

TRADE PRACTICES ACT 1974

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

BY
MILDON PTY LTD trading as CHALLENGE INTERNATIONAL
(AUST)
ACN 074 470 769

PERSON GIVING UNDERTAKING

This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Mildon Pty Ltd (ACN 074 470 769) trading as Challenge International (Aust) (**Challenge International**) of 4 Wandarri Court, Cheltenham Victoria 3192, under section 87B of the *Trade Practices Act 1974* (**the Act**).

GLOSSARY

'Consumer Protection Notice' means a notice issued by the Minister pursuant to 65C(5) of the Act.

'Cosmetic product' has the meaning given by section 3 of the Cosmetics Standard namely, a substance or preparation intended for placement in contact with any external part of the human body, including:

- (a) the mucous membranes of the oral cavity; and
- (b) the teeth;

with a view to:

- (c) altering the odours of the body; or
- (d) changing its appearance; or
- (e) cleansing it; or
- (f) maintaining it in good condition; or
- (g) perfuming it; or
- (h) protecting it.

'Cosmetics Standard' means the *Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991*.

'DEG' means diethylene glycol.

'DEG ban' means the ban on the supply of toothpaste containing more than 0.25% by weight of DEG for a period of eighteen months, as declared on 3 August 2007 in the Commonwealth of Australia *Consumer Protection Notice No. 9 of 2007*, pursuant to sub-section 65C(5) of the Act.

'packaging' includes container.

'prescribed consumer product safety standard' has the meaning given by section 65C of the Act.

'prescribed consumer product information standard' has the meaning given by section 65D of the Act and relevantly, includes the Cosmetics Standard.

'Product' means the Cosmetic products identified in paragraph 8.

BACKGROUND

1. Challenge International is the sole Australian importer of a particular range of Chinese-manufactured toothpaste, mouthwash and other cosmetic products (**the Challenge product range**). Challenge International supplies the Challenge product range to wholesalers and retailers, predominantly discount stores (**its customers**), throughout Australia.
2. Prior to about November 2007 Challenge International supplied toothpaste and mouthwash products in the Challenge product range to its customers under the brand name 'Tri Leaf'. Currently, it supplies the Challenge product range to its customers under the brand name 'Natural Bliss'.
3. The Cosmetics Standard requires, amongst other things, that the ingredients of a Cosmetic product be listed on the container, or on the product itself if the product is not packaged in a container, in descending order by volume or mass.
4. Section 65C of the Act prohibits a corporation from supplying goods whether there is a Consumer Protection Notice declaring the goods to be unsafe. Section 65D of the Act prohibits a corporation from supplying goods that do not comply with the requirements of a prescribed consumer product information standard.
5. In September 2008, a complaint was referred to the ACCC alleging that a consumer had suffered an allergic reaction after using *Tri Leaf Total Care Plus Whitening Minty Stripe Toothpaste* (**the Tri Leaf Total Care Product**). It was alleged that the allergic reaction was to a green food colour additive that was not listed as an ingredient in the Tri Leaf Total Care Product.
6. On 17 September 2008, the ACCC wrote to Challenge International raising concerns that it had supplied Cosmetic products that contained a colour additive that was not listed as an ingredient on the products or the packaging of the products and by so doing had failed to comply with the Cosmetics Standard.
7. After reviewing the material provided by Challenge International in response to the ACCC's correspondence, the ACCC identified further labelling concerns in relation to the Tri Leaf Total Care Product, as well as other products in the Challenge product range.
8. Following the ACCC's investigation, Challenge International admits that it supplied Products that did not comply with the Cosmetics Standard, as follows:
 - 8.1 between about October 2005 and about June 2008, Challenge International supplied the Tri Leaf Total Care Product, which:
 - (a) contained CI 74260 and sodium monofluorophosphate, but did not list either as an ingredient on the product or its packaging; and
 - (b) did not list the ingredients of the product in correct order by volume mass;
 - 8.2 between about March 2003 and about August 2008, Challenge International supplied 'Tri Leaf 2 in 1 Toothpaste', which:
 - (a) contained CI 42090, CI 19140 and sodium fluoride, but did not list any of those chemicals as an ingredient on the product or its packaging; and
 - (b) did not contain triclosan and sodium monofluorophosphate, but listed both as active ingredients on the packaging of the product; and

