

TRADE PRACTICES ACT 1974

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

BY

DODO AUSTRALIA PTY LTD

(ACN 097 636 970)

PERSON GIVING UNDERTAKING

1. This Undertaking is given to the Australian Competition and Consumer Commission ('ACCC') by Dodo Australia Pty Ltd (ACN 097 636 970) ('Dodo') of Level 14, 600 St Kilda Road in the State of Victoria under section 87B of the *Trade Practices Act 1974* ('the Act').

BACKGROUND

2. Dodo provides telecommunications services to Australian consumers and businesses, including local and long distance fixed line services, mobile phone services, and internet connection services (through dial-up, ADSL, ADSL2+ and mobile wireless services).
3. From about December 2007 to 2 March 2009, Dodo made the following statements to purchasers of an outright handset or other hardware product without an associated mobile plan (**Affected Purchasers**):
 - 3.1. on its website, in the 'terms and conditions' section:

No refunds will be given on purchases.
 - 3.2. on its website, in the 'view important information' section, and in its Standard Form of Agreement (**SFOA**):
 - *If you receive a faulty or dead mobile handset on delivery, please contact Dodo immediately and we will arrange to replace the handset.*
 - *If the handset becomes faulty within 14 days of the date of invoice, please contact Dodo immediately and we will arrange to replace the handset.*
 - *If the handset becomes faulty outside the 14 day period but within the manufacturer's warranty period, you will need to return the handset to the manufacturer's authorised repair centre at your own cost. Dodo will not be responsible for honouring the manufacturer's warranty. It is the responsibility of the manufacturer to repair or replace the handset according to the terms of its warranty.*

(collectively referred to as the **No Refund Representations**).

4. The ACCC was concerned that the No Refund Representations likely represent to consumers that they are not entitled to a refund on the purchase of a mobile phone in any circumstances, when consumers have a statutory right to refunds in certain circumstances.

5. The ACCC considers that Dodo, by making the No Refund Representations:
 - 5.1. engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 52 of the Act; and
 - 5.2. made false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee right or remedy in contravention of section 53(g) of the Act.
6. Dodo caused advertisements to be published on its website from 31 October 2008 to 24 March 2009 and broadcasted on television at various times from 31 October 2008 to 12 December 2008 (collectively referred to as the **Advertisements**) which included representations to the effect that a consumer would receive specified goods or cash for 'free' or at no cost from Dodo when they sign up for a minimum term of 24 months to one of the specified mobile telephone plans being offered by Dodo (the **Free Offers**).
7. The specified mobile telephone plans referred to in the Advertisements were the:
 - 7.1. \$29.90 Mobility Cap Plan;
 - 7.2. Free Fuel Mobile Cap 50, 130, 320 and 600; and
 - 7.3. Cash Offer Cap 50, 130, 320, 600 and Unlimited(collectively referred to as the **Relevant Plans**)
8. The ACCC was concerned that the Advertisements likely represented to consumers that they would receive specified goods or cash for free or at no cost when that may not be the case as the consumer pays a higher monthly fee for the mobile phone plans associated with the Free Offers than the consumer would otherwise pay for a comparable mobile phone plan (in services and included value) that was also being offered by Dodo.
9. The ACCC considers that Dodo, by making the representations about the Free Offers:
 - 9.1. engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 52 of the Act; and
 - 9.2. offered gifts or free items with the intention of not providing them, or of not providing them as offered in contravention of section 54 of the Act.
10. Dodo acknowledges that by making the No Refund Representations and causing the Advertisements to be published and broadcast it engaged in conduct that is likely to have contravened sections 52, 53(g) and 54 of the Act.
11. In resolution of this matter, Dodo has given this undertaking to the ACCC and the ACCC has accepted this undertaking pursuant to section 87B of the Act.

COMMENCEMENT

12. This undertaking comes into effect when:
 - (a) the undertaking is executed by Dodo; and
 - (b) the ACCC accepts this undertaking so executed by Dodo.
13. Upon the commencement of this undertaking, Dodo undertakes to assume the obligations set out in paragraphs 14 to 20 below.

