

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)

by 1300 Australia Pty Ltd ABN 77 108 792 016.

1. Person giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by 1300 Australia Pty Ltd ABN 77 108 792 016 (**1300 Australia**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

2. Background

- 2.1. 1300 Australia supplies “phonewords” which are telephone numbers that also spell words on a keypad (eg. 13 POOL).
- 2.2. Since 21 February 2013, 1300 Australia has entered into or renewed the following standard form contracts for the supply of phonewords with its customers (**Agreements**):
 - a. the National Number Licence Agreement, which has been used since 22 November 2017, and which has had a number of versions since that date;
 - b. the National Number Licence & Inbound Services Agreement, which has been used since 20 October 2018; and
 - c. the Telstra Phonewords National Number Licence Agreement 1 and Telstra Phonewords National Number Licence Agreement 2, which are no longer used for new customers but have been renewed with some existing customers.
- 2.3. With effect from 12 November 2016, the Australia Consumer Law (**ACL**) has included provisions to protect small businesses from unfair terms in business-to-business standard form contracts. Sections 23 and 24 of the ACL provide that a term of a small business contract is void if the term is unfair. A term of a small business contract is unfair if:
 - a. it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
 - b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - c. it would cause detriment to a party if it were applied or relied on.

3. ACCC concerns

- 3.1. Since 12 November 2016, 1300 Australia has entered into or renewed Agreements that contain the following terms (**Terms of Concern**):
 - a. an automatic renewal term providing for the automatic renewal of the agreement for 12 month terms, without 1300 Australia notifying the customer (**Auto-renewal Clause**);
 - b. a preservation of rights term requiring the customer to notify 1300 Australia of use by a third party of the phoneword (**Notification of Infringing Use Clause**);
 - c. a termination term:
 - i. permitting 1300 Australia to charge a termination fee that is no less than 92.5% of the amount of the fees due for the use of the phoneword during the remaining term of the agreement (**Early Termination Fee Clause**); and
 - ii. providing 1300 Australia with 30 days to rectify a breach of the agreement, before the customer may terminate the agreement, but only providing the customer with 14 days to rectify a breach of the agreement, before 1300 Australia may terminate the agreement (**Remedy Period Clauses**);

- d. a late payment term permitting 1300 Australia:
 - i. to charge the customer an administrative fee of an unspecified amount for late payment (**Late Fee Clause**); and
 - ii. to terminate the agreement with 14 days' notice in the event of a failure to pay any fee due under the agreement (**Non-payment Clause**).
- 3.2. Each of the Agreements contains one or more of these terms. The wording of terms may vary between the Agreements.
- 3.3. The ACCC is concerned that, to the extent that a small business consumer entered into or renewed an Agreement since 12 November 2016, the Terms of Concern, in the context of the Agreement as a whole, create a significant imbalance in the rights and obligations of 1300 Australia and the small business consumer under the Agreement. The ACCC is concerned that the Terms of Concern are not reasonably necessary in order to protect 1300 Australia's interests, in all the circumstances, and would cause detriment to the small business consumer if applied or relied on.

4. 1300 Australia's response to ACCC concerns

- 4.1. In response to the ACCC's concerns, 1300 Australia has:
 - a. acknowledged that the Notification of Infringing Use Clause, the Early Termination Fee Clause (so far as it is included in Agreements which have had their term renewed), the Remedy Period Clauses, the Late Fee Clause and the Non-payment Clause may be unfair within the meaning of sections 23 and 24 of the ACL; and
 - b. provided this Undertaking to the ACCC.

5. Commencement of this Undertaking

- 5.1. This Undertaking comes into effect when:
 - a. this Undertaking is executed by 1300 Australia; and
 - b. this Undertaking so executed is accepted by the ACCC (the **Commencement Date**).
- 5.2. This Undertaking has effect for three (3) years after the Commencement Date (**the Term**).
- 5.3. Upon the Commencement Date, 1300 Australia assumes the obligations set out in section 6 for the purposes of section 87B of the CCA.

