

TRADE PRACTICES ACT 1974

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

BY

HOLGER SCHULZ

BACKGROUND

1. Tooltechnic Systems (Aust) Pty Ltd (ACN 090 458 576) (**Tooltechnic**) is a company carrying on business within Australia as a wholesale supplier of power tools and/or power tool systems known by the brand “Festool” or “Festo” (**Festool Products**) to hardware and power tool retailers throughout Australia (**Festool Retailers**).
2. Mr Holger Schulz is and was at all material times since 8 November 1999 the Company Secretary and Managing Director of Tooltechnic.
3. In 2002 and 2003 the Australian Competition and Consumer Commission (**ACCC**) received complaints from certain consumers and Festool Retailers alleging that Tooltechnic had attempted to induce Festool Retailers not to sell Festool Products at a price less than the “recommended trade price” (**Recommended Trade Price**) for each Festool Product specified from time to time in an annual price list (**Annual Price List**) supplied by Tooltechnic to Festool Retailers (**Specified Prices**).
4. Following an investigation, the ACCC has reached the view that Tooltechnic contravened the *Trade Practices Act 1974* (Cth) (**TPA**) by two (now former) Tooltechnic Area Managers, separately, on a total of three occasions, attempting to induce two Festool Retailers not to sell Festool Products at less than Specified Prices by, among other things, saying words to the effect:
 - (a) all Festool Retailers must sell Festool Products to consumers at Specified Prices;
 - (b) “you know you’re not allowed to discount”; and
 - (c) it was possible that a certain Festool Retailer’s wholesale discount structure may have to be altered so as to induce them to increase their prices back up in line with other dealers.
5. The ACCC proposes to institute proceedings against Tooltechnic in the Federal Court (**Proceedings**) in respect of alleged contraventions of section 48 of the

TPA, by reference to section 96(3)(b) of the TPA, in relation to the conduct set out in paragraph 4 above.

6. The ACCC is also concerned that conduct by Holger Schulz, acting in his capacity as Managing Director, may have:

- (a) contributed to an environment in which the alleged contraventions of the TPA described in paragraph 4 above occurred; and
- (b) failed to take reasonable steps to avoid contraventions of the TPA,

thereby contributing to the contraventions of the TPA to be alleged by the ACCC against Tooltechnic in the Proceedings.

7. Holger Schulz' conduct of concern to the ACCC includes the following:

- (a) in or about January 2002, before the conduct by the Area Manager described in subparagraphs 4(b) and (c) hereof, Mr Schulz displayed a PowerPoint Presentation during a meeting with him which contained statements including statements to the effect that:
 - (i) the five principles of the annual agreements known as Partnership for Profit Agreements entered into by Tooltechnic with various Festool Retailers (**P4P Agreements**) were:
 - a. no compromises;
 - b. balance of benefits;
 - c. profit before turnover;
 - d. consequence;
 - e. change of behaviour;
 - (ii) Tooltechnic would reward dealers who supported the P4P Program by offering preferred terms;
 - (iii) Tooltechnic believes in the principle that long-term profit is more important than short-term sales success;
 - (iv) the aim of the P4P Program was to get Festool Retailers to sell Festool Products on the basis of their benefits and features rather than on the basis of price;
- (b) during various sales meetings with Area Managers in the course of 2002, Mr Schulz made statements to the effect that if Area Managers received complaints that a Festool Retailer was not selling Festool Products at Specified Prices, the Area Managers were to obtain evidence that this was the case and then discuss the issue with the Festool Retailer:
 - (i) advising them that a complaint had been made that they were not selling Festool Products at the Specified Prices;

- (ii) advising them that it was in their commercial interests to sell Festool Products on features and benefits and not discounting the product; and
 - (iii) taking them through their P4P Agreement advising them that there was no need to be selling Festool Products to consumers less than the Specified Prices.
- 8. Holger Schulz acknowledges that his conduct referred to in paragraph 7 above, did not make it sufficiently clear that Festool Retailers were to remain free to set their own retail prices and that Area Managers should not say anything to the contrary to Festool Retailers.
- 9. Holger Schulz acknowledges that his conduct, together with deficient supervision and training of the Area Managers, may have contributed to an environment in which the alleged contraventions of section 48 of the TPA by Tooltechnic referred to in paragraph 4 occurred.
- 10. As part of the resolution of the ACCC's concerns, Holger Schulz has offered and the ACCC has accepted this undertaking in accordance with section 87B of the TPA

UNDERTAKINGS

- 11. Holger Schulz hereby undertakes, for the purposes of section 87B of the TPA, for a period of 3 years from the commencement date of this undertaking, that he will not induce by himself, his servants, agents or otherwise:
 - (a) Tooltechnic, by itself, its servants, agents or otherwise howsoever, in its wholesale supply or potential supply of Festool Products to Festool Retailers, to make statements to Festool Retailers or prospective Festool Retailers to the effect that:
 - (i) they cannot sell Festool Products at a price less than that specified by Tooltechnic or on behalf of Tooltechnic;
 - (ii) they cannot sell Festool Products at a price less than the Recommended Trade Price specified from time to time in the Annual Price List;
 - (iii) they are not permitted to discount Festool Products;
 - (iv) they will or may be treated less favourably by Tooltechnic if they sell Festool Products at a price less than that specified by Tooltechnic or on behalf of Tooltechnic; and
 - (v) they will or may lose some or all of their wholesale discount if they sell Festool Products at a price less than that specified by Tooltechnic or on behalf of Tooltechnic;

or

- (b) any corporation, by itself, its servants, agents or otherwise howsoever, engaging in conduct similar to that specified in paragraph 11(a)(i)-(v) above.

COMMENCEMENT OF UNDERTAKING

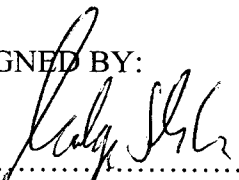
12. This undertaking comes into effect when:


- (a) the undertaking is executed by Holger Schulz; and
- (b) the undertaking so executed is accepted by the ACCC.

ACKNOWLEDGEMENTS

- 13. Holger Schulz acknowledges that the ACCC will make this undertaking available for public inspection.
- 14. Holger Schulz further acknowledges that the ACCC will from time to time publicly refer to this undertaking.
- 15. Holger Schulz further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.


SIGNED BY:


.....
Holger Schulz


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Witness

This 15 day of December 2006

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


.....
Graeme Julian Samuel
Chairman

This 17 day of January 2007 