UNDERTAKINGS

Future representations

14. Dodo undertakes that it will not, for a period of 3 years from the date of this undertaking coming into effect, whether by itself, its directors, servants or agents or otherwise howsoever, in trade or commerce:
 - 14.1. make the No Refund Representations;
 - 14.2. make a representation to the effect that a consumer is not entitled to a refund on the purchase of a mobile phone or other product in any circumstances or when a consumer may have a statutory right to a refund under the Act; or
 - 14.3. make a representation to the effect that a consumer will receive specified goods, cash or services for free from Dodo (the **Free Goods or Services**) when they sign up to a plan for any of the telecommunications services being offered by Dodo when a similar plan is being offered for supply by Dodo at a lower cost to the consumer without the Free Goods or Services.

Letter to consumers

15. Dodo undertakes that it will, within 21 days of the date of this undertaking coming into effect, send a notice in the form of **Annexure A** to all Affected Purchasers.
16. Dodo undertakes that it will, within 21 days of the date of this undertaking coming into effect, send a notice in the form of **Annexure B** to all persons who are on any of the Relevant Plans.
17. For each consumer on a Relevant Plan, Dodo undertakes that it will:
 - 17.1. change each consumer's Relevant Plan monthly fee to the corresponding Cheap Cap Plan's monthly fee (in the case of the Cash Offer Cap Unlimited plan for which there is no Cheap Cap equivalent to \$99.90 per month) as detailed in **Annexure C** which shall then be the consumer's New Relevant Plan monthly fee for the remainder of the consumer's 24 month contract;
 - 17.2. automatically credit the consumer's mobile plan account with the 'Overpaid Monthly Amount' as detailed in **Annexure C** for each month for which the consumer has paid the Relevant Plan monthly fee; and
 - 17.3. otherwise provide to each consumer on a Relevant Plan the same terms, conditions and benefits, including flagfall and call rates and call rate charge time intervals applicable to each Relevant Plan.
18. Dodo undertakes that it will within 7 days of sending the notices to all the Affected Purchasers and all the persons who are on the Relevant Plans advise the ACCC in writing that it has so sent the notices.
19. Dodo undertakes that it will within 42 days but not earlier than 35 days after sending the notices to all the Affected Purchasers and all the persons who are on the Relevant Plans advise the ACCC in writing whether:

- 19.1. it has changed each consumer's Relevant Plan monthly fee to the corresponding Cheap Cap Plan's monthly fee (in the case of the Cash Offer Cap Unlimited plan for which there is no Cheap Cap equivalent to \$99.90 per month) as required by paragraph 17.1 above and if not, provide detail of each consumer whose Relevant Plan's monthly fee has not been changed, the reason why it has not been changed and the action Dodo proposes to take to ensure it is changed;
- 19.2. it has automatically credited each consumer's mobile plan account with the 'Overpaid Monthly Amount' as required by paragraph 17.2 above and if not, provide detail of each consumer whose mobile plan account has not been automatically credited, the reason why it has not been automatically credited and the action Dodo proposes to take to ensure it is automatically credited; and
- 19.3. any Affected Purchaser has contacted Dodo in relation to the notice sent by Dodo and for each such Affected Purchaser also provide:
 - 19.3.1. their name and contact detail;
 - 19.3.2. the purpose of the contact; and
 - 19.3.3. if the Purchaser wished to make or discuss a claim, detail of the nature of the claim, the remedy sought by the Affected Purchaser and the remedy provided by Dodo.

