

TRADE PRACTICES ACT 1974

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

BY

OPTUS MOBILE PTY LIMITED

(ACN 054 365 696)

Persons giving this Undertaking

- (1) This Undertaking is given to the Australian Competition and Consumer Commission (**the ACCC**) by Optus Mobile Pty Limited ACN 054 365 696 (**Optus**) of 1 Lyonpark Road, Macquarie Park NSW 2133 under section 87B of the *Trade Practices Act 1974* (**the TPA**).

Background

- (2) Optus operates a mobile telecommunications business within Australia which includes the sale of mobile telephone handsets (**mobile handsets**).

Statutory consumer rights

- (3) Part V Division 2 of the TPA implies certain statutory rights into consumer contracts. Statutory rights give consumers a basic, guaranteed level of protection for goods and services they acquire and such rights cannot be excluded or limited by suppliers. There are two types of statutory rights implied by the TPA: statutory warranties and statutory conditions (collectively, **implied warranties**).
- (4) Statutory warranties are to the effect that a consumer who has purchased goods or services from a supplier is entitled to:
- (i) own the goods outright;
 - (ii) services carried out with due care and skill; and
 - (iii) services that are fit for the purpose for which they were supplied.
- (5) Statutory conditions are to the effect that a supplier must:
- (i) give the consumer clear title to the goods;
 - (ii) supply goods of merchantable quality;
 - (iii) supply goods fit for the purpose for which they were supplied; and
 - (iv) supply goods that match the description or the sample given to the consumer.
- (6) On 13 July 2010, the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (ACL Act)* received Royal Assent. The ACL Act completes the implementation of the Australian Consumer Law (**ACL**) and on 1 January 2011 will change the name of the TPA to the *Competition and Consumer Act 2010* which will include the ACL as a schedule. The ACL replaces the implied warranties under Part

V Division 2 of the TPA with consumer guarantees (**consumer guarantees**). Consumer guarantees operate in the same way as implied warranties – they give a basic guaranteed level of warranty protection to consumers and cannot be excluded or limited. For the purposes of this Undertaking, implied warranties and consumer guarantees will be referred to as statutory consumer rights when referring to both.

- (7) If an implied warranty is breached by a supplier, the consumer is entitled to a remedy (and similarly in relation to a breach of a consumer guarantee from 1 January 2011). The type of remedy depends on the circumstances but may include a repair, replacement of goods or a refund. There may be circumstances where suppliers and consumers have different good faith views as to whether a consumer is entitled to a particular remedy in relation to a breach of a statutory consumer right.
- (8) Representations by a supplier that a consumer is not entitled to a remedy pursuant to the statutory consumer rights may contravene sections 52 and 53(g) of the TPA (and from 1 January 2011, sections 18 and 29(1)(m) of the ACL in relation to consumer guarantees). Section 52 of the TPA prohibits conduct that is misleading or deceptive or that is likely to mislead or deceive. Section 53(g) of the TPA prohibits the making of false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Conduct of Concern - Misrepresentations in relation to implied warranties

- (9) The ACCC has received a significant number of complaints relating to Optus' supply of mobile handsets that at the time of supply were not of merchantable quality, not fit for the purpose for which they were supplied and/or did not match the description given by Optus to the consumer (**a faulty mobile handset**).
- (10) The ACCC has concerns that the remedies made available by Optus to its customers who complained of receiving a faulty mobile handset in the period from about July 2009 to 6 August 2010 were limited to those under the mobile handset manufacturer's express warranty policy and did not include remedies arising from the implied warranties under the TPA.
- (11) As a result, the ACCC is concerned that Optus is likely to have contravened sections 52 and 53(g) of the TPA in that, during the period from about July 2009 to 6 August 2010, Optus made representations to those customers who had purchased a faulty mobile handset from Optus and complained after the manufacturer's dead-on-arrival/early-life-failure warranty period (**the DOA/ELF period**) had expired, to the effect that they were not entitled to a refund or replacement mobile handset.
- (12) Optus acknowledges that:
 - (i) Optus representatives were likely to have made representations to those customers who had purchased a faulty mobile handset from Optus and complained after the DOA/ELF period had expired, to the effect that they were not entitled to a refund or replacement mobile handset when in fact a refund or replacement mobile handset may have been a remedy available to them pursuant to their rights under the implied warranties under the TPA; and
 - (ii) by engaging in the conduct referred to in subparagraph 12(i) above, Optus is likely to have made false and misleading representations to its customers about their rights under the implied warranties in breach of sections 52 and 53(g) of the TPA.

- (13) Optus further acknowledges that it can improve the way it responds to customers who inform Optus that a mobile handset supplied to them is faulty. In order to do so Optus :
- (i) has introduced an extended express repair warranty for mobile handsets so that customers who are supplied a mobile handset and who connect to an Optus postpaid mobile service pricing plan for 24 months on or after 14 November 2010 (other than satellite handsets and handsets purchased using technology funds or equipment credits) will be entitled to claim under their express repair warranty for a period of 24 months from the date of purchase of the mobile handset (**Extended Handset Warranty**). The terms of the Extended Handset Warranty are at Attachment A to this Undertaking; and
 - (ii) has introduced an extended DOA/ELF period for mobile handsets supplied by Optus which is a minimum of 30 days for handsets of the following manufacturers:
 - (a) Nokia;
 - (b) Sony;
 - (c) Ericsson;
 - (d) LG; and
 - (e) Research in Motion (Blackberry)
- (14) For the avoidance of doubt, Optus customers' rights under the Extended Handset Warranty and applicable extended DOA/ELF periods are in addition to their other rights in relation to faulty mobile handsets, including their statutory consumer rights under the TPA, and from 1 January 2011, the ACL. Specifically, Optus acknowledges that there will be circumstances where a customer is entitled to a replacement mobile handset or a refund where their mobile handset is found to be a faulty mobile handset after the DOA/ELF period has expired and prior to the 24 month service contract ending.
- (15) In addition, to improve its customer handling processes, Optus has:
- (i) significantly increased the number of loan handsets available to customers when their mobile handset is under repair by rolling out additional loan mobile handsets to 'yes' Optus Stores; and
 - (ii) decided to take a number of internal measures, including conducting further trade practices compliance training of its staff.

