

TRADE PRACTICES ACT 1974**UNDERTAKING GIVEN TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION FOR THE PURPOSES OF SECTION 87B****BY****PLANET EARTH DESIGN CONCEPTS PTY LIMITED
ACN 003 848 842****Background**

- (1) Planet Earth Design Concepts Pty Limited ACN 003 848 842 (Planet Earth Design Concepts) is based in Sydney, New South Wales and manufactures, wholesales and retails printed and plain T-shirts. Planet Earth Design Concepts trades as Churinga Designs, and uses the trade names “Earth Child”, “L.A.B.”, “Native Worlds”, “Other Worlds”, “Outback Originals”, “Planet Earth” and “Riptide T-Shirts”. These items are sold by various retailers, and by Planet Earth Design Concepts throughout Australia and overseas, and through a “Party Plan” system in New South Wales. Planet Earth Design Concepts also oversees the “Party Plan” system in Queensland, which is operated by a company which is separate to Planet Earth Design Concepts.
- (2) One of Planet Earth Design Concepts’ wholesale customers is Ms VA Soper, trading as AR-GEES “VISIONS”, of Scarborough, Brisbane in Queensland. Ms Soper has been a customer of Planet Earth Design Concepts since mid 1996 and has sold its products at markets and festivals in and around Brisbane. Ms Soper has conducted business at the Woodridge markets in Brisbane since approximately June 1997.
- (3) In July 1999, Ms Soper informed the Australian Competition and Consumer Commission (ACCC) that Planet Earth Design Concepts had told her during June and July 1999 that she must cease trading in its products at the Woodridge markets because her selling prices were lower than those charged through Planet Earth Design Concepts’ Party Plan system; that Planet Earth Design Concepts told her that it would allow her to continue to trade in its products provided that she substantially raised her prices to those charged through the Party Plan system; and that, if she did not do so, it would withhold supply from her. From this time, Ms Soper alleges she experienced delays of orders, incomplete filling of an order and restriction of credit terms, which she had not customarily experienced before in her dealings with Planet Earth Design Concepts.
- (4) In July 1999, the ACCC raised Ms Soper’s allegations with Planet Earth Design Concepts and, after communications between the ACCC and Planet Earth Design Concepts during the period from July 1999 to October 1999, Planet Earth Design Concepts requested that the ACCC accept court enforceable undertakings from Planet Earth Design Concepts pursuant to section 87B of the Trade Practices Act 1974 (the Act).
- (5) Planet Earth Design Concepts acknowledges that section 48 of the Act prohibits the practice of resale price maintenance, which includes the practice of a supplier withholding or threatening to withhold supply of its products for the reason that the buyer is selling the products at a price less than a price specified by the supplier. Planet Earth Design Concepts acknowledges that the withholding of supply includes refusing or failing to

supply, refusing to supply except on terms that are disadvantageous to the buyer, and a supplier treating a buyer less favourably than the supplier treats other persons to whom the supplier supplies the same or similar products.

- (6) Planet Earth Design Concepts admits its conduct with respect to Ms Soper referred to at (3) above, understands that the conduct contravened section 48 of the Act, and states that it has ceased the conduct.