- (c) did not list the ingredients of the product in correct order by volume mass;
- 8.3 between about July 2005 and about October 2008, Challenge International supplied 'Tri Leaf Cool Kids Berry Fruit Toothpaste', which:
 - (a) did not contain aroma, limonene and benzyl alcohol, but listed all as ingredients on the packaging of the product; and
 - (b) did not list the ingredients of the product in correct order by volume mass;
- 8.4 between about March 2008 and about September 2008, Challenge International supplied 'Natural Bliss 2 in 1 Toothpaste', which:
 - (a) contained CI 42090, CI 19140 and trisodium phosphate, but did not list any of those chemicals as an ingredient on the packaging of the product; and
 - (b) did not list the ingredients of the product in correct order by volume mass;
- 8.5 between about December 2007 and about October 2008, Challenge International supplied 'Natural Bliss Freshmint Toothpaste', which:
 - (a) contained sodium monofluorophosphate, but did not list it as an ingredient on the product or the packaging of the product; and
 - (b) did not list the ingredients of the product in correct order by volume mass;
- 8.6 between about March 2008 and about October 2008, Challenge International supplied 'Natural Bliss Active Freshmint Mouthwash', which:
 - (a) contained Allantoin, but did not list it as an ingredient on the product or its packaging; and
 - (b) did not list the ingredients of the product in correct order by volume mass;
- 8.7 during the period of 2005 to about July 2007, and prior to the DEG ban coming into effect, Challenge International supplied 'Tri Leaf Whitening Toothpaste', 'Tri Leaf Freshmint Cavity Control Pump Pack', 'Price Spearmint Toothpaste' and 'Tri Leaf Spearmint Toothpaste', certain batches of which contained DEG in higher levels than 0.25%, but did not list DEG as an ingredient on the products or the packaging of the products.
- 9. Challenge International acknowledges that:
 - 9.1 by engaging in the conduct described in paragraph 8 above excluding 8.2(b) and 8.3(a), it is likely to have contravened section 65D of the Act; and
 - 9.2 by engaging in the conduct described in paragraph 8 above including 8.2(b) and 8.3(a), Challenge International may have misled or deceived consumers in contravention of sections 52 and 53(a) of the Act.
- 10. Section 52 of the Act prohibits conduct that is misleading or deceptive or that is likely to mislead or deceive. Section 53(a) of the Act provides that a corporation will not, in trade or commerce, in connexion with the supply or possible supply of goods or services falsely represent that goods are of a particular composition.

RESOLUTION OF CONCERNS

- 11. Upon being made aware of the ACCC's concerns, Challenge International:
 - 11.1 ceased supply of the Products;

- 11.2 voluntarily took steps to have the Products withdrawn from sale by its customers, including by seeking written confirmation from its customers that they had removed the Products from sale; and
- 11.3 offered this Undertaking to the ACCC pursuant to section 87B of the Act.

COMMENCEMENT

12. This undertaking comes into effect when:
 - 12.1 the Undertaking is executed by Challenge International; and
 - 12.2 the ACCC accepts the Undertaking so executed,
(the commencement of this Undertaking).
13. Upon the commencement of this Undertaking, Challenge International undertakes to assume the obligations set out in paragraphs 14 to 15.

