

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission Given under section 87B of the Competition and Consumer Act 2010 (Cth) by Fitbit (Australia) Pty Limited

1. Person(s) giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Fitbit (Australia) Pty Limited (Fitbit) for the purposes of section 87B of the Competition and Consumer Act 2010 (CCA).

2 Background

- 2.1 Fitbit is a subsidiary of Fitbit, Inc., which is headquartered in San Francisco, California, USA and is a manufacturer of wireless technology products that track personal activity, also known as 'fitness trackers', under the brand name 'Fitbit'. Fitbit products are sold to Australian consumers via the Fitbit.com website and third party retailers, including JB Hi-Fi, Harvey Norman, Officeworks and Coles. Consumers may also purchase services relating to its products via subscription on its Fitbit.com website.

Australian Consumer Law

- 2.2 The Australian Consumer Law (ACL) in Schedule 2 to the CCA provides consumers with a guaranteed level of protection for goods and services they acquire (the **consumer guarantees**). Consumer guarantees cannot be excluded, restricted or modified.
- 2.3 Consumers who are supplied with goods and services that fail to meet the consumer guarantees are entitled to remedies under the ACL against the supplier of the goods and services depending on whether the failure is major or minor. Where a failure of a good is major, the consumer may choose a refund or a replacement from the supplier. If the failure is minor, the supplier may choose to provide a refund, repair or replacement. Consumers may also seek compensation from a manufacturer for goods that are not of acceptable quality.
- 2.4 Representations by a supplier that purport to limit or exclude remedies available under the ACL may contravene the ACL. Representations by a manufacturer that consumers are only entitled to a remedy specified by the manufacturer may also contravene the ACL.
- 2.5 Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
- 2.6 Section 29(1)(m) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under the ACL).
- 2.7 Section 64 of the ACL provides that a consumer guarantee cannot be excluded, restricted or modified by contract.
- 2.8 Regulation 90 of the Competition and Consumer Regulations 2010 (Cth) requires the following text to be included in any warranty against defects:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure. (Prescribed Text)

Fitbit Policies

- 2.9 Fitbit offers consumers who purchase a Fitbit product through fitbit.com a '45 Day Satisfaction Guaranteed Return Policy' under which consumers who are not satisfied with their purchase for any reason can return their product and receive a full refund within 45 days of purchase, even if the product is not defective. Under this Return Policy, Fitbit reserves the right to have consumers responsible for shipping charges and a restocking fee if they return a product without a return authorisation from Fitbit or without all parts and accessories originally included with the purchase. Fitbit's current practice is to fully refund the consumer all costs from purchase of the Fitbit product.
- 2.10 Fitbit offers consumers who purchase a Fitbit product a one year limited manufacturer's warranty under which Fitbit will, at its option (and expressly stated to be to the extent permitted by law), either repair the product at no charge, using new or refurbished replacement parts, or replace the product with a new or refurbished product. The Fitbit warranty:
- 2.10.1 includes the Prescribed Text;
 - 2.10.2 states that shipping and handling charges may apply except where prohibited by applicable law;
 - 2.10.3 limits the duration of implied warranties to one year, noting that some jurisdictions do not allow limitations on the duration of an implied warranty and so this limitation may not apply to those consumers;
 - 2.10.4 limits the duration of the Fitbit manufacturer's warranty on replacement products to the remainder of the original warranty period or thirty (30) days, whichever is longer, or for any additional period of time that may be required by applicable law; and
 - 2.10.5 excludes liability for special, indirect, incidental or consequential damages, noting that some jurisdictions do not allow such limitations on liability and so this exclusion may not apply to those consumers.
- 2.11 The Fitbit Safety Instructions & Limited Warranty document included in product packing includes the full limited manufacturer's warranty, including the Prescribed Text.
- 2.12 The Fitbit Terms of Service on the Fitbit website provide that, except to the extent prohibited by applicable law, Fitbit would not be liable for special, indirect, incidental or consequence damages.
- 2.13 The Fitbit Policies above are in addition to consumers' rights under the ACL.

