

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION**

No. VG 948 of 2000

BETWEEN:

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

and

**PRIMUS TELECOMMUNICATIONS (AUSTRALIA) PTY LTD  
(ACN 061 754 943)**

First Respondent

**GLOBAL SALES PTY LTD**

**(ACN 078 891 200)**

Second Respondent

**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION GIVEN UNDER SECTION 87B OF  
THE *TRADE PRACTICES ACT 1974***

BY

**PRIMUS TELECOMMUNICATIONS (AUSTRALIA) PTY LTD  
(ACN 061 754 943)**

**PERSONS GIVING UNDERTAKING**

- (1) This undertaking is given to the Australian Competition and Consumer Commission ("the Commission") by Primus Telecommunications (Australia) Pty Ltd (ACN 061 754 943) of level 3, 538 Collins Street Melbourne, Victoria, ("Primus") under section 87B of the *Trade Practices Act 1974* ("the Act").

**BACKGROUND**

- (2) Primus operates a telecommunications network for the purposes of supplying telecommunications services, including local, long-distance and fixed to mobile services, to consumers throughout Australia.

- (3) Primus has promoted its services throughout Australia by telemarketing and door-to-door sales, with the objective of persuading potential customers to transfer their telephone service pre-selection from their existing supplier to Primus.
- (4) In and around June 2000, the Commission became aware of a significant number of complaints by consumers in relation to transfers to Primus made without the consumer's consent or informed consent. The complaints alleged that the transfers or "churns" were induced by misrepresentations made by certain agents appointed by Primus to market its services, namely Orator Pty Ltd and Global Sales Pty Ltd (the "Agents") as to the nature and effect of the transaction or as to the nature of documents presented for signature in the case of door- to- door sales.
- (5) As a result of its investigations the Commission formed the view that in breach of s.51AB, s.52 and s.53(c) and (d) of the Act, Primus, through the conduct of the Agents, had induced transfers without the consent or informed consent of the consumers concerned. Specifically, the Commission formed the view that the Agents had misled consumers as to the reason for which or the basis on which their authorisation was sought. The representations made by the Agents included the following:
  - that Primus's services were offered by, on behalf of or at the request of Telstra;
  - that Primus was a subsidiary of or otherwise connected with Telstra;
  - that the document presented for signature ("the transfer document") constituted merely:
    - an expression of interest by the consumer in transferring his or her telephone service pre-selection to Primus;
    - a request by the consumer to be provided with further information;
    - an acknowledgment that the Primus representative had spoken to or attended upon the consumer.

## **COMMENCEMENT OF UNDERTAKINGS**

- (6) This undertaking comes into effect when:
  - (a) the undertaking is executed by Primus; and
  - (b) the undertaking so executed is accepted by the Commission.

## UNDERTAKINGS

- (7) Primus will, within 30 days of executing this undertaking, send a written notice in the form of Schedule "A" attached hereto to all customers acquired during the period 16 March 2000 to 30 November 2000 (the "Relevant Period") by means of the Agents.
- (8) Primus will adopt the following procedure in respect of complaints received from any of its customers obtained during the Relevant Period by the Agents:
  - (a) Primus will in all instances consider the customer's complaint and form a bona fide view as to the veracity of the complaint and whether the transfer of the customer was authorised;
  - (b) where, upon completing its consideration of a customer's complaints, Primus is satisfied that the transfer of the customer to Primus was not authorised, it shall:
    - (i) inform the customer that it is entitled to have the churn reversed if it so wishes;
    - (ii) if the customer requests to have the churn reversed, Primus shall reverse the churn;
    - (iii) where the customer has prior to the date of this undertaking disputed the transfer to Primus on the grounds that the transfer was not authorised, Primus will, subject to paragraph (10) below, reimburse all payments received from the customer as a result of the unauthorised customer transfer;
    - (iv) where the customer has received and paid Primus accounts during the period he or she was a customer, then any reimbursement of call payments received from the customer will be made at Primus's discretion;
- (9) Where Primus considers on reasonable grounds that a customer has been the subject of an unauthorised customer transfer, Primus will not, subject to paragraph (10) below, seek nor accept payment for any costs incurred by the customer during the period of the unauthorised transfer without the customer's implied or express consent.
- (10) Nothing in this undertaking is intended to impose on Primus an obligation to reimburse payments received from a customer where Primus, on reasonable grounds, concludes that there has been fraud by the customer or where the call costs have been incurred in a period that exceeds three months (although Primus may, at its discretion, choose to do so).
- (11) Primus will, within 30 days of executing this undertaking, engage an independent assessor approved by the Commission who will undertake a

complete review, to be completed by 30 March 2001, of each of the following aspects of Primus's business:

- (a) trade practices compliance training;
- (b) selling channels and methods;
- (c) complaints handling and resolution;
- (d) arrangements for the transfer of customers from other telecommunications companies; and
- (e) Primus's compliance with the procedures set out at (8) above.

The purpose of the review is to identify operational improvements, if any, that could assist Primus in complying with the Act and in its fair dealings with customers and potential customers obtained via telemarketing and door-to-door marketing channels. Primus will supply the Commission with a report in relation to this review within 14 days of completion of the review.