UNDERTAKINGS

14. Challenge International undertakes to the ACCC, for the purposes of section 87B of the Act, that:
 - 14.1 whether by itself or by the conduct of its directors, agents or employees, it will not in trade or commerce, supply Cosmetic products which do not comply with the Cosmetics Standard; and
 - 14.2 whether by itself or by the conduct of its directors, agents or employees, it will not in trade or commerce, supply toothpaste products:
 - (a) that do not comply with any applicable prescribed consumer product safety standard;
 - (b) in respect of which the DEG ban applies; and
 - (c) in respect of which there is a permanent ban under s65C(7) of the Act.
 - 14.3 prior to supplying or offering to supply a Cosmetic product in Australia that is subject to a prescribed consumer product safety standard or a prescribed consumer product information standard, Challenge International will request and receive from its supplier written confirmation that the Cosmetic product complies with any applicable prescribed consumer product safety standard or prescribed consumer product information standard;
 - 14.4 prior to supplying or offering to supply a Cosmetic product in Australia, Challenge International will request and receive from its supplier written confirmation:
 - (a) of the complete list of ingredients in the Cosmetic product in descending order by volume or mass; and
 - (b) that the supplier will advise Challenge International within a reasonable time period in writing of any changes to the ingredients (including presence in volume or mass relative to other ingredients) in the Cosmetic product;
 - 14.5 prior to supplying or offering to supply a toothpaste product in Australia, Challenge International will obtain independent verification from an agency

accredited with the National Association of Testing Authorities Australia (NATA) that a sample of each batch of any such toothpaste product has been tested and that the product:

- (a) is not a product to which the DEG ban applies;
 - (b) is not a product to which any permanent ban under s65C(7) of the Act applies; and
 - (c) complies with any applicable prescribed consumer product safety standard.
15. Challenge International undertakes to the ACCC, for the purposes of section 87B of the Act, that it will:
- 15.1 establish and implement a Trade Practices Compliance Program in accordance with the requirements set out in “**Annexure A**” for the employees of or other persons responsible for the packaging and marketing of products supplied by Challenge International’s business, being a program designed to ensure compliance with sections 52, 53, 65C and 65D of the Act and awareness of its responsibilities and obligations in relation to the requirements of those sections;
 - 15.2 maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this Undertaking coming into effect; and
 - 15.3 provide, at its own expense, a copy of any documents required by the Commission in accordance with Annexure A within the time period specified.

ACKNOWLEDGEMENTS

- 16. Challenge International acknowledges that the ACCC will make this undertaking available for public inspection.
- 17. Challenge International further acknowledges that the ACCC will from time to time publicly refer to this undertaking.
- 18. Challenge International further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct

EXECUTED BY

Mildon Pty Ltd (ACN 074 470 769) and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.


.....
Signature (Director/Secretary)


.....
Signature (Director/Secretary)

Fred Bianchi
.....
Print Name

Michael Chen
.....
Print Name

This *12* day of *12* 2008

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT
1974.**


.....
Graeme Julian Samuel
Chairperson

This *19th* day of *December* 2008

Annexure A

TRADE PRACTICES COMPLIANCE PROGRAM

Mildon Pty Ltd (ACN 074 470 769) trading as Challenge International (Aust) (**Challenge International**) will establish a Trade Practices Compliance Program (**the Compliance Program**) that complies with each of the following requirements:

1. Appointments

- 1.1. Within 1 month of the date of the Undertaking coming into effect Challenge International will appoint a Director or a Senior Manager of the business to be responsible for the development, implementation and maintenance of the compliance program (**the Compliance Officer**).

2. Compliance Officer Training

- 2.1. Challenge International will ensure that, within 2 months of the Undertaking coming into effect, the Compliance Officer attends practical trade practices training focusing on sections 52, 53, 65C and 65D of the Trade Practices Act (**the Act**);
- 2.2. Challenge International will ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law; and
- 2.3. Challenge International, within 14 days of completion of training, will provide the ACCC with a written statement from the compliance professional or legal practitioner confirming the completion of the training conducted in accordance with 2.1 and 2.2 above.

3. Staff Training

- 3.1. Challenge International will cause all employees of Challenge International whose duties could result in them being concerned with conduct that may contravene sections 52, 53, 65C and 65D of the Act to receive regular (at least once a year) practical training administered by the Compliance Officer (once trained) or a qualified, compliance professional or legal practitioner with expertise in trade practices law, that focuses on sections 52, 53, 65C and 65D of the Act.