Commencement of Undertaking

- (16) This Undertaking commences when:
- (i) the Undertaking is executed by Optus; and
 - (ii) the ACCC accepts the Undertaking so executed;
- (17) Upon the commencement of this Undertaking, Optus undertakes to assume the obligations set out in paragraphs 19 to 25 below.

Undertakings

- (18) Optus provides the following undertakings for the purposes of section 87B of the TPA.

Statutory Consumer Rights

- (19) Optus undertakes that for a period of 3 years from the commencement of this Undertaking, it will not in trade or commerce, in connection with the promotion, supply or possible supply of mobile handsets, make any false or misleading representation to a consumer about their statutory consumer rights to the effect that the consumer is not entitled to a refund or replacement mobile handset when this is not the case.

Extended Handset Warranty

- (20) Optus further undertakes that for a period of three years from the commencement of this Undertaking, it will continue to provide the Extended Handset Warranty to customers who purchase a mobile handset from Optus on a 24 month post paid mobile service contract.

Extended DOA/ELF periods

- (21) Optus further undertakes that, for a period of three years from the commencement of this Undertaking, it will:
- (i) continue to provide the extended DOA/ELF period to all consumers who purchase a mobile handset from Optus which is a minimum of 30 days for mobile handsets of the following manufacturers:
 - (a) Nokia;
 - (b) Sony;
 - (c) Ericsson;
 - (d) LG; and
 - (e) Research in Motion (Blackberry).
 - (ii) provide a replacement mobile handset to those consumers who have purchased a mobile handset from Optus which is found to be a faulty mobile phone within the DOA/ELF period.

Repairs

- (22) Optus undertakes for the purposes of section 87B of the TPA that for a period of three years from the commencement of this Undertaking it will take all reasonable steps to ensure repairs to faulty mobile handsets are completed in a timely manner.

Consumer Redress

- (23) Optus further undertakes that it will, as soon as possible, and in any event no later than 60 days from the date this Undertaking comes into effect, provide appropriate consumer redress, including where appropriate repairs, replacements or refunds, to

those Optus customers with an active unresolved complaint existing as at the date of this Undertaking and which is no more than 6 months old (whether that complaint is being assessed by Optus or by the Telecommunications Industry Ombudsman) and who is able to demonstrate in good faith having been supplied by Optus with a faulty mobile handset.

- (24) Optus further undertakes that it will, within 90 days from the date this Undertaking comes into effect, provide a report to the ACCC outlining:
- (i) The number of active unresolved complaints existing as at the date of this Undertaking and which were no more than 6 months old (whether that complaint was being assessed by Optus or by the Telecommunications Industry Ombudsman);
 - (ii) The number of such complaints that were resolved; and
 - (iii) The redress to customers that has been provided in accordance with paragraph 23 above.

Compliance Program

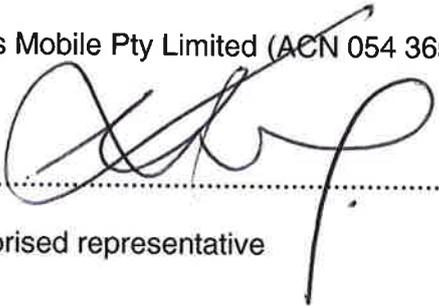
- (25) Optus further undertakes that it will:
- (i) within 60 days from the date this Undertaking comes into effect, review its existing trade practices compliance program to ensure that appropriate procedures and systems are in place to convey to Optus staff the obligations under the statutory consumer rights provisions and prohibitions on misleading or deceptive conduct and false or misleading representations in the TPA, and from 1 January 2011, the ACL;
 - (ii) within 60 days from the date this Undertaking comes into effect, implement any appropriate changes to its trade practices program identified in the review; and
 - (iii) within 90 days from the date this Undertaking comes into effect, provide a report to the ACCC outlining the outcome of the review and what changes were implemented.

Acknowledgements

- (26) Optus acknowledges that:
- (i) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of s. 87B undertakings on its website;
 - (ii) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications;
 - (iii) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed by

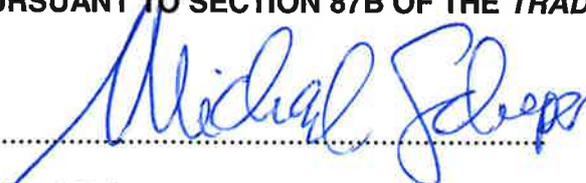
Optus Mobile Pty Limited (ACN 054 365 696) and by its authorised representative.



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Authorised representative

This 23rd day of Dec 2010

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



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Michael Schaper
Acting Chairman

This SIXTH day of JANUARY 2011