (iii) The Company will require the Trade Practices Compliance Officer to, either personally or through his/her delegate, maintain a documentary record of all compliance reviews carried out in accordance with (ii) above ("the Documentary Record"). Such Documentary Record will include:
 - (a) a description and copy of the Proposed Toys 'R' Us In Store Material which relates to refunds;
 - (b) a description (including an exact record of any written content) of the Proposed Toys 'R' Us In Store Material other than that relating to refunds;
 - (c) written confirmation that the Proposed Toys 'R' Us In Store Material has been reviewed and cleared by the Trade Practices Compliance Officer, either personally or through his or her delegate, (including the date on which the Proposed Toys 'R' Us In Store Material was reviewed);
 - (d) written advice of any possible contraventions of the Act that were identified by the Trade Practices Compliance Officer or his or her delegate and the action taken to address those possible contraventions.
 - (iv) The Company will ensure that the Documentary Record is available to the ACCC to be reviewed from time to time. The Documentary Record will be available from one week after the date of display or date of publication of the Proposed Toys 'R' Us In Store Material. The Documentary Record will be provided to the ACCC (up to 30 November 2000) within five (5) working days of a written request for such.
 - (v) The Company will ensure that, prior to the full implementation of the Program, the processes which Toys R Us intends to implement in order to comply with the Program are approved by a solicitor with expertise in trade practices law retained by and on behalf of the Company (or employed in a firm of solicitors retained by or on behalf of the Company).

- (vi) The Company will incorporate a mandatory Trade Practices Compliance Module ("the Module") in its STEPS training programme. The model will cover the relevant sections of Parts IV and V of the Act and its content will vary so as to be appropriate to the various job positions.

All existing Store staff, Store Operations and Property and Services Head Office staff will be required to achieve competency in the Module by 31 March 1998. All existing Merchandise Head Office staff will be required to achieve competency by 30 April 1998. New Store staff and Merchandise, Store Operations and Property and Services Head Office staff will be required to achieve competency in the Module within three (3) months of commencing work with the Company.

Assessment of competency in the Module, and presentations (as required below) will be conducted as follows:

- (a) for the merchandise Director and the Training Manager, by a solicitor with expertise in trade practices law;
- (b) for Merchandise, Store Operations and Property and Services Head Office staff, State Trainers and Area Directors of Stores, by the Merchandise Director or Training Manager or a solicitor with expertise in trade practices law;
- (c) for Store Management and Crew trainers, by the Training Manager, State Trainer, an Area Director of Stores or the Store Operations Director;
- (d) for Store Associates, by Store Management or Crew Trainers.

Competency in the Module will be supplemented by:

- (a) for Merchandise, Store Operations and Property and Services Head Office staff and Store Management staff, a presentation on sections 52 and 53(g) and Division 2 of Part V of the Act once every six months, with the first presentation to be completed by 31 January 1998 for Store Operations and Property and Services Head Office staff and Store Management staff, and by 31 March 1998 for Merchandise Head Office staff;
 - (b) For Store Associates, a retest of competency in the Module once every 12 months after achieving their initial competency.
- (vii) The Company will retain a solicitor with expertise in trade practices law to provide the ACCC with two annual reports (at 12 months and 24 months following 30 November 1997) reporting on the Company's compliance with the Program, and these reports will be provided to the ACCC by:
- (a) 15 January 1999; and
 - (b) 15 January 2000

respectively.

- (viii) Nothing done by the Company pursuant to the requirements set out in subparagraphs (1) to (vii) above, including the provision of solicitor's reports as required by subparagraph (vii), shall waive any privilege which would otherwise

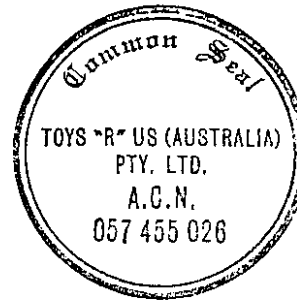
exist or require the disclosure of any privileged information, with respect to any communication or document belonging to or concerning the Company in any respect.