Undertaking

- (7) This undertaking takes effect at the time the ACCC's acceptance of it is communicated to Planet Earth Design Concepts.
- (8) Planet Earth Design Concepts undertakes for the purposes of section 87B of the Act:
- (i) that it will not by itself, its directors, servants, agents or howsoever:
 - (a) engage in the practice of resale price maintenance; nor
 - (b) withhold supply from Ms Soper without first informing her in writing of all the reasons for the decision to withhold supply from her; and
 - (ii) that it will:
 - (a) within two weeks of this undertaking taking effect, communicate in writing, in the terms in the schedule in this undertaking, with each person to whom it currently supplies products, including persons engaged in the Party Plan system, and enclosing a copy of this undertaking;
 - (b) within three weeks of this undertaking taking effect, provide to the ACCC evidence of completion of the action referred to in (8)(ii)(a) above; and
 - (c) cause a trade practices compliance program to be designed, implemented, maintained and audited in accordance with (9) and (10) below.
- (9) Within three months of this undertaking taking effect, Planet Earth Design Concepts will design, implement and make provision to maintain and audit, at its own expense, a trade practices compliance program which complies with Australian Standard AS 3806 (which Standard for the purposes of this undertaking includes Appendix A to the Standard) relating to those provisions of the Act which are relevant to the conduct of its business, as that may be from time to time, which:
- (i) demonstrates commitment to a policy of compliance and will embed a culture of compliance throughout Planet Earth Design Concepts;
 - (ii) identifies risk areas for trade practices contraventions and develops systems to eliminate or minimise these risks;
 - (iii) provides that Planet Earth Design Concepts will take appropriate action concerning any person within its control who is responsible for contraventions of the Act and will not indemnify any such person from the consequences of suit or settlement in respect of contravention of the Act; and

(iv) provides practical and verifiable training for all directors, employees and agents of Planet Earth Design Concepts so that contraventions and potential contraventions of the Act may be prevented, detected and redressed.

(10) Action taken by Planet Earth Design Concepts in pursuance of the matters at (9) above will include:

(i) Commitment

- (a) Publication to all directors, employees and agents of Planet Earth Design Concepts of a written policy of commitment to compliance.
- (b) Ensuring that compliance is a standing item at Board meetings.
- (c) Appointment of a Compliance Officer with overall responsibility for compliance systems.
- (d) Implementation of adequate procedures to monitor compliance.
- (e) Ensuring that all directors and employees, and relevant third parties such as distributors, advertising representatives and other agents, understand compliance procedures.

(ii) Policy and procedures

- (a) Implementation of procedures to ensure that the compliance policy is understood by directors, employees and agents of Planet Earth Design Concepts; and
- (b) Ensuring procedures are established to assess compliance against predetermined objectives and assessment criteria.

(iii) Management responsibility

- (a) Identification of processes involved in designing, implementing and maintaining the compliance program and the roles and responsibilities of directors, employees and agents.
- (b) Ensuring that line managers are responsible for compliance in their immediate area.

(iv) Resources and authority

- (a) Ensuring that the Compliance Officer has:
 - A authority, recognition and support from directors and managers;
 - B access to all directors, employees and agents to ensure compliance;
 - C overall responsibility for design, implementation, maintenance and audit of the compliance program; and
 - D access to the Board as required.
- (b) Ensuring that directors, employees and agents have access to necessary materials including compliance manuals, training, reference material and databases.
- (c) Ensuring that any external compliance service providers have the resources and expertise necessary to carry out the required tasks.

(v) Continuous improvement

Implementation of procedures to ensure that the program is continuously reviewed.

(vi) Operating procedures for compliance

Integration of compliance considerations into other aspects of corporate operations such as operation of computer systems, drafting of forms and contracts, administrative procedures, financial evaluations, and performance evaluation of directors, employees and agents.

(vii) Training

Implementation of a practical and easily understood compliance training system which is:

- A integrated into induction courses;
- B reviewed at least every six months;
- C participatory;
- D verifiable by independent third parties;
- E framed to reflect areas of risk; and
- F part of line and senior manager development.

(viii) Complaints handling system

Implementation of a visible and accessible complaints handling system which complies with Australian Standard AS 4269 when read together with Appendix A to Australian Standard AS 3806.

(ix) Record keeping

Keeping accurate record of instances of compliance failure and complaints, and of action taken to redress such instances.

(x) Disciplinary policy

- (a) Implementation of a disciplinary policy for contraventions of the Act by directors, employees and agents, and publication of the policy to all such persons.
- (b) Ensuring that compliance is integrated into performance reviews for employees.

(xi) Identification and rectification

Development of a system to identify and classify instances of compliance failure and complaints so that systemic and recurring problems are rectified.

(xii) Reporting

Ensuring that compliance problems are promptly reported to the Compliance Officer.

(xiii) Monitoring and review

Introduction of a system to monitor and review the effectiveness of the compliance program.

