

# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by  
BVivid Pty Ltd ACN 619 543 547

## 1. Person giving the Undertaking

1.1. This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by BVivid Pty Ltd ACN 619 543 547 (BVivid) for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (CCA).

## 2. Background

- 2.1. BVivid supplies telecommunications services, including fixed phone, ADSL and NBN services to Australian businesses and consumers. It uses the Telstra network to supply some of its services.
- 2.2. From October 2017, BVivid, through a wholly owned subsidiary in India, CTI Pvt Ltd, employed staff in India to market its services by unsolicited telephone marketing to prospective Australian consumers.
- 2.3. In marketing its NBN services to prospective consumers, BVivid made unsolicited contacts to consumers in an NBN-ready area for the purpose of selling BVivid NBN services to the consumer. On each occasion that BVivid sold its NBN services to a consumer, BVivid entered into an unsolicited consumer agreement (as defined by section 69 of the Australian Consumer Law (ACL), contained in Schedule 2 to the CCA).
- 2.4. The ACCC considers that in the course of marketing its NBN services between October 2017 and May 2018, BVivid made false or misleading representations to some consumers to the effect that the consumer should immediately switch to the NBN to avoid either disconnection of their landline or losing their landline number, when this was not required.
- 2.5. In many instances, those representations led consumers to transfer from their current telecommunications services provider to BVivid without those consumers fully understanding the nature of the services they were signing up to or the NBN migration process.
- 2.6. In addition, in some instances, between October 2017 and August 2018, BVivid:
  - a) failed to conspicuously and prominently inform consumers of their termination rights in the agreement document;
  - b) failed to set out BVivid's business address;
  - c) failed to provide a notice to the consumer that could be used to terminate the agreement when sending out the agreement document;
  - d) accepted payment in connection with BVivid's NBN services during the cooling off period (the period of time before which services can be supplied or payment can be accepted in relation to the services) by accepting payment from the consumer for the NBN modem required to connect to NBN services; and

- e) supplied NBN services to the consumer within the cooling off period (which, for agreements negotiated by telephone, is ten business days after the day on which the consumer was given the agreement document).

### **Relevant Provisions**

- 2.6 Section 18 of the ACL prohibits a person, in trade or commerce, from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive.
- 2.7 Section 29(1)(l) of the ACL prohibits a person, in trade or commerce, in connection with the supply or possibly supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services from making a false or misleading representation concerning the need for any goods or services.
- 2.8 Section 79 of the ACL requires that a supplier under an unsolicited consumer agreement must ensure that the agreement, or (if the agreement was negotiated by telephone), the agreement document, complies with certain requirements, including:
- a) its front page must include a notice that conspicuously and prominently informs the consumer of the consumer's right to terminate the agreement;
  - b) it must set out the supplier's business address, not being a PO box; and
  - c) it must be accompanied by a notice that may be used by the consumer to terminate the agreement.
- 2.9 Section 86(1) of the ACL requires that a supplier under an unsolicited consumer agreement must not:
- a) supply to the consumer under the agreement the goods or services to be supplied under the agreement; or
  - b) accept any payment, or any other consideration, in connection with those goods or services
- during (if the agreement was negotiated by telephone) the period starting on the day on which the agreement was made and ending at the end of the tenth business day after the day on which the consumer was given the agreement document (the cooling off period).

### **Contraventions**

- 2.10 The ACCC considers, and BVivid admits, that the conduct described at paragraphs 2.4-2.5 above is likely to have contravened sections 18, 29(1)(l), 79 and 86(1) of the ACL.
- 2.11 In order to resolve this matter, BVivid has offered this Undertaking to the ACCC pursuant to section 87B of the CCA and by the payment of two Infringement Notices totalling \$25,200 issued by the ACCC pursuant to section 134A(1) of the ACL for the alleged contravention of sections 79 and 86(1) of the ACL.

## **3 Commencement of this Undertaking**

3.1 This Undertaking comes into effect when:

- a) the Undertaking is executed by BVivid; and

- b) the ACCC accepts the Undertaking so executed (the **Commencement Date**).