4. Complaints handling – Challenge International will:

- 4.1. develop procedures for recording, storing and responding to trade practices complaints within 2 months of the Undertaking coming into effect; and
- 4.2. provide the ACCC with a written outline of the complaint handling system within 2 months of the Undertaking coming into effect.

5. **Product Safety** – Challenge International will:
 - 5.1. maintain up-to-date copies, at its business premises, of all:
 - 5.1.1.1. prescribed consumer product safety standards and prescribed consumer information standards that relate to products Challenge International supplies; and
 - 5.1.1.2. all bans relating to a cosmetic product as defined in the Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991;and ensure that they are readily available to all employees of Challenge International;
 - 5.2. ensure that the products supplied that are subject to a prescribed safety and/or information standard under the Act, comply with the relevant standard; and
 - 5.3. design, implement and maintain recall procedures that enable products supplied by Challenge International that do not comply with prescribed safety and/or information standards under the Act to be efficiently and effectively withdrawn from the market and returned to Challenge International.
6. Challenge International will ensure that the Compliance Officer reports to their director(s) or governing body every 12 months on the continuing effectiveness of the Compliance Program.
7. **Review** – Challenge International will, at its own expense, cause an annual review of the Compliance Program elements (**the Review**) to be carried out in accordance with each of the following requirements:
 - 7.1. **Scope of the Review** – Challenge International will ensure that the Review is broad and rigorous enough to:
 - 7.1.1. provide Challenge International and the ACCC with a supportable verification that Challenge International has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of Challenge International; and
 - 7.1.2. provide the Review Report and opinions detailed at point 8 below.
 - 7.2. **Independence of Reviewer** - Challenge International will ensure that the Review is 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:
 - 7.2.1. did not design or implement the Compliance Program;
 - 7.2.2. is not a present or past staff member or director of Challenge International;

- 7.2.3. has not acted and does not act for Challenge International in any trade practices related matters;
 - 7.2.4. has not and does not act for or consult to Challenge International or provide other services on trade practices related matters to Challenge International other than Compliance Program reviewing; and
 - 7.2.5. has no significant shareholding or other interests in Challenge International.
- 7.3. **Evidence** - Challenge International will use its best endeavors to ensure that the Review is able to be conducted on the basis that the Reviewer has access to all relevant sources of information in Challenge International's possession or control, including without limitation:
- 7.3.1. enquiries of any employees, representatives, agents and stakeholders of Challenge International;
 - 7.3.2. documents created by Challenge International's consultants, legal practitioners and accountants for use in Challenge International's Compliance Program; and
 - 7.3.3. all documents required to assess Challenge International's compliance with the relevant product safety/information standards under the Act.
- 7.4. Challenge International will ensure that the first Review is completed within one year and one month of this Undertaking coming into effect and that each subsequent Review is completed within one year thereafter.

8. Reporting

- 8.1. Challenge International will use its best endeavours to ensure that the Reviewer sets out the findings of the Review in a Trade Practices Compliance Program Review Report, which will provide particular and specific information regarding the scope of the Review and the effectiveness of the Trade Practices Compliance Program including:
- 8.1.1. details of the evidence gathered and examined during the Review;
 - 8.1.2. the name and relevant experience of the person appointed as the Challenge International Compliance Officer;
 - 8.1.3. the Reviewer's opinion on whether Challenge International has in place effective staff training, complaints handling programs that comply with the requirements of the Undertaking; and
 - 8.1.4. actions recommended by the Reviewer to ensure the continuing effectiveness of Challenge International's Compliance Program.

- 8.2. Challenge International will ensure that each Trade Practices Compliance Program Review Report is completed and provided to Challenge International within one month of completion of the Review.
 - 8.3. Challenge International will cause the Trade Practices Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.
 - 8.4. Challenge International will implement promptly and with due diligence any recommendations made by the Reviewer or required by the ACCC that are reasonably necessary to ensure that Challenge International maintains and continues to develop the Compliance Program elements in accordance with the requirements of this Undertaking.
9. If requested by the ACCC Challenge International will, at its own expense, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.