



TRADE PRACTICES ACT 1974

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

BY

FORTY WINKS FRANCHISING PTY LTD (ACN 059 512 640)

PERSONS GIVING UNDERTAKING

1. These undertakings are given to the Australian Competition and Consumer Commission ("the Commission") by Forty Winks Franchising Pty Ltd (ACN 059 512 640) ("Forty Winks") of 8 Holly Drive, Dingley, in the State of Victoria, under section 87B of the *Trade Practices Act 1974* ("the Act").

BACKGROUND

2. The principal trading activity of Forty Winks involves the sale of household furniture, including bedding, bedding suites and other household furnishings. As part of its sales activities, Forty Winks advertises and promotes various household furniture items including beds and lounge suites for sale through its eighty five franchised outlets located throughout Australia.
3. In or about May 2005, Forty Winks published and distributed its "Celebration Sale" catalogue (the catalogue) throughout Australia. The cover page of the catalogue contained the statement "Save up to \$1000", and the remaining pages quoted a number of "\$ savings" on bedding and furniture which the Commission believes conveys the representation to consumers that the savings were calculated from the price at which Forty Winks usually sold those products.
4. The back page of the catalogue contained a very fine print disclaimer which stated:

"Savings shown in the catalogue are off the normal ticketed prices. Forty Winks stores usually sell their products at less than the ticketed prices because we want to give our customers the best and most competitive prices we can. Accordingly, the comparisons to ticketed prices given in this catalogue are an indication of the maximum price from which savings are calculated, not necessarily the usual selling price of product..."

Commission's concerns

5. The Commission considers Forty Winks' "Save up to \$1000" statement and its quoted savings throughout the catalogue:-
 - (a) may be misleading and deceptive and contravene section 52 of the Act; and
 - (b) may falsely represent the prices and/or price savings of its furniture and contravene section 53(e) of the Act.

By using the statement and quoting the savings specified in the catalogue, Forty Winks may have overstated the actual savings offered to consumers in the catalogue.

6. Further, the Commission considers the use of the fine print disclaimer on the back page of the catalogue may not be sufficient to correct the misleading representations in the body of the catalogue.

UNDERTAKINGS

7. In consideration of, and as a result of the Commission expressing its concerns to Forty Winks, Forty Winks has offered, and the Commission has agreed to accept, these undertakings for a period of three years, in accordance with section 87B of the Act.

Advertisement of price reductions

8. Forty Winks will, whether by itself, its directors, servants, agents or otherwise, in trade or commerce in connection with the supply or possible supply of goods or services, only advertise price reductions (such as "save up to \$xx", "\$xx off" or "xx% off") for products calculated by reference to the usual selling prices for those products at Forty Winks stores unless a clear and prominent explanation specifies the alternative price reference point used for the advertised price reduction.

Record keeping

9. Within sixty days of the commencement of these Undertakings, Forty Winks will establish, implement and maintain a system of record keeping sufficient to substantiate any claims that products have been sold or ticketed at Forty Winks stores at particular prices.
10. Upon a request from the Commission, Forty Winks will permit a representative/s of the Commission to inspect the records maintained pursuant to paragraph 9 of these undertakings or provide the Commission with copies of such records.

Internal approvals of advertisements

11. Within sixty days of the commencement of these Undertakings, Forty Winks will establish, implement and maintain a system for internal approvals of all Forty Winks advertisements which provides that:-
 - a) the individual holding the position of General Manager has the responsibility for considering whether any prospective advertisement includes representations which risk breaching the Act and for approving such advertisements;
 - b) appropriate legal advice is obtained in relation to prospective advertisements; and
 - c) records are maintained of such approvals.

Certification by Chairman

12. Within ninety days of the commencement of these Undertakings, and then annually upon the anniversary of the commencement of these undertakings, the Chairman of the Forty Winks Group must certify to the Commission in writing that Forty Winks has complied with these undertakings.

Trade practices compliance program

13. Within sixty days of the commencement of these Undertakings, Forty Winks will establish, implement and maintain a Trade Practices Compliance Program covering Parts IV and V of the Act, in accordance with the requirements set out in **Annexure A**, for the employees of Forty Winks, its franchisees and its franchisees' employees, being a program designed to minimise Forty Winks' risk of future breaches of the Act and to ensure its awareness of the responsibilities and obligations in relation to the requirements of the Act;
14. Forty Winks will maintain and continue to implement the Trade Practices Compliance Program for a period of three (3) years from the commencement of this Undertaking and provide, at its own expense, a copy of any documents (other than those in respect of which Forty Winks claims legal professional privilege) required by the Commission in accordance with **Annexure A**.

COMMENCEMENT OF UNDERTAKINGS

15. These undertaking come into effect when:
 - i. the undertaking is executed by Forty Winks; and
 - ii. the undertaking so executed is accepted by the Commission.