6. Undertakings

Current contracts

- 6.1. 1300 Australia undertakes that, for small business consumers that entered into or renewed an Agreement after 12 November 2016 that is currently in force, it will:
 - a. not terminate the Agreement solely because the small business consumer fails to notify 1300 Australia of the use of the phoneword by a third party;
 - b. allow the small business consumer to terminate the Agreement during a renewal term by providing not less than 3 months' notice, with no termination fee;
 - c. not charge a termination fee in excess of the equivalent of 3 months' fees if, during a renewal term, the Agreement is terminated other than by provision of 3 months' notice;
 - d. allow the small business consumer 30 days in which to remedy any breach by them of the Agreement (including a breach relating to non-payment) prior to a right to terminate arising;
 - e. charge no more than \$25 as an administration fee in the event of late payment by a customer; and
 - f. provide the small business consumer with at least 30 days' written notice of the renewal date of the Agreement.

Future contracts

- 6.2. 1300 Australia undertakes that future Agreements entered into with small business consumers will include terms:
- a. requiring 1300 Australia to provide the small business consumer with 30 days' written notice of each renewal date of the Agreement;
 - b. permitting the small business consumer to terminate their contract at any time after the initial term, with not less than 3 months' notice and without any fee being payable in relation to that termination;
 - c. limiting any termination fee payable on early termination of the Agreement during a renewal term (other than a termination by provision of 3 months' notice) to the equivalent of 3 months' fees;
 - d. providing both 1300 Australia and the small business consumer with the ability to terminate the agreement by notice in writing if the other party commits a breach of the contract and does not cure the breach within 30 days of being notified in writing of the breach;
 - e. specifying that, in the event of late payment, an administration fee of \$25 will apply; and
 - f. defining a 'phoneword' to mean 'the Licensed Number and any phoneword specified on the front page of this Agreement and any name which incorporates, is derived from, or is similar to, that phoneword'
- and will not include a term:
- g. that permits 1300 Australia to terminate the Agreement solely because the small business consumer fails to notify 1300 Australia of the use of a phoneword by a third party.

Corrective notice

- 6.3. Within 21 days of the Commencement Date, 1300 Australia will at its own expense place a corrective notice on the homepage of the 1300 Australia website, in the form set out at **Attachment A** of this Undertaking, and will maintain that notice on the website for 60 consecutive days (**Website Corrective Notice**).

Complaint review scheme

- 6.4. Within 60 days of the Commencement Date, 1300 Australia will engage an independent external reviewer (**External Reviewer**) who has significant experience in implementing ACL compliance programs, to identify all complaints received by 1300 Australia since 12 November 2016 from current or former customers where:
- a. the customer entered into or renewed their Agreement subsequent to 12 November 2016;
 - b. the customer was a small business consumer at the time they entered into or renewed their Agreement;
 - c. 1300 Australia's customer relationship management database indicates that the complaint concerned the imposition of a termination fee;
 - d. the Agreement was terminated after its initial term; and
 - e. the customer paid a termination fee which exceeded the equivalent of three months' fees under their Agreement,

(Complaint Review).

- 6.5. The Complaint Review will be completed within 120 days of its commencement.
- 6.6. Where the External Reviewer determines that a complaint meets the criteria in paragraph 6.4 above, 1300 Australia will contact the small business consumer and refund the portion of the termination fee paid by the small business consumer that exceeds the equivalent of three months' fees under the Agreement.

- 6.7. Within 30 days of the completion of the Complaint Review, the External Reviewer is to produce a report to be provided to the ACCC and the board of 1300 Australia's parent company, Uniti Group Limited. The report should include data in relation to the nature and number of remedies provided to customers. The ACCC may request further information within 2 weeks of receiving the report, and 1300 Australia will provide that information within 2 weeks of the request.

Compliance program

- 6.8. 1300 Australia undertakes that, within three months of the Commencement Date and at its own expense, it will:
- a. establish and implement an ACL Compliance Program (**Compliance Program**) in accordance with the requirements set out in **Attachment B** to this Undertaking; and
 - b. maintain and continue to implement the Compliance Program for a period of 3 years from the Commencement Date.

ACCC inquiries



- 6.9. For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable inquiries of 1300 Australia with respect to compliance with this Undertaking and 1300 Australia will respond to such inquiries within a reasonable period of time.