Conduct by Fitbit

- 2.14 From at least 1 January 2017, Fitbit, in trade or commerce, in connection with the promotion, supply or possible supply of products to Australian consumers, made representations on the Fitbit.com/au website in the "Return Policy and Warranty" page, the "Terms of Service" page and "Terms of Sale" page, on the Fitstar.com website in the "Terms of Use" page and in a "Safety Instructions & Limited Warranty" document in product packaging to the effect that:
- 2.14.1 remedies for defective products were only available within one year of the date of purchase (unless this limitation on duration was not allowed in the jurisdiction in which case it will not apply), even though the ACL does not limit remedies for defective goods to a specific period of time;
 - 2.14.2 replacement products will only be warranted under the Fitbit manufacturer's warranty for the longer of the remainder of the original warranty period or thirty days, or for any additional period required by applicable law even though the ACL does not limit remedies for replacement products that are defective to a specific period of time;
 - 2.14.3 a consumer may have to pay the costs of returning defective products (except where prohibited by applicable law), even though the ACL does not require consumers to pay any significant costs of returning goods where a product is returned pursuant to a right to return under the ACL;
 - 2.14.4 Fitbit is not liable for any loss or damages from a breach of any express or implied warranty

(unless this limitation is not allowed in the jurisdiction in which case it will not apply), even though guarantees under the ACL cannot be excluded by contract

- 2.14.5 membership fees will automatically renew, which may mislead consumers about the price of services if there is not adequate disclosure of the ongoing fees.
- 2.15 The ACCC considers that by engaging in the conduct in paragraphs 2.9 to 2.14, Fitbit has:
 - 2.15.1 engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 18 of the ACL, and
 - 2.15.2 in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of goods or services, made false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under the ACL) in contravention of section 29(1)(m) of the ACL.
- 2.16 In response to the ACCC's investigation, Fitbit:
 - 2.16.1 acknowledges that its conduct may have contravened section 18 and section 29(1)(m) of the ACL
 - 2.16.2 has cooperated with and responded to the ACCC's enquiries
 - 2.16.3 has extended the product warranty from one year to two years for Australian consumers who make a warranty claim or who deal with a Fitbit customer service representatives
 - 2.16.4 has amended the "Safety Instructions & Limited Warranty" document in the packaging of Fitbit products to include the Prescribed Text
 - 2.16.5 has offered and agreed to:
 - 2.16.5.1 include the statement "The Fitbit Return Policy and Limited Warranty is in addition to any other rights and remedies that you may have under the Australian Consumer Law" towards the top of the "Return Policy and Warranty" web page located at <https://www.fitbit.com/au/legal/returns-and-warranty>
 - 2.16.5.2 move the "Australian Consumer Law" section of the Return Policy and Warranty to make it more prominent within the "Limited Product Warranty" section and amend the date at the top of that web page located at <https://www.fitbit.com/au/legal/returns-and-warranty> to reflect the most recent changes
 - 2.16.5.3 make amendments to other documents identified by the ACCC (as set out in this Undertaking) to make it clear those documents do not exclude or limit consumers' rights under the ACL
 - 2.16.5.4 amend the document "Fitbit Safety Instructions & Limited Warranty" distributed in the packaging of Fitbit products to include the Prescribed Text
 - 2.16.6 has offered this Undertaking to the ACCC.

3 Commencement and term of this Undertaking

- 3.1 This Undertaking comes into effect when:
 - 3.1.1 this Undertaking is executed by Fitbit, and
 - 3.1.2 this Undertaking so executed is accepted by the ACCC(the **Commencement Date**).
- 3.2 The Undertaking has effect for three (3) years after the Commencement Date (the **Term**).
- 3.3 Upon the Commencement Date, Fitbit undertakes to assume the obligations in paragraph 4 for the Term of the Undertaking for the purposes of section 87B of the CCA.