ACKNOWLEDGMENTS

- 6. The Company acknowledges that this Undertaking in no way derogates from the rights and remedies available to any person arising from the alleged conduct.
- 7. The Company acknowledges the ACCC's right to make this Undertaking available for public inspection and notes that the ACCC may, at its discretion, from time to time publish and publicly refer to this Undertaking.

IN WITNESS OF THIS UNDERTAKING:

THE COMMON SEAL OF
 TOYS 'R' US (AUSTRALIA) PTY LTD)
 was affixed hereunto by)
 authority of the Board of Directors)
 in the presence of:)



[Signature]

 Director

Name (Printed): JOHN SCHAYNER

[Signature]
 DIRECTOR

MICHAEL MANNING

This 17th day of December 1997.

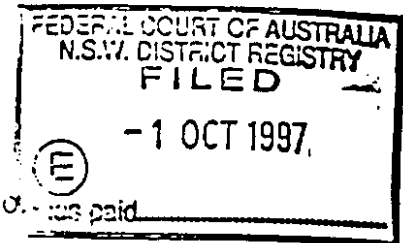
Accepted by the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION pursuant to section 87B of the Trade Practices Act 1974.

[Signature]

 Professor Allan Fels
 Chairman

This 19 day of *[Month]* 1997

Annexure A
to s87B Undertaking



IN THE FEDERAL COURT OF AUSTRALIA ,
NEW SOUTH WALES DISTRICT REGISTRY)

BETWEEN:

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION

Applicant

AND:

TOYS "R" US (AUSTRALIA) PTY LTD
(ACN 057 455 026)

Respondent

STATEMENT OF CLAIM

1. The Applicant is a body corporate established by section 6A of the *Trade Practices Act 1974* ("the Act") and is entitled to sue in its corporate name.
2. The Respondent is and at all material times has been:-
 - (a) a trading corporation within the meaning of the Act, duly incorporated pursuant to the laws of the State of New South Wales:

Filed on behalf of the Applicant by: AUSTRALIAN GOVERNMENT SOLICITOR

Address: Levels 21-25, Piccadilly of Sydney.
133 Castlereagh Street
SYDNEY NSW 2000. DX 444. SYDNEY

Postal Address: P.O. Box 2727, GPO SYDNEY, NSW 2001

Addresss for Service: Levels 21-25, Piccadilly of Sydney.
133 Castlereagh Street.
SYDNEY NSW 2000. DX 444. SYDNEY

Contact Officer: Jan O'Neill -- Telephone: (02) 9581 7565
Facsimile: (02) 9581 7627

- (b) carrying on business under the name "Toys 'R' Us, and engaging in trade or commerce, as a supplier of, inter-alia, videos, computers, video games, toys, video/computer software and associated equipment by retail to consumers in Australia;
 - (c) conducting its business from premises situated at, inter-alia:-
 - (i) Renaissance Centre, Rundle Mall, Adelaide, South Australia ("the Rundle Mall store");
 - (ii) Westfield Shopping Complex, Benjamin Way, Belconnen ACT ("the Belconnen store").
3. From a date presently unknown to the Applicant, but at least from about:-
- (i) 27 December 1996 until 24 September 1997 in relation to the Rundle Mall store; and
 - (ii) 15 September 1997 until 25 September 1997 in relation to the Belconnen store.

the Respondent has displayed, by way of a sticker affixed to the packaging of video games and video/computer software offered for retail sale from those stores, a sign in the following terms:

"No refunds on open video/computer software boxes. Exchange for same title only."