7. Acknowledgments

- 7.1. 1300 Australia 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 will, from time to time, make public reference to this 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 Terms of Concern.

Executed as an undertaking

Executed by 1300 Australia Pty Ltd ABN 77 108 792 016 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director /company secretary (delete as appropriate, or entire column if sole director company)
Michael Simmons	Ashe-lee Jegathesan
Name of director (print)	Name of director /company secretary (print)
20 March 2020	20 March 2020
Date	Date

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

26 March 2020

Date

and signed on behalf of the Commission:



Chair

Rodney Graham Sims

Date

26 March 2020

ATTACHMENT A

WEBSITE CORRECTIVE NOTICE

If you are a small business, employing 20 people or less, and have entered into or renewed a contract with 1300 Australia Pty Ltd (1300 Australia) for the supply of a phoneword since November 2016, 1300 Australia advises you that, effective immediately, it will:

- a. not terminate your contract solely because you fail to notify 1300 Australia of the use of your phoneword by a third party;
- b. allow you to terminate the contract during a renewal term by providing not less than 3 months' notice, with no termination fee;
- c. not charge a termination fee in excess of the equivalent of 3 months' fees if, during a renewal term, the contract is terminated other than by provision of 3 months' notice;
- d. allow you 30 days in which to remedy any breach of the contract (including a breach relating to non-payment) prior to 1300 Australia having a right to terminate the contract;
- e. charge no more than \$25 as an administration fee in the event of late payment; and
- f. give you 30 days' written notice in advance of a renewal date.

1300 Australia agreed with the Australian Competition and Consumer Commission (ACCC) to make these changes in the administration of its contracts with its small business customers after concerns were raised by the ACCC that 1300 Australia's contracts contained unfair contract terms. Since 12 November 2016 the Australian Consumer Law has protected small businesses from unfair terms in standard form contracts. This agreement is set out in a court enforceable undertaking given to the ACCC by 1300 Australia.

1300 Australia will also conduct an independent review of complaints received from current or former small business customers about the payment of termination fees. If 1300 Australia finds that a customer paid a termination fee during a renewal term in excess of the equivalent of 3 months' fees, it will refund the excess.

If you have any concerns regarding this corrective notice please contact us on [insert 1300 Australia email address or telephone number].

ATTACHMENT B

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

1300 Australia Pty Ltd (**1300 Australia**) will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within one month of 1300 Australia's section 87B undertaking (**Undertaking**) coming into effect, 1300 Australia will appoint a senior manager of its business (or a senior manager of a related body corporate) as a compliance officer, with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).
2. Within one month of this Undertaking coming into effect, 1300 Australia will appoint or engage a suitably qualified, internal or external, compliance professional with expertise in competition and consumer law (**Compliance Advisor**).
3. 1300 Australia will instruct the Compliance Advisor to conduct a competition and consumer law risk assessment within three months of being appointed as the Compliance Advisor (**Risk Assessment**).
4. 1300 Australia will use its best endeavours to ensure that the Risk Assessment covers the following matters, to be recorded in a written report (**Risk Assessment Report**):
 - 4.1. identifies the areas where 1300 Australia is at risk of breaching Part 2-3 (unfair contract terms) of the Australian Consumer Law (schedule 2 to the *Competition and Consumer Act 2010 (Cth)*) (**ACL**);
 - 4.2. assesses the likelihood of such a breach occurring;
 - 4.3. identifies where there may be gaps in 1300 Australia's existing procedures for managing these risks; and
 - 4.4. provides recommendations for any action to be taken by 1300 Australia having regard to the above assessment.

Compliance Policy

5. 1300 Australia will, within 21 days of the Undertaking coming into effect, issue a policy statement outlining 1300 Australia's commitment to compliance with the *Competition and Consumer Act 2010 (Cth)* (**CCA**) (**Compliance Policy**).
6. 1300 Australia will ensure the Compliance Policy:
 - 6.1. contains a statement of commitment to compliance with the CCA;
 - 6.2. contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and
 - 6.3. contains a clear statement that 1300 Australia will take action internally against any employees or officers who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings in respect of that contravention.