4 Undertaking

Fitbit websites

- 4.1 Fitbit undertakes that within 60 days of the Commencement Date, it will publish the Prescribed Text towards the top of each page of the Fitbit.com website specifically directed at Australian consumers that sets out terms and conditions of Australian consumers' use of Fitbit products or services, including the following pages:
- 4.1.1 "Return Policy and Warranty" (www.fitbit.com/au/legal/returns-and-warranty)
 - 4.1.2 "Terms of Service" (www.fitbit.com/au/legal/terms-of-service)
 - 4.1.3 "Terms of Sale" (www.fitbit.com/au/legal/terms-of-sale)
- 4.2 For the purposes of paragraph 4.1, the Prescribed Text will be in the same font and size as the other terms and conditions on these webpages.
- 4.3 In addition to paragraph 4.1, Fitbit undertakes that within 60 days of the Commencement Date, it will also include at the top of the webpage specifically directed at Australian consumers with Fitbit Terms of Service and the Fitbit Terms of Sale words to the effect that these terms are subject to the Australian Consumer Law and consumers' rights under the Australian Consumer Law.
- 4.4 Fitbit undertakes that within 60 days of the Commencement Date, it will amend the "Terms specific to Fitbit Premium" to include a provision requiring Fitbit to provide notice to consumers before any recurring membership fees associated with Fitbit Premium Services are incurred. The notice to consumers will clearly and prominently identify all fees associated with the consumer's membership of Fitbit Premium Services.
- 4.5 Fitbit undertakes that within 60 days of the Commencement Date, it will publish the notice below for a period of 90 consecutive days on the "Return Policy and Warranty" page for Australian consumers at www.fitbit.com/au/legal/returns-and-warranty:

"If you feel your consumer rights under the Australian Consumer Law have not been properly observed, [click here](#) to submit your concern to Fitbit for consideration by us".

- 4.6 The notice in paragraph 4.5 will be:
- 4.6.1 in the same font and size as other terms and conditions on this webpage;
 - 4.6.2 displayed as static text on the web page (not as a 'pop-up', 'pop under' or other display separate to the web page browser window); and
 - 4.6.3 its contents may be indexed by a search engine.
- 4.7 Fitbit undertakes that it will reassess and seek to resolve each complaint from a consumer who contacts Fitbit and seeks a review within 90 days of Fitbit publishing the notice in paragraph 4.5.

Compliance Program

- 4.8 Fitbit undertakes that it will implement an ACL compliance program (Compliance Program) in accordance with the measures in **Annexure A**.

Other items

- 4.9 A commitment by Fitbit to take action by a specific time or in a specific form under this Undertaking may be varied with written consent from the ACCC without a formal amendment to this Undertaking where circumstances arise such that specific performance would not be practicable.



5 Acknowledgments

- 5.1 Fitbit acknowledges that:
- 5.1.1 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

- 5.1.2 the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications
- 5.1.3 this Undertaking in no way detracts from the rights and remedies available to any other person arising from the alleged conduct, and

Executed as an Undertaking

Executed by Fitbit (Australia) Pty Limited 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)
RON KISLING	ANDREW MULLAN
Name of director (print)	Name of director/company secretary (print)
22 MAY 2018	22 MAY 2018
Date	Date

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

31/5/18

Date

and signed on behalf of the Commission:



Chairman

Date

31/5/18

ANNEXURE A

AUSTRALIAN CONSUMER LAW COMPLIANCE PROGRAM

Fitbit will establish a Compliance Program that complies with each of the following requirements for the Term of the Undertaking:

Appointment

1. Within 30 days of the Commencement Date, Fitbit will appoint a director or senior manager of the business with suitable qualifications or experience in corporate compliance to be responsible for the effective development, implementation and maintenance of the Compliance Program (the **Compliance Officer**).
2. Within 60 days of the Commencement Date, Fitbit will appoint a suitably qualified external compliance professional or legal practitioner with expertise in Australian competition and consumer law (the **Compliance Advisor**).

Compliance Policy

3. Within 90 days of the Commencement Date, Fitbit will issue an internal policy statement outlining Fitbit's commitment to compliance with the Australian Consumer Law (ACL) (**Compliance Policy**).
4. Fitbit will ensure that the Compliance Policy:
 - (a) contains a statement of commitment to compliance with the ACL
 - (b) contains an outline of how commitment to ACL compliance will be realised within Fitbit
 - (c) contains a requirement for all staff to report any Compliance Program related issues and ACL compliance concerns to the Compliance Officer
 - (d) contains a commitment that whistle blowers with ACL compliance concerns will not be prosecuted or disadvantaged in any way and that their reports will be kept confidential and secure, and
 - (e) contains a statement that Fitbit will take action internally against any person who is knowingly or recklessly concerned in a contravention of the ACL and will not indemnify them in the event of any court proceedings in respect of that contravention.
5. Fitbit will take reasonable steps to ensure its directors, officers and employees whose duties may include communicating with Australian consumer or dealing with their inquiries or complaints are made aware of the Compliance Policy.