(xiv) Accountability

Ensuring that the Compliance Officer is accountable to the Board for compliance issues.

(xv) Audit of the trade practices compliance program

- (a) Planet Earth Design Concepts shall cause, at its own expense, an independent audit of its compliance program to be conducted:
- A within six months of the time at which this undertaking takes effect;
 - B upon each of the first three anniversaries of the time at which this undertaking takes effect; and
 - C on any additional occasions as the auditor reasonably determines necessary.
- (b) The audit will be conducted by a suitably qualified compliance professional who is independent of Planet Earth Design Concepts and has no conflict of interest or duty in providing audit services to it.
- (c) The auditor will review and report in writing on:
- A Planet Earth Design Concepts' adherence to this undertaking;
 - B the particulars of the compliance program, its implementation and the achievement of its objectives; and
 - C any recommended changes to the compliance program that may be necessary to ensure achievement of its objectives.
- (d) The auditor will provide a copy of the audit report to the ACCC within one week of completion of the audit.
- (e) If requested by the ACCC, Planet Earth Design Concepts will provide forthwith to the ACCC:
- A the name of the auditor;
 - B the information upon which it relies in determining the auditor is independent from it; and
 - C information showing whether any recommendations by the auditor have been implemented.

Schedule

LETTERHEAD OF PLANET EARTH DESIGN CONCEPTS PTY LIMITED

Dear Customer

RE: YOUR SELLING PRICES FOR PLANET EARTH PRODUCTS

The purpose of this letter is to inform you that you are free to advertise and sell Planet Earth products at discount prices as you wish, unless you obtain the products from us on consignment or as a commission agent. In the latter cases, we can set the prices at which you are to sell our products if we wish.

We are writing to you to clarify what decisions you can make about the pricing of Planet Earth products because of discussions we have had with the Australian Competition and Consumer Commission (ACCC). Those discussions, and the actions we have undertaken to carry out as a result of them, are outlined in the enclosed Undertaking we have given to the ACCC. If we break this undertaking, the ACCC can take legal proceedings against us to enforce it.

The *Trade Practices Act 1974* (the Act) prohibits resale price maintenance. Resale price maintenance can happen where a supplier specifies minimum prices below which their customers cannot sell.

Once a customer buys products, they are generally theirs to price as they wish – although we can legally specify a maximum price above which Planet Earth products not be sold, and in some circumstances we can stop supplying customers who sell Planet Earth products below cost. Where we supply products on consignment or to commission agents, we can specify at what prices our products are to be sold.

The purpose of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. Breaches of the Act are serious offences.

Planet Earth wishes to comply with the Act. We have decided to implement a compliance program so that possible breaches of the Act can be avoided. The program is outlined in the enclosed Undertaking. You can expect to see changes in the way we do business and, where people are engaged by us as agents, they will also be required to participate in our compliance program.

We **enclose** a copy of a booklet called “Small Business and the Trade Practices Act” published by the ACCC which may assist you in understanding your rights and obligations under the Act.

Yours sincerely

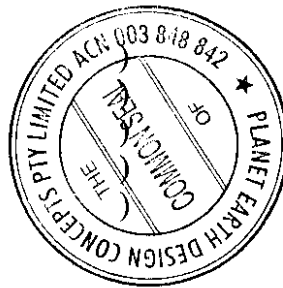
Mark McCarthy
Director

Stephen Kamphuis
Director

Acknowledgments

- (11) Planet Earth Design Concepts acknowledges that:
 - (a) the ACCC will make this undertaking available for public inspection;
 - (b) the ACCC may from time to time publicly refer to this undertaking; and
 - (c) this undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct referred to at (3) above.

The common seal of **PLANET EARTH DESIGN CONCEPTS PTY LIMITED** ACN 003 848 842 is affixed in accordance with its Articles of Association in the presence of:



Steph. J. Magosh
.....
Director

[Signature]
.....
Director

This 10 day of January ~~1999~~ 2000

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

[Signature]
.....
(Professor Allan Fels)
Chairman

This 8 day of February 2000