

TRADE PRACTICES ACT 1974

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

BY

TMG ASIA PACIFIC PTY LTD (ACN 119 828 698)

AND

THE MOBILE GENERATION I BV

ACCEPTED SEPTEMBER 2008

BACKGROUND

1. The Australian Competition and Consumer Commission (**ACCC**) is investigating the misleading and deceptive nature of advertisements relating to competitions which are entered into by consumers through the use of their mobile telephones. The ACCC is concerned that advertisements promoting what are known as premium mobile telephone content services are misleading consumers as to:
 - a. the exact nature of the service being acquired by consumers;
 - b. the fact that such services are typically subscription services; and
 - c. the cost to consumers of subscribing to such services.
2. It is in the context of the ACCC's investigations in relation to the promotion of premium mobile telephone content services that The Mobile Generation I BV (**TMG BV**) and TMG Asia Pacific Pty Ltd (ACN 119 828 898) (**TMG AP**) have come to the attention of the ACCC. TMG AP is related body corporate of TMG BV.
3. The ACCC commenced proceedings in the Federal Court of Australia on 19 August 2008 (N1310 of 2008) alleging that TMG AP had engaged in misleading and deceptive conduct in promoting certain premium mobile telephone content services (the **Federal Court Proceedings**).
4. The Federal Court Proceedings have been resolved by consent orders being made by the Federal Court on 1 October 2008. Annexed and marked "A" is a copy of the Orders made in the Federal Court Proceedings. Those orders include:
 - a. declarations as to the fact that TMG AP engaged in misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (the Act);
 - b. injunctions preventing a repetition of the conduct;
 - c. orders that corrective advertisements be screened by TMG AP; and
 - d. an order ensuring TMG AP has in place an adequate trade practices compliance program.
5. TMG AP and TMG BV have co-operated with the ACCC in relation to the resolution of the Federal Court Proceedings.
6. In the context of TMG BV's co-operation with the ACCC in relation to the Federal Court Proceedings, the ACCC has been prepared to work with TMG BV in relation to the resolution of an investigation by the ACCC concerning separate

advertisements published on the internet promoting premium mobile telephone content services. The service the subject of the ACCC's investigation was promoted by Wixawin.

7. Wixawin is a business operated by TMG BV.
8. Wixawin operates a mobile entertainment website which offers, among other services, SMS competitions to participants in a number of different countries around the world, including Australia. In particular, Wixawin ran a competition to win a \$500 voucher redeemable at Woolworths' Limited (**Woolworths**) stores (the **Wixawin Competition**).
9. The Wixawin Competition was, among other means, promoted by an internet 'pop-up' screen which included representations to the effect that:
 - a. the Wixawin Competition was run by, associated with and/or endorsed by Woolworths Limited;
 - b. the Wixawin Competition could be entered by anyone, regardless of the Australian state or territory in which they resided; and
 - c. to be eligible to enter the Wixawin Competition, a person would only need to answer one question by sending, and incurring the cost for, a single standard text message,

whereas in fact:

- d. the Wixawin competition was not being run by Woolworths, it was not associated with Woolworths and was not endorsed by Woolworths;
- e. only people residing in NSW, SA, WA, TAS and NT were eligible to enter the competition; and
- f. to be eligible to enter, five (5) questions had to be answered at a cost of \$2.50 for each question asked and each question answered.

(the **Wixawin Competition Promotion**).

10. The ACCC received complaints including from Woolworths in relation to the fact that the Wixawin Competition Promotion was misleading and deceptive in contravention of section 52 of the Act, a conclusion also reached by the ACCC.
11. On or about 1 July 2008 TMG BV became aware of Woolworths' concerns and suspended the Wixawin Competition.
12. TMG BV and TMG AP have offered this undertaking to address the ACCC's concerns in relation to the Wixawin Competition Promotion.

Handwritten initials and a circled 'Q'.