Compliance Program

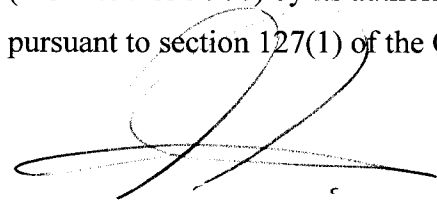
20. Dodo undertakes that it will:
 - 20.1. revise its Trade Practices Compliance Program to ensure that it complies with the requirements set out in '**Annexure D**', for the employees or other persons involved in Dodo's business, being a program designed to minimise Dodo's risk of future breaches of sections 52, 53(g) and 54 of the Act and to ensure its awareness of the responsibilities and obligations in relation to the requirements of Part V of the Act within 3 months of the date of this Undertaking coming into effect;
 - 20.2. 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
 - 20.3. provide, at its own expense, a copy of any documents required by the ACCC in accordance with **Annexure D**.

Acknowledgments

21. Dodo acknowledges that the ACCC will make this undertaking available for public inspection.
22. Dodo further acknowledges that the ACCC will from time to time publicly refer to this undertaking.
23. Dodo further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

24. Dodo further acknowledges that a summary of the Commission Compliance Program Review reports referred to in Annexure D of the Undertaking may be held with this undertaking on the public register.

Executed by Dodo Australia Pty Ltd)
(ACN 097 636 970) by its authorised officers)
pursuant to section 127(1) of the Corporations Act 2001)



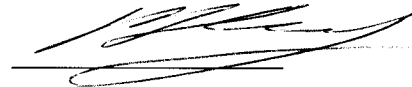
Signature

LARRY KESTELMAN

Print name

DIRECTOR

Office held



Signature

MICHAEL SUTER

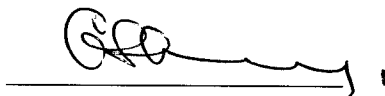
Print name

DIRECTOR

Office held

This 23 day of April 2009

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



Graeme Julian Samuel

Chairperson

This 5th day of ~~April~~ ^{May} 2009

Annexure A

Re: Your recent purchase from the Dodo Mobile Store (www.dodo.com.au)

An issue has been brought to our attention by the Australian Competition and Consumer Commission regarding the terms and conditions and the warranty information published on our website. We are writing to provide you with further information about the conditions that apply to the purchase of your product from Dodo, to ensure you are aware of your rights as a consumer.

Important conditions of purchase information

Please be aware that all products supplied by Dodo, including the product that you purchased, come with **statutory conditions under the Trade Practices Act 1974, which cannot be excluded**. The manufacturer's warranty that came with the product is in addition to these statutory conditions.

When you purchased your product, published on our website in the 'Payments terms' section of the 'Terms and Conditions' was the statement '**No refunds will be given on purchases**'. Further statements were published on our website under the heading 'IMPORTANT WARRANTY INFORMATION'.

Dodo wishes to point out to you that the statutory conditions that apply to the product you have purchased include a requirement that any goods sold by Dodo:

- are of *merchantable quality*;
- are reasonably *fit for the purpose* for which they are supplied; and
- *match any description or sample* provided by Dodo.

If any of these statutory conditions are breached, you are entitled to a refund.

If you wish to make or discuss a claim in relation to the product you have purchased or to discuss your rights pursuant to those statutory conditions please contact Dodo on 1300 582 840 or by email at warranty@dodo.com.au.

Dodo is committed to the observance of all laws and the highest ethical standards, and we strive to provide excellent customer service.

Thank you shopping with Dodo and we look forward to providing you with excellent products and service in the future.

Yours faithfully

Dodo Customer Service

Annexure B

Corrective Notice for Relevant Plans

CORRECTIVE NOTICE

A CORRECTION FROM DODO

You recently signed up to a 24 month mobile phone plan with Dodo, which included a ['free' fuel card/cash amount credited to your card or account or an Asus Eee PC 701SD].

The Australian Competition and Consumer Commission (ACCC) has raised concerns with Dodo that the 'free' representations made in the advertisements for these plans were likely to be misleading because Dodo also offered a similar mobile phone plan for a lower monthly fee without the ['free' fuel card/cash payment or an Asus Eee PC 701SD].

Dodo has given the ACCC an enforceable undertaking to refrain from making those representations which were of concern to the ACCC, to reduce the monthly cost to you of your plan, and to credit to your account the amount of the monthly fee that you have overpaid to date.