3.2 Upon the Commencement Date, BVivid undertakes to assume the obligations set out in paragraphs 4.1-4.7 below.

#### **4 Undertaking**

##### ***Future conduct***

4.1 BVivid undertakes that for a period of three years from the Commencement Date, it will not, whether by itself, its officers, employees, representatives or agents, in trade or commerce, in connection with the promotion, supply or possibly supply of telecommunications services make any representation, whether express or implied, to customers that they must switch to the NBN immediately to avoid disconnection of their landline or lose their landline number, when that is not the case.

4.2 BVivid undertakes, for a period of three years from the Commencement Date that whenever it enters into an unsolicited consumer agreement, it will:

- a) provide each consumer with an agreement which complies with the requirements of the unsolicited consumer agreement provisions of the ACL; and
- b) not supply services to the consumer or require payment in connection with those services during the cooling off period.

##### ***Consumer redress program***

4.3 BVivid undertakes that it will within 30 days of the Commencement Date:

- a) identify each former or current BVivid customer who as a result of a telemarketing call from BVivid transferred telecommunications services from another telecommunications service provider to BVivid between 1 October 2017 to the date of this Undertaking (**Relevant Customers**). Relevant Customers include customers who after receipt of a telemarketing call from BVivid, were asked to telephone BVivid to conclude the transaction; and
- b) write to each of the Relevant Customers in the form set out in Annexure A (**Corrective Letter**) by email or, where BVivid does not have a Relevant Customer's email address, by letter.

4.4 In the event that BVivid is contacted by a Relevant Customer requesting to either terminate their contract with BVivid or obtain a refund of any termination fee previously paid to BVivid, BVivid will provide a response to that Relevant Customer within seven days advising that BVivid will:

- a) allow such a termination and any transfer to that Relevant Customer's chosen telecommunications service provider without the need to pay termination fee or penalty; and
- b) provide a refund of the termination fee paid within 30 days of receiving that request.

BVivid will consider all requests in a reasonable manner and engage with all Relevant Customers in good faith.

4.5 BVivid further undertakes that it will within three months after the Commencement Date, advise the ACCC in writing of:

- a) the number of Relevant Customers who requested a transfer of their telecommunications services from BVivid;
- b) the number of Relevant Customers who have been allowed to transfer their telecommunications services from BVivid to another telecommunications service provider without charge or penalty;
- c) the number of Relevant Customers who requested a refund of any termination fee previously charged by BVivid;
- d) the number of Relevant Customers who have been given a refund of any termination fee charged; and
- e) the name and contact details of any Relevant Customers that BVivid did not allow to transfer or to transfer without charge or penalty or did not provide a refund as requested and the reason why that request was denied.

#### ***Compliance Program***

4.6 BVivid undertakes that it will implement a Compliance Program in accordance with Annexure B.

#### ***ACCC requests for information***

4.7 During the period of this Undertaking, the ACCC may make reasonable inquiries of BVivid about its compliance with this Undertaking and BVivid will provide any documents and/or information sought within a reasonable period of time as agreed between the parties.



### **5 Acknowledgments**

5.1 BVivid acknowledges that:

- a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- b) the ACCC may, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications;
- c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and
- d) a summary of the ACCC Compliance Program review reports referred to in Annexure B of this Undertaking may be held with this Undertaking in the public register.

**Executed as an Undertaking**

Executed by BVivid Pty Ltd ACN 619 543 547 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director/ <del>company secretary</del> (delete as appropriate, or entire column if sole director company)
Simon Yu	MARCUS SHEERAN
Name of director (print)	Name of director/company secretary (print)
9-JUL-2019	9-JULY-2019
Date	Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

Date

and signed on behalf of the Commission:

~~Chair~~

ACTING CHAIR



9.9.2019

Date

## **Annexure A – Corrective Letter**

Dear ...

We may have breached the Australian Consumer Law regarding your NBN service. As a result of an agreement with the ACCC, you may be entitled to exit from your BVivid contract without having to incur any termination fee or to claim a refund for a previous termination fee.