13. The ACCC is prepared to accept this undertaking to bring an end to its investigation in relation to the Wixawin Competition Promotion because the ACCC is satisfied that this undertaking will ensure that TMG BV and TMG AP do not engage in the conduct the subject of the investigation. Additionally, the outcome achieved in the Federal Court Proceedings coupled with this undertaking will assist the ACCC in raising awareness with consumers and premium mobile telephone content providers as to the importance of advertisements promoting premium mobile telephone content services communicating clearly:
- a. the nature of services being provided;
 - b. who is eligible to enter the competition;
 - c. who the services are being promoted by; and
 - d. the terms and conditions (including as to price) to which consumer's agree when they acquire the services.

PERSON GIVING UNDERTAKING

14. This undertaking is given to the ACCC by each of TMG BV and TMG AP.

COMMENCEMENT OF UNDERTAKINGS

15. This undertaking comes into effect when:
- a. the undertaking is executed by each of TMG BV and TMG AP; and
 - b. the ACCC accepts the undertaking.

OBLIGATION TO PROCURE

16. Each of TMG BV and TMG AP will do all things necessary to procure that the obligations in this undertaking bind, and are given effect to by, their respective related bodies corporate (as that term is defined by the Act) and their respective agents.

UNDERTAKINGS

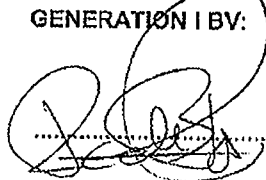
17. Each of TMG BV and TMG AP undertakes that in advertisements and/or promotions for premium mobile telephone content services, including SMS competitions, it will communicate clearly:
- a. who is eligible to enter the competition;
 - b. the nature of services being provided;
 - c. who the services are being promoted by; and
 - d. the terms and conditions (including as to price) to which consumer's agree when they acquire the services.
18. Without limitation, each of TMG BV and TMG AP will:

- a. ensure that services that are run as competitions Australian residents are eligible to enter are clearly promoted as being competitions and do not represent that the competition is endorsed by, or associated with, the manufacturer or supplier of the competition's prize, where that is not the case; and
- b. not use the trade marks or logos of manufacturers or retailers in the advertising material for any competitions where Australian residents are eligible to enter, other than for the purpose of describing a prize.

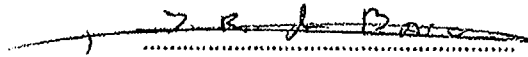
ACKNOWLEDGEMENTS

- 19. Each of TMG BV and TMG AP acknowledge that the ACCC will make this undertaking available for public inspection.
- 20. Each of TMG BV and TMG AP acknowledge that the ACCC will issue a media release in relation to this undertaking and may from time to time publicly refer to the undertaking.
- 21. Each of TMG BV and TMG AP acknowledge that this undertaking in no way derogates from the rights and remedies available to any person arising from the alleged conduct.

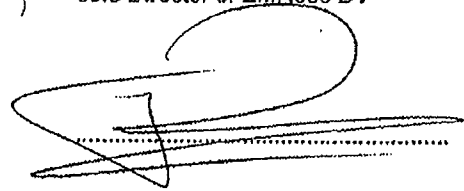
**EXECUTED by THE MOBILE
GENERATION I BV:**



Signature of Rudolph de Back, sole
Director of TOPSAM BV



) Signature of Johannes de Back,
) sole Director of EmRose BV



) Signature of Anthonius Kolenburg,
) sole Director of Orinoco BV

Dated: 2008

EXECUTED by TMG ASIA PACIFIC)
PTY LTD (ACN 119 828 698) in)
accordance with section 127(1) of the)
Corporations Act 2001 (CTH) by)
authority of its directors;



Signature of director

DAVID McLELLAN

Name of director (block letters)

~~HAND BACK~~

Signature of director/company
secretary*

*delete whichever is not applicable

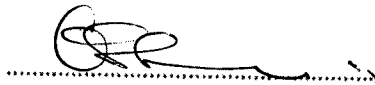
~~HAND DE BACK~~

Name of director/company
secretary* (block letters)