Complaints Handling System

7. 1300 Australia will ensure the Compliance Program includes a complaints handling system capable of identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

Staff Training

8. 1300 Australia will ensure that the Compliance Program includes a requirement for regular (at least once a year) training for all employees of 1300 Australia whose duties could result in them being concerned with conduct that may contravene Part 2 of the ACL.
9. 1300 Australia will ensure that the staff training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
10. 1300 Australia will ensure that the Compliance Program includes a requirement that awareness of competition and consumer compliance issues forms part of the induction of all new directors, officers and employees whose duties could result in them being concerned with conduct that may contravene Part 2 of the ACL.

Reports to Board/Senior Management

11. 1300 Australia will ensure that the Compliance Officer reports to the Board and/or senior management every 6 months on the continuing effectiveness of the Compliance Program.

Compliance Review

12. 1300 Australia will, at its own expense, cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:
 - 12.1. **Scope of Review** – the Review should be broad and rigorous enough to provide 1300 Australia and the Australian Competition and Consumer Commission (**ACCC**) with:
 - 12.1.1. a verification that 1300 Australia has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1-11 above; and
 - 12.1.2. the Compliance Reports detailed at paragraph 13 below.
 - 12.2. **Independent Reviewer** – 1300 Australia will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
 - 12.2.1. did not design or implement the Compliance Program;
 - 12.2.2. is not a present or past employee or director of 1300 Australia or a related body corporate;
 - 12.2.3. has not acted and does not act for, and does not consult and has not consulted to, 1300 Australia or a related body corporate, in any competition and consumer law matters, other than performing Reviews under the Undertaking; and
 - 12.2.4. has no significant shareholding or other interests in 1300 Australia or a related body corporate.
 - 12.3. **Evidence** – 1300 Australia will use reasonable endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in 1300 Australia's possession or control, including without limitation:
 - 12.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of 1300 Australia;

- 12.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;
 - 12.3.3. documents relating to the Compliance Program, including documents relevant to the Compliance Policy, the Complaints Handling System and the staff training and induction programs; and
 - 12.3.4. any reports made by the Compliance Officer to the Board or senior management regarding the Compliance Program.
- 12.4. 1300 Australia will ensure that a Review is completed within one year of this Undertaking coming into effect, and that a subsequent Review is completed within each year for 2 years.

Compliance Reports

13. 1300 Australia will use its best endeavours to ensure that, within fourteen days of a Review, the Reviewer includes the following findings of the Review in a report to 1300 Australia (**Compliance Report**):
- 13.1. whether the Compliance Program includes all the elements detailed in paragraphs 1-11 above and if not, what elements need to be included or further developed;
 - 13.2. whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;
 - 13.3. whether the staff training and induction are effective, and if not, what aspects need to be further developed;
 - 13.4. whether the Complaints Handling System is effective, and if not, what aspects need to be further developed; and
 - 13.5. whether there are any material deficiencies in the 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/s¹.

1300 Australia response to Compliance Reports

14. 1300 Australia will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
- 14.1. provides the Compliance Report to the Board of 1300 Australia; and
 - 14.2. if a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the Board identifying how 1300 Australia can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
15. 1300 Australia 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

16. If a Material Failure has been identified by the Reviewer in a Compliance Report, 1300 Australia will:

¹ 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 the Complaints Handling System did not provide an 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.

- 16.1. provide a copy of the Compliance Report to the ACCC within seven days of the Board receiving the Compliance Report; and
- 16.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
- 16.3. otherwise outline the steps 1300 Australia proposes to take to implement the recommendations and then inform the ACCC once those steps have been implemented.

Provision of Compliance Program documents to the ACCC

17. 1300 Australia will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than 5 years.
18. If requested by the ACCC during the period of 5 years following the Undertaking coming into effect, 1300 Australia will, at its own expense, cause to be produced and provided to the ACCC copies of all documents relating to and constituting the Compliance Program, including:
 - 18.1. the Compliance Policy;
 - 18.2. the Risk Assessment report;
 - 18.3. an outline of the Complaints Handling System;
 - 18.4. staff training materials and induction materials;
 - 18.5. all Compliance Reports that have been completed at the time of the request; andcopies of the reports to the Board and/or senior management referred to in paragraph 11.

ACCC Recommendations

19. 1300 Australia will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that 1300 Australia maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.