

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

by

Dragon Alliance South Pacific Pty Ltd

ACN 090 616 005

Persons giving this Undertaking

- (1) This Undertaking is given to the Australian Competition and Consumer Commission (the **ACCC**) by Dragon Alliance South Pacific Pty Ltd (ACN 090 616 005) (**Dragon**) of 101 West Fyans Street, Newtown, VIC, 3220 for the purposes of section 87B of the *Competition and Consumer Act 2010* (the **CCA**).

Background

- (2) Dragon sells and distributes a range of sports equipment and accessories in Australia, including: ski goggles, motocross goggles and sunglasses (**Dragon Products**). Dragon sells Dragon Products online and distributes Dragon Products in Australia through a network of approximately 400 retailers. At least nine of the retailers sell Dragon Products online.
- (3) In or around August 2009, October 2009 and May 2010, Dragon sent a standard form online trading agreement (the **2009 OTA**) to four retailers that sell Dragon Products online (**Online Retailers**). Clause 11 of the 2009 OTA stated:

"11. SALE OF DRAGON GOODS ON THE INTERNET

Subject to the Retailer obtaining Dragons consent pursuant to the provisions of sub clause 10.1 hereof, the Retailer may sell Dragon products on the internet... subject to the following provisions, namely:- ...

11.3 That in selling Dragon products on the internet, the Retailer will not sell the products below Dragon's recommended retail prices; ..."

- (4) On 11 August 2009 Dragon's National Sales Manager for and on behalf of Dragon sent an email attaching the 2009 OTA to one of the Online Retailers which stated:

"I have attached the on-line trading agreement for you to review, there are ... 3 main points for you to review;

1) - The requirement to adhere to recommended retail pricing on-line..."

- (5) Dragon specifies its recommended retail prices for Dragon Products on the order forms it sends to Online Retailers.
- (6) The ACCC considers that by engaging in the conduct described in paragraphs (3) to (5), Dragon contravened section 48 of the *Trade Practices Act 1974* (the TPA) because Dragon:
 - (a) made it known to the Online Retailers that it would not supply Dragon Products to the Online Retailers unless the Online Retailers agreed not to sell Dragon Products at prices less than the prices specified by Dragon;
 - (b) attempted to induce the Online Retailers not to sell Dragon Products at prices less than the prices specified by Dragon;
 - (c) entered, or offered to enter, into agreements with the Online Retailers for the supply of Dragon Products to the Online Retailers which contained a term that the Online Retailers would not sell Dragon Products at prices less than the prices specified by Dragon; and
 - (d) used, in relation to Dragon Products supplied to Online Retailers, statements of price, namely the recommended retail prices, that were likely to be understood by the Online Retailers as the prices below which Dragon Products are not to be sold.
- (7) Dragon admits that the conduct described at paragraphs (3) to (5) above contravened section 48 of the TPA.
- (8) In response to the ACCC's concerns Dragon has:
 - (a) ceased the conduct;
 - (b) revised the 2009 OTA by deleting clause 11.3 (the **2010 OTA**); and
 - (c) offered these Court enforceable undertakings to the ACCC pursuant to section 87B of the CCA.

Commencement of Undertaking

- (9) This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Dragon; and
 - (b) the ACCC accepts the Undertaking so executed.
- (10) Upon the commencement of this Undertaking, Dragon undertakes to assume the obligations set out in paragraphs 11 to 13 below.

Undertakings

- (11) Dragon undertakes for the purposes of section 87B of the CCA that it will not, by itself, its servants or agents, or otherwise for a period of three years:
- (a) make it known to any retailer of Dragon Products in Australia (**Australian Retailer**) that it will not supply Dragon Products to an Australian Retailer unless the Australian Retailer agrees not to sell Dragon Products at a price less than a price specified by Dragon;
 - (b) induce or attempt to induce any Australian Retailer not to sell Dragon Products at a price less than a price specified by Dragon;
 - (c) use, in relation to Dragon Products supplied to any Australian Retailer, a statement of price that is likely to be understood by the Australian Retailer as the price below which Dragon Products are not to be sold; or
 - (d) enter, or offer to enter, into an agreement with any Australian Retailer for the supply of Dragon Products to the Australian Retailer which contains a term that the Australian Retailer will not sell Dragon Products at a price less than a price specified by Dragon.
- (12) Dragon undertakes for the purposes of section 87B of the CCA that it will, at its own expense, within 14 days of this Undertaking coming into effect, send a letter in the terms of Annexure A to each Online Retailer:
- (a) advising of the ACCC's concerns regarding the 2009 OTA;
 - (b) advising that Dragon withdraws the 2009 OTA with immediate effect;
 - (c) substituting the 2010 OTA for the 2009 OTA; and
 - (d) informing the Online Retailer that it is free to set the minimum price at which they advertise or sell Dragon Products.
- (13) Dragon undertakes for the purposes of section 87B of the CCA that it will, at its own expense:
- (a) implement a Trade Practices Compliance Program to ensure that Dragon meets the requirements set out in Annexure B for the employees and other persons involved in its business, being a program designed to minimise Dragon's risk of future breaches of section 48 of the CCA and to ensure awareness of Dragon's responsibilities and obligations in relation to the requirements of Part IV of the CCA, in particular section 48;
 - (b) maintain and continue to implement the Trade Practices Compliance Program for a period of three years from the date of this Undertaking coming into effect; and

- (c) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure B.