Effective immediately, we have reduced your monthly plan fee from [\$insert mobile cap amount] to [\$insert cheap cap amount] and have credited to your account the sum of \$XX.00.

We apologise for any inconvenience. You can contact Dodo on 1300 582 240.

Annexure C

| Relevant Plan | Relevant Plan monthly fee | Corresponding Cheap Cap Plan | Corresponding Cheap Cap Plan monthly fee | Overpaid Monthly Amount |
|----------------------------------|----------------------------------|-------------------------------------|---|--------------------------------|
| \$29.90 Mobility Cap Plan | \$29.90 | Cheap cap 130 | \$19.90 | \$10.00 |
| Free Fuel Mobile Cap 50 | \$19.90 | Cheap Cap 50 | \$12.90 | \$7.00 |
| Free Fuel Mobile Cap 130 | \$29.90 | Cheap Cap 130 | \$19.90 | \$10.00 |
| Free Fuel Mobile Cap 320 | \$49.90 | Cheap cap 320 | \$29.90 | \$20.00 |
| Free Fuel Mobile Cap 600 | \$79.90 | Cheap Cap 600 | \$49.90 | \$30.00 |
| Cash Offer Cap 50 | \$19.90 | Cheap Cap 50 | \$12.90 | \$7.00 |
| Cash Offer Cap 130 | \$29.90 | Cheap Cap 130 | \$19.90 | \$10.00 |
| Cash Offer Cap 320 | \$49.90 | Cheap cap 320 | \$29.90 | \$20.00 |
| Cash Offer Cap 600 | \$79.90 | Cheap Cap 600 | \$49.90 | \$30.00 |
| Cash Offer Cap Unlimited | \$129.90 | No equivalent Cheap Cap | \$99.90 | \$30.00 |

Annexure D

TRADE PRACTICES COMPLIANCE PROGRAM

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

Appointments

1. Within one month of the date of the Undertaking coming into effect Dodo 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. Dodo shall appoint a qualified, internal or external compliance professional with expertise in trade practices issues (**the Compliance Advisor**) within 3 months of the Undertaking coming into effect, for the purposes set out in paragraph 3.
3. Dodo shall instruct the Compliance Advisor to conduct a Trade Practices Act risk assessment (**the Risk Assessment**) in accordance with 3.1 to 3.5 below:
 - 3.1. identify the areas where Dodo is at risk of breaching Part V of the *Trade Practices Act 1974* (**the Act**), in particular sections 52, 53(g) and 54 of the Act;
 - 3.2. assess the likelihood of these risks occurring and the consequences of the risks to the business operations of Dodo should they occur;
 - 3.3. identify where there may be gaps in Dodo's existing procedures for managing these risks;
 - 3.4. review all consumer information currently published by Dodo for the purpose of ensuring they do not have the effect of excluding or limiting in any way the conditions and warranties implied by the Act into a contract between Dodo and a consumer for the supply of goods and/or services; and
 - 3.5. provide recommendations for action having regard to the assessment.
4. Within 14 days of the Compliance Advisor providing to Dodo the recommendations for action as required by paragraph 3.5 above, Dodo shall provide to the ACCC a report in writing detailing the recommendations provided by the Compliance Advisor and the action taken by Dodo to address those recommendations.
5. Dodo will, issue a policy statement outlining Dodo's commitment to trade practices compliance (**the Compliance Policy**). Dodo will ensure the Compliance Policy:
 - 5.1. is written in plain language;

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

Complaints Handling System

6. Dodo 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

7. Dodo 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 Dodo, whose duties could result in them being concerned with conduct that may contravene Part V of the Act. The training program will be designed to ensure the employees' awareness of the responsibilities and obligations in relation to Part V of the Act, in particular sections 52, 53(g) and 54 of the Act. Dodo must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
8. Dodo 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 V of the Act.

Reports to Senior Management

9. Dodo will ensure that the Compliance Officer reports to the Board and/or senior management meetings every 6 months on the continuing effectiveness of the Compliance Program.