### **Why has this happened?**

When your area is ready to be connected to the NBN, you generally have 18 months to move your service to the NBN. There are also many different providers and plans to choose from. However when we called you to sign you up to BVivid, our telephone calls may have been misleading in relation to your need to transfer to the NBN or your options when doing so.

This may have included:

- **if we told you that you had to switch to the NBN immediately** as your landline would be disconnected or you would lose your landline number; or
- **if you did not understand what you were signing up to with us because you didn't know you were changing from your existing telecommunications provider, or you had other choices of providers.**

**If you feel this applies to you, contact us on 1300 833 177 to arrange for an exit without incurring a termination fee or a refund of your termination fee.**

### **Questions?**

If you have any questions about this letter, you can contact us on 1300 833 177 or via our website at [www.bvivid.com.au](http://www.bvivid.com.au).

Yours sincerely

## **Annexure B – Compliance Program**

### **COMPETITION AND CONSUMER LAW COMPLIANCE PROGRAM**

BVivid Pty Ltd (BVivid) will establish a Competition and Consumer Compliance Program (Compliance Program) that complies with each of the following requirements:

#### **Appointments**

1. Within one month of the Commencement Date, BVivid will:

- 1.1 engage a suitably qualified, independent compliance professional with expertise in consumer law to conduct a review of all BVivid's policies, practices and procedures relating to its sales and transfer methodology to ensure compliance with the Australian Consumer Law (ACL), being Schedule 2 of the *Competition and Consumer Act 2010*. The compliance professional will also consider commissions paid by BVivid to its sales representatives, the impact this may have on the sales practices of these representatives and provide any recommendations in this regard; and
- 1.2 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).

#### **Compliance Officer Training**

2. Within one month of the appointment of the Compliance Officer, BVivid will ensure that the Compliance Officer attends practical training focusing on sections 18, 29 and the Unsolicited Consumer Agreement provisions of the ACL.
3. BVivid will ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in consumer law.

#### **Complaints Handling**

4. Within one month of the Compliance Officer completing the training at paragraph 2 above, BVivid will develop procedures for recording, storing and responding to consumer law complaints (Complaints Handling System).
5. The procedures specified in 4. above must include arrangements for the recording and retention of the recording of all telemarketing calls that conclude in any agreement with consumers for the supply of telecommunications services. Such recordings are to be retained for the term of each agreement plus a further 12 months.

#### **Staff Training**

6. BVivid will cause all employees of BVivid whose duties could result in them being concerned with conduct that may contravene sections 18, 29 and the Unsolicited Consumer Agreement provisions of the ACL to receive regular (at least once a year) training administered by the Compliance Officer (once trained) or a qualified compliance professional or legal practitioner with expertise in consumer law, that focuses on sections 18, 29 and the Unsolicited Consumer Agreement provisions of the ACL.
7. BVivid will ensure awareness of consumer compliance issues forms part of the induction of all new directors, officers and employees whose duties could result in possible breaches of the ACL, and particularly those sections listed at 6 above.



## **Reporting to Board/Senior Management**

8. BVivid will ensure that the Compliance Officer reports to BVivid's director(s) or governing body every 12 months on the continuing effectiveness of the Compliance Program.

## **Compliance Review**

9. BVivid will, at its own expense, cause a review of the Compliance Program (the Review) to be completed one year after the Commencement Date and carried out in accordance with each of the following requirements:

- 9.1 **Scope of Review** – the Review should be broad and rigorous enough to provide BVivid and the ACCC with:

- 9.1.1 verification that BVivid has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of BVivid; and

- 9.1.2 the Compliance Report detailed at paragraph 10 below.

- 9.2 **Independent Reviewer** – BVivid will ensure that the Review is carried out by a suitably qualified, independent compliance professional with expertise in consumer law (the Reviewer). The Reviewer will qualify as independent on the basis that he or she:

- 9.2.1 did not design or implement the Compliance Program;

- 9.2.2 is not a present or past staff member or director of BVivid;

- 9.2.3 has not acted and does not act for, and does not consult and has not consulted to, BVivid in any competition or consumer law related matters, other than performing Reviews under this Undertaking; and

- 9.2.4 has no significant shareholding or other interests in BVivid.