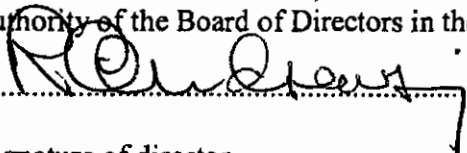
ACKNOWLEDGMENTS

16. Forty Winks acknowledges the Commission's right to make this undertaking available to the public including by placing it on a register, publishing it and allowing third parties to publish it.
17. Forty Winks acknowledges that the Commission may issue a media release about this undertaking and may, from time to time, publicly refer to the undertaking.
18. Forty Winks acknowledges and accepts that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.


19. Forty Winks further acknowledges that a summary of the Commission Compliance Program Review reports referred to in Annexure A of the Undertaking may be held with these undertakings on the public register.



The Common Seal of **Forty Winks Franchising Pty Ltd** (ACN 059 512 640) was affixed in accordance with the authority of the Board of Directors in the presence of:)

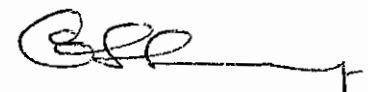

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Signature of director
.....
RODERICK JAMES GORDON
ANDREWS
(Print name of director)


Signature of ~~director~~/secretary
Roger Brian White
(Print name of ~~director~~/secretary)

This 27th day of September 2005

ACCEPTED by the Australian Competition and Consumer Commission pursuant to section 87B of the *Trade Practices Act 1974*.


.....
(Graeme Samuel)
Chairman

This 18 day of October 2005

Annexure A

TRADE PRACTICES COMPLIANCE PROGRAM

Forty Winks will establish a Trade Practices Compliance Program (**the Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within sixty days of the commencement of this Undertaking, Forty Winks will appoint a Director or a Senior Manager of the business, whose responsibilities are to include the development, implementation and maintenance of the Compliance Program, and who reports directly to the company Board or governing body (**the Compliance Officer**).
2. Forty Winks shall appoint a qualified, internal or external compliance professional with expertise in trade practices issues (**the Compliance Advisor**) within sixty days of the commencement of this Undertaking, for the purposes set out in paragraph 3.
3. Forty Winks shall instruct the Compliance Advisor to conduct a Trade Practices Act risk assessment (**the Risk Assessment**) in accordance with i. – v. below:
 - i. identify the areas where Forty Winks is at risk of breaching Parts IV and V of the Act;
 - ii. assess the likelihood of these risks occurring and the consequences of the risks to the business operations of Forty Winks should they occur;
 - iii. identify where there may be gaps in Forty Winks' existing procedures for managing these risks; and
 - iv. provide recommendations for action having regard to the assessment.

Compliance Policy

4. Forty Winks will, issue a policy statement outlining Forty Winks' commitment to trade practices compliance (**the Compliance Policy**). Forty Winks will ensure the Compliance Policy:
 - i. is written in plain language;
 - ii. contains a statement of commitment to compliance with the Trade Practices Act 1974;

- iii. contains a requirement for all staff to report any compliance related issues and trade practices compliance concerns to the designated officer (**Compliance Officer**); and
- iv. contains a clear statement that Forty Winks will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Trade Practices Act and will not indemnify them.

Complaints Handling System

- 5. Forty Winks will ensure the Compliance Program includes a complaints handling system capable of identifying, classifying, storing and where necessary, referring internal and external trade practices complaints.

Training

- 6. Forty Winks will ensure that the Compliance Program includes a requirement for regular (at least once a year) and practical trade practices training for all employees of Forty Winks, whose duties could result in them being concerned with conduct that may contravene Part IV and V of the Act. The training program will be designed to ensure the employees' awareness of the responsibilities and obligations in relation to Part IV and V of the Act. Forty Winks must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
- 7. Forty Winks will ensure that the Compliance Program includes a requirement that awareness of trade practices compliance issues forms part of the induction of all new employees whose duties could result in them being concerned with conduct that may contravene Part IV and V of the Act.

Reports to Senior Management

- 8. Forty Winks will ensure that the Compliance Officer reports to the Board and/or senior management meetings every twelve (12) months on the continuing effectiveness of the Compliance Program.

Supply of Compliance Program Documents to the Commission

- 9. Forty Winks shall, at its own expense, within three (3) months of the date of this Undertaking coming into effect, cause to be produced and provided to the Commission copies of each of the documents constituting the Compliance Program. Forty Winks will implement promptly and with due diligence any recommendations the Commission may make that are reasonably necessary to ensure that Forty Winks

maintains and continues to implement the Compliance Program in accordance with the Undertaking.