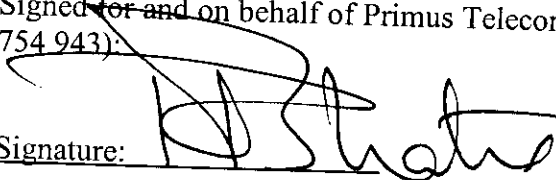
- (12) Primus will adopt the Selling Practices and Customer Transfer Code, within 14 days following being notified or becoming aware of its adoption by the ACIF board.
- (13) Primus will contribute \$500,000 towards a public education and awareness campaign targeted at explaining consumer rights and benefits in respect of customer transfer arrangements in order to raise general public and consumer awareness of consumers' rights and carriers' responsibilities (as provided for in relevant codes and laws) concerning selling practices and telecommunications customer churn. The fund established for this purpose will be administered by the Commission in its absolute discretion. The amount paid by Primus as referred to in this paragraph is to be paid in 12 equal monthly instalments commencing on 1 January 2001.
- (14) Primus will pay the Commission's reasonable legal costs in relation to this matter up to the sum of \$45,000.

#### **ACKNOWLEDGMENTS**

- (15) Primus acknowledges that by the conduct of the Agents it has breached s.51AB, s.52 and s.53(c) and (d) of the Act.
- (16) Primus acknowledges the Commission's right to make this undertaking available for public inspection and notes that the Commission will, at its discretion, from time to time, publish and publicly refer to this undertaking.
- (17) Primus acknowledges and accepts that this undertaking in no way derogates from the rights and remedies available to any person arising from Primus's conduct.

**IN WITNESS TO THESE UNDERTAKINGS**

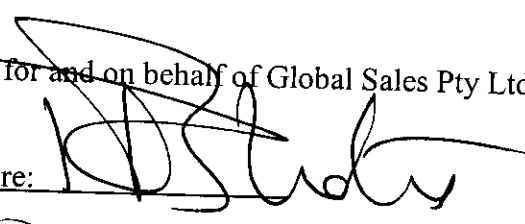
Signed for and on behalf of Primus Telecommunications (Australia) Pty Ltd (ACN 061 754 943):

Signature: 

Title: Chief Executive Officer

Date: 11/12/2000.

Signed for and on behalf of Global Sales Pty Ltd (ACN 078 891 200):

Signature: 


Title: Director

Date: 11/12/2000.

ACCEPTANCE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT, 1974:

 Chairman:

~~This~~ day of December 2000. ~~2-1-01~~

ACTING CHAIRMAN:   
DATE: 12-1-01

## **Annexure A**

(Primus letter head)

Dear

### **NOTIFICATION OF CONDUCT IN CONTRAVENTION OF THE *TRADE PRACTICES ACT***

We write to you as a Primus customer.

We understand that during this year, you made the decision to switch to Primus for your local, long distance, international and fixed to mobile services after being contacted by an agent of Primus either over the phone or through a door to door agent.

In December 2000, the Australian Competition and Consumer Commission ("**ACCC**") commenced an action in the Federal Court against Primus and one of its agents. The ACCC alleged that agents engaged by Primus to conduct door to door and telemarketing campaigns had, on occasions, engaged in conduct that was contrary to the *Trade Practices Act* (1974).

In particular, the ACCC alleged that false and misleading statements were made by the agents in relation to some transfers by customers to Primus, including misrepresentations that:

- the Primus application form which the agents were having the customer complete was merely an expression of interest, a request for further information or an acknowledgement that the representative had spoken with the potential customer when, in fact, the form gave Primus permission to transfer the customer's telephone service pre-selection to Primus;
- the agent was acting on behalf of Telstra, that Primus was associated with Telstra and/or that Primus' services had this sponsorship or approval of Telstra when, in fact, Primus and Telstra are competitors.

The *Trade Practices Act* prohibits corporations from making false representations and from engaging in misleading and deceptive conduct, or unconscionable conduct.

Primus does not condone this illegal conduct and takes these concerns very seriously. The conduct of the agents, who were not under the direct control of Primus, is prohibited by the agents' terms of appointment and is contrary to Primus' explicit instructions. Primus has thus admitted in the Federal Court that this illegal conduct of its agents has resulted in contraventions of the *Trade Practices Act*.

While such illegal conduct may not have affected you, Primus has agreed to clarify its position as follows:

1. By signing the Primus application form or agreeing on the phone to transfer, you made an application to switch to Primus for the provision of your local, long distance, international and fixed to mobile calls.
2. The Primus application form or telephone transfer was not for a trial period only, nor was it a request to be sent further information about Primus.
3. Primus does not represent Telstra and does not provide services on behalf of Telstra.

If any of the above matters affected your decision to sign the Primus application form or agree over the phone to switch to Primus, you are at liberty to switch back to your previous service provider(s) without penalty. Simply contact Primus on 1800 #### ###, within 28 days from the date of this letter so that Primus can assist you to have your services returned to your previous service provider(s).

Primus apologises for any inconvenience it or its representatives may have caused you. We look forward to continuing to provide you with service and value for money.

Yours sincerely

Primus Telecommunications Pty. Ltd.