Acknowledgments

- (14) Dragon acknowledges that:
 - (a) 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;
 - (b) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications; and
 - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed by

Dragon Alliance South Pacific Pty Ltd (ACN 090 616 005) pursuant to section 127(1) of the *Corporations Act 2001*.


.....

Director/Secretary

William H. Howard
.....

Print name


.....

Director/Secretary

BRAD SAFFIN
.....

Print name

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE *COMPETITION AND
CONSUMER ACT 2010*.**


.....

Graeme Julian Samuel
Chairman

This *24th* day of *February* 2011

ANNEXURE A

LETTER TO DRAGON RETAILERS

[To be placed on Dragon letterhead] [To Dragon Retailer][insert address]

Dear Sir/madam (or personalise)

Australian Competition and Consumer Commission (ACCC)

Between August 2009 and May 2010, Dragon distributed an Online Trading Agreement to a number of Dragon's retailers (**2009 OTA**). The 2009 OTA set out the way which in Dragon's retailers were permitted to advertise Dragon products online. Clause 11.3 of the 2009 OTA stated: '*in selling Dragon products on the internet, the Retailer will not sell the products below Dragon's recommended retail prices.*'

The ACCC contacted Dragon and expressed concern that in circulating the 2009 OTA, Dragon was likely to have engaged in resale price maintenance.

As an explanation, resale price maintenance is an attempt by a supplier (i.e. Dragon) to set a minimum price below which its retailers cannot sell, advertise, display or offer goods for sale. It is prohibited by section 48 of the Trade Practices Act 1974 (*Cth*) (**Act**).

Dragon has admitted that its conduct contravened the Act. In response to the ACCC's concerns, on or about XX, Dragon agreed to withdraw the 2009 OTA and revise it by deleting paragraph 11.3 (**revised Online Trading Agreement**). Please see the revised Online Trading Agreement **attached**. Dragon has also provided court enforceable undertakings to the ACCC to minimise the risk of any trade practices issues arising in the future. I am writing to you pursuant to those undertakings (which you can view on the ACCC's undertakings register at www.accc.gov.au).

Please note that as a retailer of Dragon products, you are free to set the minimum price at which you advertise or resell products you purchase from Dragon. This right is provided by the Act. Any "recommended retail price" or "RRP" used or set by Dragon (or any other supplier for that matter) is a suggestion only.

I have enclosed for your further information an ACCC publication titled '*Resale Price Maintenance*'. You can also obtain further information about the Act generally from the ACCC website at www.accc.gov.au.

If you have any questions regarding Dragon's online resale price advertising policy please contact XX or me.

Yours sincerely XX

ANNEXURE B

TRADE PRACTICES COMPLIANCE PROGRAM

Dragon Alliance South Pacific Pty Ltd (ACN 090 616 005) (**Dragon**), will implement a Trade Practices Compliance Program (the **Compliance Program**) that complies with each of the following requirements:

1. Training

- 1.1. Within three months of this Undertaking coming into effect, and thereafter at least once a year for the period of the Undertaking, Mr Brad Saffin, Managing Director and Mr Mark Hudson, National Sales Manager will attend practical trade practices training focusing on Part IV, Division 2, and in particular section 48 of the *Trade Practices Act 1974* (Cth) (the **Act**).
- 1.2. Dragon will ensure that the training referred to in paragraph 1.1 is administered by a suitably qualified, compliance professional or legal practitioner with expertise in trade practices law.
- 1.3. Dragon will provide a written statement or certificate from the trade practices professional who conducts the training referred to in paragraph 1.1 to the Australian Competition and Consumer Commission (the **ACCC**) within 14 days of completion of the training verifying that such training has occurred.

2. Complaints handling

- 2.1. Within two months of this Undertaking coming into effect, Dragon will:
 - 2.1.1. develop procedures for recording, storing and responding to trade practices complaints; and
 - 2.1.2. provide the ACCC with an outline of the complaint handling system developed.

3. Provision of documents

- 3.1. If requested by the ACCC, Dragon will provide, at its own expense, copies of any other documents or information in respect of matters which are the subject of the Compliance Program.