*delete whichever is not applicable

Dated: 30-9-2008

ACCEPTED BY THE AUSTRALIAN COMPETITION & CONSUMER
COMMISSION

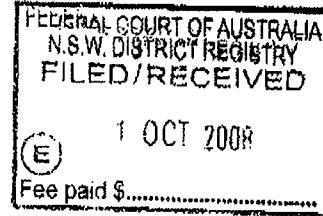


Graeme Julian Samuel
Chairman
Australian Competition and Consumer Commission

Dated: 3¹ October 2008

(Annexure A)

ORIGINAL



Form 47 Order
(Order 38, rule 4)

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

No: (P)NSD1310/2008

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Applicant

TMG ASIA PACIFIC PTY LTD ACN 119 828 698
Respondent

ORDER

JUDGE: Justice Cowdroy
DATE OF ORDER: 1 October 2008
WHERE MADE: Sydney



THE COURT DECLARES THAT:

1. The Respondent (TMG), by causing to be broadcast on television stations in Western Australia, New South Wales, Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, between November 2007 and August 2008, certain advertisements (the Advertisements):
 - 1.1 which contained representations that:
 - 1.1.1 a consumer responding to the Advertisements was entering a one-off competition;
 - 1.1.2 a consumer would be charged the price of one text message for entering the competition in response to the Advertisements;
 - 1.1.3 the total price that a consumer would be charged in order to become eligible to be awarded a prize would be the price of one text message;
 - and

Entered on behalf of the Respondent by:

Truman Hoyle Lawyers
Level 11/68 Pitt Street
Sydney NSW 2000

Contact: Hamish Fraser

File Ref: HP:8350
Telephone: 02 9226 9888
Facsimile: 02 9226 9899
Email: hfraser@trumanhoyle.com.au

- 1.1.4 any consumer responding to the Advertisements would be eligible to be awarded a prize in respect of the competition irrespective of the State or Territory in which the consumer normally resided;
- 1.2 which failed to disclose and/or failed sufficiently to disclose that:
 - 1.2.1 a consumer responding to the Advertisements was entering both a competition consisting of a maximum of 10 questions and a subscription service consisting of 6 messages per month, and could receive a further message requesting the consumer's address and up to 2 messages with details about the knock-out final of the competition;
 - 1.2.2 by entering the competition, the consumer would be charged a one-off joining fee of \$5, and at least an additional \$5 for receiving a message;
 - 1.2.3 in order for a consumer to become eligible to win a prize, the consumer would be charged a one-off joining fee of \$5, and all messages received by the consumer thereafter in order to qualify for the prize would be charged at \$5 each, with each message sent by the consumer charged at \$0.25 each;
 - 1.2.4 a consumer responding to the Advertisements was not eligible to be awarded a prize in respect of the competition if the consumer normally resided in Victoria, Queensland or the Australian Capital Territory, but would nonetheless incur the costs associated with entering the service,
- 1.3 has, in trade or commerce:
 - 1.3.1 engaged in conduct that was misleading or deceptive or was likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the Act);
 - 1.3.2 in connexion with the supply or possible supply of, or the promotion of the supply of services, made false or misleading representations with respect to the price of services in contravention of s 53(e) of the Act.
 - 1.3.3 in connexion with the supply or possible supply of, or with the promotion of the supply of services, made false or misleading representations with respect to the existence of a right of the consumer against the Respondent in contravention of s 53(g) of the Act.