4. From a date presently unknown to the Applicant, but at least from about:-

- (i) 9 July 1997, until 24 September 1997 in relation to the Rundle Mall store; and
- (ii) 15 September 1997 until 25 September 1997 in relation to the Belconnen store.

the Respondent has displayed, in plastic pockets attached to shelving exhibiting video games and video/computer software games offered for retail sale from those stores, a sign in the following terms:

**"Toys "R" Us
VIDEO GAME
RETURN POLICY**

**Refund Given if:
Returned In Sealed
Unopened Package.**

**Exchanged For:
Identical Title Only If
Package Has Been
Opened"**

- 5. The Respondent has, in displaying the signs referred to in paragraphs 3 and 4, represented to all persons who purchase video games or video/computer software goods or both from the Respondent and who open the box or package containing such goods, that:-
 - (a) such persons have no right, under any circumstances whatsoever, to seek to recover from the Respondent a refund of the whole or any part of the price paid by such persons for the said goods; and
 - (b) the only redress such persons have is to have those goods exchanged for identical goods of the same title or name.
- 6. From a date presently unknown to the Applicant, but at least from about 11 June 1997 until 24 September 1997 in relation to the Rundle Mall store the Respondent has displayed at or near the cash registers from which goods are

sold by retail at that store, a sign in the following terms:

**--Video/Computer Software
Return Policy**

Refund given if:

- Returned in sealed, unopened package.
 - Accompanied with receipt, all faulty merchandise will receive a cash refund.
-

Exchanged for:

- Identical title only if package has been opened."

7. The Respondent has, by displaying the signs referred to in paragraph 6, represented to all persons who purchase video/computer software goods from the Respondent that:-
- (a) such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only where:
 - (i) the package containing such goods is sealed and unopened when returned; and
 - (ii) the goods are faulty and the person has a receipt for the purchase of the goods;
 - (b) where the package containing such goods has been opened:
 - (i) such persons have no right, under any circumstances whatsoever, to seek to recover from the Respondent a refund of the whole or any part of the price paid by such persons for the said goods; and

- (ii) the only redress such persons have is to have those goods exchanged for identical goods of the same title or name.

8. From a date presently unknown to the Applicant, but at least from about 15 September 1997 until 25 September 1997 in relation to the Belconnen store, the Respondent has displayed at or near the cash registers from which goods are sold by retail at that store, a sign in the following terms:

**"Video/Computer Software
Return Policy**

Refund given if:

- Returned in sealed, unopened package.
-

Exchanged for:

- Identical title only if package has been opened."

9. The Respondent has, by displaying the sign referred to in paragraph 8, represented to all persons who purchase video/computer software goods from the Respondent that:
- (a) such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only where the package containing such goods is sealed and unopened when returned.
- (b) where the package containing such goods has been opened:
- (i) such persons have no right, under any circumstances whatsoever, to seek to recover from the Respondent a refund of the whole or any part of the price paid by such persons for the said goods; and

- (ii) the only redress such persons have is to have those goods exchanged for identical goods of the same title or name.

10. From a date presently unknown to the Applicant, but at least from about 11 June 1997 until 24 September 1997 in relation to the Rundle Mall store the Respondent has displayed at or near the cash registers from which goods are sold by retail at that store, a sign in the following terms:

**“Video/Computer
Return Policy**

Refund given if:

- Returned within 90 days
- Returned in original carton
- Returned with all parts
- Accompanied with receipt
- All faulty merchandise will receive a cash refund
- Policy applies to all returns.”

11. The Respondent has, by displaying the signs referred to in paragraph 10, represented to all persons who purchase video/computer goods from the Respondent that such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only if the goods are returned to the Respondent:-

- (i) within 90 days from their date of purchase;
- (ii) in their original carton;
- (iii) with all their parts; and
- (iv) accompanied by a receipt for the purchase of the goods.

12. From a date presently unknown to the Applicant, but at least from about

15 September 1997 until 25 September 1997 in relation to the Belconnen store, the Respondent has displayed at or near the cash registers from which goods are sold by retail at that store, a sign in the following terms:

**“Video/
Return Policy**

Refund given if:

- Returned within 90 days
- Returned in original carton
- Returned with all parts
- Accompanied with receipt
- Policy applies to all returns.”