Supply of Compliance Program Documents to the Commission

10. Dodo shall, at its own expense, within 6 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. Dodo will implement promptly and with due diligence any recommendations the Commission may make that are reasonably necessary to ensure that Dodo maintains and continues to implement the Compliance Program in accordance with the Undertaking.

Review

11. Dodo 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:
 - 11.1. **Scope of the Review** – the Reviews should be broad and rigorous enough to provide Dodo and the Commission with supportable verification that the Dodo has in place a program that complies with each of the requirements detailed in paragraphs 1-10 above and to provide the Review reports and opinions detailed at point 12 below.
 - 11.2. **Independence of Reviewer** - Dodo 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:
 - 11.2.1. did not design or implement the Compliance Program;
 - 11.2.2. is not a present or past staff member or director of Dodo;
 - 11.2.3. has not acted and does not act for Dodo in any trade practices related matters;
 - 11.2.4. has not and does not act for or consult to Dodo or provide other services on trade practices related matters other than Compliance Program reviewing; and
 - 11.2.5. has no significant shareholding or other interests in Dodo.
 - 11.3. **Evidence** - Dodo 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 Dodo's possession or control, including without limitation:
 - 11.3.1. enquiries of any officers, employees, representatives, agents and stakeholders of Dodo;
 - 11.3.2. Dodo's records, including the company's complaints register/reports and any documents relevant to the Dodo training or induction program; and
 - 11.3.3. documents created by the Dodo's consultants and legal practitioners for use in the Dodo's Compliance Program.
 - 11.4. Dodo shall 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.

Reporting

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

Company Compliance Program Review Report (to be provided to Dodo)

- 12.1. Dodo Trade Practices Review Report will provide particular and specific information regarding the performance of the Trade Practices Compliance Program including:
 - 12.1.1. if, and to what extent, the Compliance Program of the Dodo includes all the elements detailed in paragraphs 1-11 above;
 - 12.1.2. if, and to what extent, the trade practices training is effective;
 - 12.1.3. if, and to what extent, Dodo's complaints handling system is effective;
 - 12.1.4. recommendations for rectifying deficiencies in 12.1.1 to 12.1.3 that the Reviewer thinks are reasonably necessary to ensure that Dodo maintains and continues to implement the Compliance Program in accordance with the requirements of the Undertaking.

Commission Compliance Program Review Report (to be provided to the Commission)

- 12.2. 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:
 - 12.2.1. details of the evidence gathered and examined during the Review;
 - 12.2.2. the name and relevant experience of the person appointed as the company Compliance Officer;
 - 12.2.3. the Reviewer's opinion on whether Dodo has in place an effective Trade Practices Compliance Program that complies with the requirements detailed in paragraph 1 – 11 above;
 - 12.2.4. the Reviewer's opinion on if, and to what extent, the Dodo has complied with the Trade Practices Compliance Program component of the Undertaking;
 - 12.2.5. actions recommended by the Reviewer to ensure the continuing effectiveness of the Dodo's Trade Practices Compliance Program;

- 12.2.6. confirmation that any actual and potential inadequacies in Dodo Compliance Program have been brought to the attention of the Compliance Officer and the governing body;
 - 12.2.7. confirmation that the Reviewer has revisited any actual and potential inadequacies in the Dodo's Compliance Program identified in the previous Compliance Program Review Report (to be provided to Dodo), and assessed how they have been addressed by Dodo;
 - 12.2.8. 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
 - 12.2.9. any comments or qualifications concerning the Review process that the Reviewer, in his or her professional opinion, considers necessary.
- 12.3. Dodo will ensure that the Review Reports are completed and provided to Dodo within two months of each Review.
 - 12.4. Dodo 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.
- 13. **Recommendations** - Dodo shall implement promptly and with due diligence any recommendations made by the Reviewer or required by the Commission, that are reasonably necessary to ensure that Dodo maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.
 - 14. Dodo shall, at its own expense, if requested by the Commission, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.

In the event the Commission has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Dodo 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.