Review

10. Forty Winks shall, at its own expense, cause annual reviews of the Compliance Program (**the Reviews**) to be carried out in accordance with each of the following requirements:
 - (a) **Scope of the Review** – the Reviews should be broad and rigorous enough to provide Forty Winks and the Commission with supportable verification that Forty Winks has in place a program that complies with each of the requirements detailed in paragraphs 1-9 above and to provide the Review reports and opinions detailed at point 11 below.
 - (b) **Independence of Reviewer** - Forty Winks shall ensure that the Reviews are carried out by a suitably qualified, independent compliance professional with expertise in trade practices law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
 - i. did not design or implement the Compliance Program;
 - ii. is not a present or past staff member or director of Forty Winks;
 - iii. has not acted and does not act for Forty Winks in any trade practices related matters;
 - iv. has not and does not act for or consult to Forty Winks or provide other services on trade practices related matters other than Compliance Program reviewing; and
 - v. has no significant shareholding or other interests in Forty Winks.
 - (c) **Evidence** - Forty Winks shall use its best endeavors to ensure that the Reviews are conducted on the basis that the Reviewer has access to all relevant sources of information in Forty Winks' possession or control, including:
 - i. enquiries of any officers, employees, representatives, agents and stakeholders of Forty Winks;
 - ii. Forty Winks' records, including the company's complaints register/reports and any documents relevant to the Forty Winks training or induction program; and

- iii. documents created by Forty Winks' consultants and legal practitioners for use in the Forty Winks' Compliance Program.
- (d) Forty Winks shall use its best endeavours to ensure that the first Review is completed within one year and one month of the commencement of this Undertaking and that each subsequent Review is completed within one year thereafter.

Reporting

11. Forty Winks shall use its best endeavours to ensure that the Reviewer sets out the findings of the Review in two separate reports as outlined below:

- (a) Company Compliance Program Review Report (to be provided to Forty Winks)

Forty Winks' Company Compliance Program Review Report will provide particular and specific information regarding the performance of the Trade Practices Compliance Program including:

- i. if, and to what extent, the Compliance Program of Forty Winks includes all the elements detailed in paragraphs 1-10 above;
- ii. if, and to what extent, the trade practices training is effective;
- iii. recommendations for rectifying deficiencies in i. – ii. that the Reviewer thinks are reasonably necessary to ensure that Forty Winks maintains and continues to implement the Compliance Program in accordance with the requirements of the Undertaking.

- (b) Commission Compliance Program Review Report (to be provided to Forty Winks and by Forty Winks to the Commission)

The Review Report to be provided to the Commission will supply particular and specific information regarding the scope of the Review and the effectiveness of the Trade Practices Compliance Program including:

- i. details of the evidence gathered and examined during the Review;
- ii. the name and relevant experience of the person appointed as the company Compliance Officer;

- iii. the Reviewer's opinion on whether Forty Winks has in place an effective Trade Practices Compliance Program that complies with the requirements detailed in paragraph 1 – 10 above;
- iv. the Reviewer's opinion on if, and to what extent, Forty Winks has complied with the Trade Practices Compliance Program component of the Undertaking;
- iv. actions recommended by the Reviewer to ensure the continuing effectiveness of Forty Winks' Trade Practices Compliance Program;
- v. confirmation that any actual and potential inadequacies in Forty Winks' Compliance Program have been brought to the attention of the Compliance Officer and the governing body;
- vii. confirmation that the Reviewer has revisited any actual and potential inadequacies in Forty Winks' Compliance Program identified in the previous Compliance Program Review Report (to be provided to Forty Winks), and assessed how they have been addressed by Forty Winks;
- vii. any reservations that the Reviewer might have about the reliability and completeness of the information to which the Reviewer had access in the conduct and reporting of the Review; and
- ix. any comments or qualifications concerning the Review process that the Reviewer, in his or her professional opinion, considers necessary.

Notwithstanding anything in this paragraph, the Review Report is not required to disclose information or documents in respect of which Forty Winks claims legal professional privilege and the provision of the Review Report to the Commission is not to be taken as a waiver of privilege by Forty Winks.

- (c) Forty Winks will use its best endeavours to ensure that the Review Reports are completed and provided to Forty Winks within two months of each Review.
- (d) Forty Winks will retain the Company Compliance Program Review Report and cause the Commission Compliance Program Review Report to be provided to the Commission within 14 days of its receipt from the Reviewer.

12. Recommendations - Forty Winks shall implement promptly and with due diligence any recommendations made by the Reviewer or the

Commission, that are reasonably necessary to ensure that Forty Winks maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.

13. Forty Winks shall, at its own expense, if requested by the Commission, provide copies of documents and information (other than those in respect of which Forty Winks claims legal professional privilege) in respect of matters which are the subject of the Compliance Program.
14. In the event the Commission has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Forty Winks shall, at its own expense and if requested by the Commission, cause an interim or additional Review to be conducted and cause the resulting Review Report to be provided to the Commission.