13. The Respondent has, by displaying the signs referred to in paragraph 12, represented to all persons who purchase video goods from the Respondent that such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only if the goods are returned to the Respondent:

- (i) within 90 days from their date of purchase;
- (ii) in their original carton;
- (iii) with all their parts; and
- (iv) accompanied by a receipt for the purchase of the goods.

14. From a date presently unknown to the Applicant, but at least from about:-

- (i) 17 July until 24 September 1997 in relation to the Rundle Mall store;
and
- (ii) 15 September 1997 until 25 September 1997 in relation to the Belconnen store.

the Respondent has displayed at or near the service desk for customers purchasing goods by retail at those stores, a sign in the following terms:

REFUND POLICY

WITH A RECEIPT OF PROOF OF PURCHASE	WITHOUT A RECEIPT OR PROOF OF PURCHASE:
IF ORIGINAL PAYMENT IS MADE BY:	REFUND WILL BE GIVEN IN GEOFFREY MONEY

CASH	CASH
CHARGE CARD	CREDIT TO CHARGE CARD
GEOFFREY MONEY	GEOFFREY MONEY

REFUNDS REQUIRE:-

- 1) ITEM TO BE IN ORIGINAL AND UNSPOILT CONDITION
- 2) ITEM TO BE RETURNED WITH ALL PARTS
- 3) ITEM TO BE RETURNED IN ORIGINAL PACKAGING

VIDEO/COMPUTER SOFTWARE MAY BE REFUNDED WITH MANAGEMENT APPROVAL ONLY IF RETURNED IN SEALED, UNOPENED PACKAGE. IF NOT, SOFTWARE CAN ONLY BE CHANGED FOR THE SAME TITLE

PC HARDWARE AS PER THE MANUFACTURER'S WARRANTY

THE ABOVE IS A TOYS "R" US VOLUNTARY POLICY AND DOES NOT AFFECT YOUR STATUTORY RIGHTS BEFORE ENTERING THE STORE ALL PACKAGES MUST BE CHECKED HERE AT THE REFUND AREA"

15. The Respondent has, by displaying the signs referred to in paragraph 14, represented to all persons who purchase goods from the Respondent that such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only if the goods are returned to the Respondent:-

- (i) in their original and unspoilt condition;
- (ii) with all their parts; and
- (iii) in their original packaging.

16. The Respondent has, by displaying the signs referred to in paragraph 14, represented to all persons who purchase video/computer software goods from the Respondent that such persons have a right to seek to recover from the Respondent a refund of the whole or part of the price paid by such persons for those goods only where:-

- (a) the package containing such goods is sealed and unopened, when returned; and
 - (b) the Respondent's management approves.
17. The Respondent has, by displaying the signs referred to in paragraph 14, represented to all persons who purchase video/computer software goods from the Respondent that, where the package containing such goods has been opened:-
- (a) such persons have no right, under any circumstances whatsoever, to seek to recover from the Respondent a refund of the whole or any part of the price paid by such persons for the said goods; and
 - (b) the only redress such persons have is to have those goods exchanged for identical goods of the same title or name.
18. The Respondent has, by displaying the signs referred to in paragraph 14, represented to all persons who purchase PC or personal computer hardware from the Respondent that:-
- (a) such persons have no right, under any circumstances whatsoever, to seek to recover from the Respondent a refund of the whole or any part of the price paid by such persons for the said goods; and
 - (b) the only redress such persons have is that contained in any warranty given by the manufacturer of the goods.
19. Each of the said representations is false, or alternatively, misleading in that:-
- (a) with respect to the representations pleaded in paragraphs 5(a), 7(a), 7(b)(i), 9(a), 9(b)(i), 11, 13, 15, 16, 17(a) and 18(a) hereof, each purchaser from the