THE COURT ORDERS BY CONSENT THAT:

1. TMG be restrained for a period of three (3) years from the date of these orders, whether by itself, its servants, agents or otherwise howsoever, from, in trade or commerce, supplying, or offering to supply, to any person, a premium mobile telephone content service by way of subscription without disclosing to the person:
 - 1.1 that the content service being provided is a subscription service; and
 - 1.2 what the person will receive from the subscription service.
2. TMG be restrained for a period of three (3) years from the date of these orders, whether by itself, its servants, agents or otherwise howsoever, from, in trade or commerce, supplying, or offering to supply, to any person, a premium mobile telephone content service without disclosing to the person the actual charges to be incurred for acquiring the content service.
3. TMG be restrained for a period of three (3) years from the date of these orders, whether by itself, its servants, agents or otherwise howsoever, in connexion with the supply or possible supply of, or the promotion of the supply of a premium mobile telephone content service from making representations as to the price of the content service without disclosing all conditions which apply to the price of the content service.
4. TMG be restrained for a period of three (3) years from the date of these orders, whether by itself, its servants, agents or otherwise howsoever, in connexion with the supply or possible supply of, or the promotion of the supply of, premium mobile telephone content services from making representations as to eligibility for being awarded a prize in a competition without disclosing all conditions which apply to such eligibility.
5. TMG be restrained for a period of three (3) years from the date of these orders, whether by itself, its servants, agents or otherwise howsoever, from, in trade or commerce, supplying, or offering to supply, to any person, a premium mobile telephone content service involving a prize, without disclosing to the person the charges to be incurred in order for the person to be eligible to win the prize.
6. TMG cause to be broadcast nationally, in accordance with the schedule annexed and marked "A", at its own expense, the corrective advertisement which is annexed in printed form and marked "B" stating that the Court has:
 - 6.1 declared that, by causing each of the Advertisements to be broadcast, TMG has engaged in conduct in contravention of ss 52 and 53 of the Act; and

- 6.2 made an order preventing TMG from engaging in such conduct in the future.
7. TMG:
- 7.1 within three (3) months of the date of the order, establish and maintain for a period of three (3) years a trade practices compliance program (the Compliance Program) for directors, employees or other persons involved in its business which is designed to ensure an awareness of the consumer protection provisions under ss 52 and 53 of the Act.
- 7.2 subject to the Compliance Program being tailored to TMG's circumstances, make reasonable endeavours to ensure it is consistent with the Australian Standard on Compliance Programs AS3806;
- 7.3 within one (1) month of the making of the order appoint a person with experience in trade practices law to advise the Respondent as to the content of the Compliance Program; and
- 7.4 within three (3) months of the making of the order, provide a written report to the Applicant on the content of the Compliance Program and provide a further report to the Applicant on the implementation and administration of the Compliance Program at the conclusion of each period of twelve months during which the Compliance Program is being implemented and administered.
8. TMG pay the Applicant's costs in the agreed amount of \$15,000.00.

Date that entry is stamped:

- 1 OCT 2008



Deputy District Registrar

A

Corrective
campaign

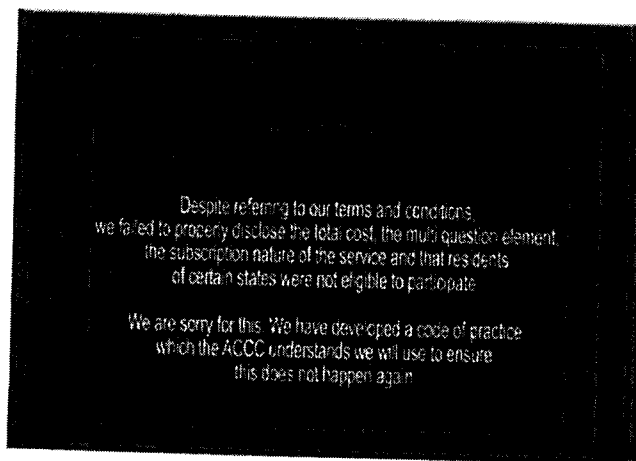
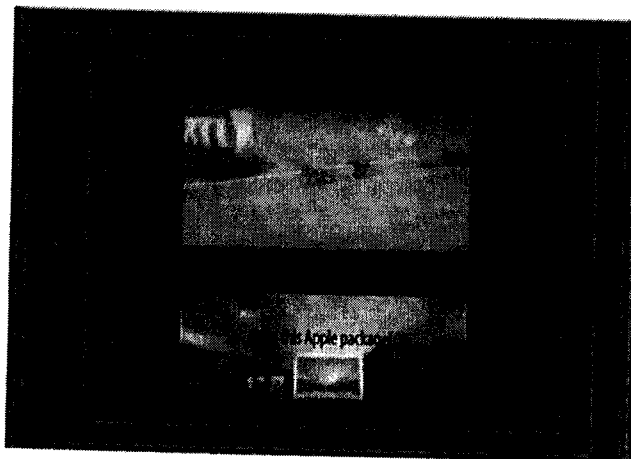
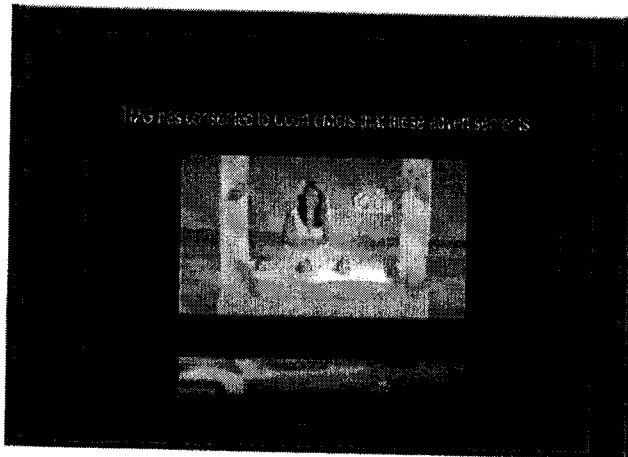
Market Type Code	Market	0:00-6:00	12:00-16:00	16:00-20:00	20:00-24:00	6:00-12:00	TOTAL
PAY TV	National	2	3	3	2	2	12
METRO	Adelaide	0	1	1	1	1	4
	Perth	0	1	1	0	1	3
	Sydney	0	1	1	0	1	3
REGIONAL	Darwin	0	1	0	0	0	1
	Northern NSW Aggregated	1	2	1	1	1	6
	Port Pirie/Broken Hill	0	1	0	0	0	1
	Queensland Aggregated	0	1	0	0	1	2
	Satellite	0	1	1	0	0	2
	Southern NSW Aggregated	1	2	1	1	1	6
	Tasmania Aggregated	1	1	1	1	1	5
	Western Australia	1	2	1	0	1	5
TOTAL		6	17	11	6	10	50

Most used programmes

Market Type Code	Market	0:00-6:00	12:00-16:00	16:00-20:00	20:00-24:00	6:00-12:00
PAY TV	National	MTV + Vh1	MTV + Vh1	MTV + Vh1	MTV + Vh1	MTV + Vh1
METRO	Adelaide		Midday Movie	Seven News	Saturday Movie	Seven Morning News
	Perth		Midday Movie	Seven News		Seven Morning News
	Sydney		Midday Movie	Seven News		Seven Morning News
REGIONAL	Darwin		Midday Movie			
	Northern NSW Aggregated	Movie	Midday Movie + Dr. Phil	Bold And The Beauif	Movie	Video Hits
	Port Piter/Broken Hill		Midday Movie			
	Queensland Aggregated		Midday Movie			Kerri-Anne
	Satellite		Bold And The Beauif	Neighbours		
	Southern NSW Aggregated	Movie	Midday Movie + Dr Phil	Seven News at 4.30	Movie	Video Hits
	Tasmania Aggregated	Movie	Drama	Neighbours	Nightline	Family
	Western Australia	Movie	Midday movie + Saints And Sinners	Seven News		The Morning show

Screenshots TMG 30 sec. corrective ad (key number JPAUCOR01030)

B



Please note that the different green/grey frames in screen indicate so called broadcast safe areas and won't be visible on TV.