- 9.3 **Evidence** - BVivid will use its best endeavours to ensure that the Review is conducted on the basis that the Reviewer has access to all relevant sources of information in BVivid's possession or control, including without limitation:

- 9.3.1 the ability to make enquiries of any officers, employees, representatives and agents of BVivid;

- 9.3.2 documents relating to BVivid's Compliance Program, including documents relevant to BVivid's Complaints Handling System and Staff Training; and

- 9.3.3 any reports made by the Compliance Officer to BVivid's director(s) or governing body regarding BVivid's Compliance Program.

## **Compliance Report**



10. BVivid will use its best endeavours to ensure that within one month of the Review, the Reviewer includes the following findings of the Review in a report to BVivid (the **Compliance Report**):

10.1 whether the Compliance Program of BVivid includes all the elements detailed in paragraphs 1-8 above, and if not, what elements need to be included or further developed;

10.2 whether the Staff Training is effective, and if not, what aspects need to be further developed;

10.3 whether BVivid's Complaints Handling System is effective, and if not, what aspects need to be further developed; and

10.4 whether there are any material deficiencies in BVivid's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program (**Material Failure**), and if so, recommendations for rectifying the Material Failure(s)<sup>1</sup>.

#### **BVivid Response to Compliance Report**

11. BVivid will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:

11.1 provides the Compliance Report to the director(s) or governing body of BVivid; and

11.2 where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to BVivid's director(s) or governing body identifying how BVivid can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.

12. BVivid will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

#### **Reporting Material Failures to the ACCC**

13. Where a Material Failure has been identified by the Reviewer in the Compliance Report, BVivid will:

13.1 provide a copy of the Compliance Report to the ACCC within seven days of BVivid's director(s) or governing body receiving the Compliance Report; and

13.2 inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or

13.3 otherwise outline the steps BVivid proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

#### **Provision of Compliance Program documents to the ACCC**

---

<sup>1</sup> Material Failure means a failure, that is non-trivial, and which is ongoing or continued for a significant period of time, to:

- Incorporate a requirement of the Undertaking in the design of the Compliance Program, for example if a Complaints Handling System did not provide any mechanism for responding to complaints; or
- Comply with a fundamental obligation in the implementation of the Compliance Program, for example, if no Staff Training has been conducted within the Annual Review period.

14. BVivid will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
15. If requested by the ACCC during the five year period, BVivid will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 15.1 an outline of the Complaints Handling System;
  - 15.2 Staff Training materials;
  - 15.3 all Compliance Reports that have been completed at the time of the request; and
  - 15.4 copies of the reports to the director(s) or governing body referred to in paragraph 8 and paragraph 11.

#### **ACCC Recommendations**

16. BVivid will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that BVivid maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.

## **Compliance Program Checklist**

Commencement Date: \_\_\_\_\_

### **Action**

#### **Within one month of the Commencement Date**

- ☐ Engage a compliance professional to review BVivid's policies, practices and procedures relating to its sales and transfer methodology (para 1.1)
- ☐ Appoint a Compliance Officer (para 1.2)

#### **Within one month of the appointment of the Compliance Officer**

- ☐ Compliance Officer attends training on section 18, 29 and the Unsolicited Consumer Agreement provisions of the Australian Consumer Law (para 2)

#### **Within one month of the Compliance Officer completing training**

- ☐ Develop procedures for recording, storing and responding to competition and consumer law complaints (para 4)

#### **After one year of the Commencement Date**

- ☐ Review the Compliance Program (para 9)
- ☐ Produce a Compliance Report within one month of the review (para 10)
- ☐ Provide the Compliance Report to the governing body of BVivid (para 11)

#### **Every 12 months**

- ☐ Employees, agents, contractors and representatives receive training on the Australian Consumer Law (para 6)
- ☐ Compliance Officer reports to BVivid's director on the effectiveness of the Compliance Program (para 8)