Respondent who is a "consumer" within the meaning of section 4B of the Act has, inter alia, the right to rescind his or her contract for the purchase of the relevant goods in the circumstances and upon the happening of the events set forth in section 75A of the Act and thereby to recover from the Respondent, as a debt, the amount of any consideration paid by him or her for the goods:

- (b) with respect to the representations pleaded in paragraphs 5(b), 7(b)(ii), 9(b)(ii), 17(b) and 18(b) hereof, each purchaser from the Respondent who is a "consumer" within the meaning of section 4B of the Act has, inter alia-
- (i) the right to rescind his contract for the purchase of the relevant goods in the circumstances and upon the happening of the events set forth in section 75A of the Act and thereby to recover from the Respondent, as a debt, the amount of any consideration paid by him or her for the goods;
 - (ii) the right at law to damages for a breach of any conditions or warranties imposed by the operation of Division 2 of Part V of the Act with respect to the goods; and
 - (iii) the rights to compensation conferred upon consumers by the operation of Division 2A of Part V of the Act in the circumstances and upon the happening of the events therein set out.

20. By reason of the matters pleaded aforesaid the Respondent has, in trade or commerce:-

- (a) engaged in conduct that is misleading or deceptive, or likely to mislead or

deceive, in contravention of section 52 of the Act; and

- (b) in connection with the supply or possible supply of goods, or in connection with the promotion by any means of the supply or use of goods, made a false or misleading representation concerning the existence, exclusion or effect of a condition, warranty, right or remedy (namely, the existence, exclusion or effect of the conditions, warranties, rights and remedies imposed or conferred by the Act as aforesaid) in contravention of section 53(g) of the Act.

AND THE APPLICANT CLAIMS:

The orders specified in the Application filed herein.

Dated: 1 October 1997.

AUSTRALIAN GOVERNMENT SOLICITOR

per:

Megan Pitt

Solicitor for the Applicant

Annexure B
to s87B Undertaking

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)

NG 811 of 1997

BETWEEN:

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION

Applicant

AND:

TOYS "R" US (AUSTRALIA) PTY LTD
(ACN 057 455 026)

Respondent

CONSENT ORDERS AND RESPONDENT'S UNDERTAKING TO THE COURT

Without admission THE RESPONDENT UNDERTAKES to the Court that:

1. The Respondent will not, whether by itself, its servants, agents or otherwise howsoever, display, in trade or commerce, at any place from which it carries on business, signs, stickers or displays in the terms set forth in paragraphs 3, 4, 6, 8, 10, 12 and 14 of the Statement of Claim annexed hereto.
2. The Respondent will continue to be bound by its Undertaking 2 given to the Court on 31 October 1997 in respect of signs in the form and terms of the document annexed to that Undertaking.

AND THE COURT ORDERS THAT:

- 1 The Respondent be released from its Undertaking 1 given to the Court on 31 October 1997.

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SYDNEY NSW 2000

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DX 444 SYDNEY

2. The Respondent pay the Applicant's costs in the amount of \$16,000, within seven (7) days of the date of this Order.
3. The proceedings be otherwise dismissed

AND THE COURT NOTES :

1. That the Respondent acknowledges its statutory obligation to pay refunds to consumers in the circumstances set out in Division 3 of Part V of the Trade Practices Act 1974 ("the Act") and the Respondent undertakes to waive reliance on any fact or circumstance set out or described in subsection 75A(2)(a), (b) or (c) of the Act in respect of any claim by a consumer (as defined by the Act) for rescission of a contract under section 75A of the Act, if and to the extent that such fact or circumstance came into existence because the consumer had been misled by reliance on any sign or sticker in the terms of those referred to in the Statement of Claim annexed hereto.
2. The Undertaking to be given to the Applicant by the Respondent pursuant to section 87B of the Trade Practices Act 1974, a copy of which is Annexure 1 hereto.

Dated: December 1997

AUSTRALIAN GOVERNMENT SOLICITOR
per:

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Solicitor for the Applicant

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Solicitor for the Respondent