Compliance Training

6. Within 180 days of the Commencement Date, Fitbit will cause its directors, officers and employees whose duties may include communicating with Australian consumers or dealing with their inquiries or complaints, to receive training that focuses on compliance with the provisions of the ACL regarding the consumer guarantees and misleading or deceptive conduct (including sections 18 and 29(1)(m)) in relation to consumers' rights and remedies under the consumer guarantees, administered by the Compliance Advisor, with such training to be provided at least once each year for the Term of the Undertaking (**Compliance Training**).
7. Fitbit will take reasonable steps to ensure that awareness of ACL issues forms part of the induction of all new directors, officers and employees whose duties may include communicating with Australian consumers or dealing with their inquiries or complaints regarding the goods and services supplied by Fitbit.

Complaints Handling System

8. Within 90 days of the Commencement Date, Fitbit will undertake a review of its complaints handling system and will, to the extent required, enhance its existing procedures for recording, storing and responding to ACL related complaints (**Complaints Handling System**).

9. Fitbit will take reasonable steps to ensure relevant staff and customers are aware of the complaint handling system.

Compliance Monitoring

10. Within 90 days of the Commencement Date, Fitbit will undertake a review of its existing quality assurance procedures for its customer service representatives and will enhance those procedures to the extent required to monitor whether representations made by Fitbit customer service representatives to Australian consumers regarding reported faults or other product complaints are consistent with:
 - (a) consumers' rights under the consumer guarantees in the ACL; and
 - (b) the prohibitions against misleading or deceptive conduct (including sections 18 and 29(1)(m)) of the ACL.

In conducting this review, Fitbit will consult the Compliance Advisor and implement any reasonable recommendations of the Compliance Advisor.

Compliance and Risk Review

11. Fitbit will ensure the Compliance Officer reports to senior management on an annual basis for the Term of the Undertaking on the effectiveness of the Compliance Program (**Compliance Review**).
12. Fitbit will ensure:
 - (a) within 180 days of the Commencement Date, the Compliance Officer, with the assistance of the Compliance Advisor, will conduct an ACL risk review (**Risk Review**) which sets out in the form of a written report:
 - (i) any areas of Fitbit's promotion or supply of products in Australia which are at risk of not complying with the provisions of the ACL regarding the consumer guarantees, or misleading or deceptive conduct (including sections 18 and 29(1)(m)) in relation to consumers' rights and remedies under the consumer guarantees
 - (ii) the procedures put in place by Fitbit in relation to its promotion and supply of products in Australia to minimise the risk of not complying with the provisions or contravening the provisions of the ACL the consumer guarantees or misleading or deceptive conduct (including sections 18 and 29(1)(m)) in relation to consumers' rights and remedies under the consumer guarantees
 - (iii) any material gaps in Fitbit's existing procedures for managing these risks
 - (iv) recommendations for any action to be taken to address these risks, and
 - (b) as soon as reasonably practicable following the Risk Review, implement any reasonable and appropriate recommendations made by the Risk Review.

Provision of Compliance Program documents to the ACCC

13. Fitbit will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than three (3) years.
14. If requested by the ACCC during the Term of the Undertaking, Fitbit will, at its own expense, cause to be produced and provided to the ACCC copies of all documents (excluding any legally privileged documents) evidencing the Compliance Program and its implementation, including:
 - (a) the Compliance Policy
 - (b) a written statement or certificate from the Compliance Advisor who conducts the Compliance Training referred to in paragraph 6, verifying that such training has occurred
 - (c) the outcomes of the Complaints Handling System review
 - (d) the outcomes of Compliance Monitoring

- (e) the Compliance Review(s), and
- (f) the Risk Review.

