

**TRADE PRACTICES ACT 1974**  
**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER**  
**COMMISSION GIVEN FOR THE PURPOSE OF SECTION 87B**  
**BY**  
**KMART AUSTRALIA LIMITED**  
**ACN 004 700 485**

**BACKGROUND**

1. Kmart Australia Limited ("Kmart") is incorporated under the Corporations Law and its principal activities include the supply of goods by retail to consumers in Australia under the business name "Kmart".
2. On 24 July 1998, the Australian Competition and Consumer Commission ("ACCC") instituted proceedings in the Federal Court of Australia (No. SG100 of 1998) against Kmart, alleging that between October 1997 and April 1998 the Kmart store in Firlie, South Australia, and certain other Kmart stores made certain representations as to savings to be made on the purchase of the Black & Decker 2 Cup Espresso Maker coffee machine ("the product"), on paper flags attached to shelves displaying the product, each of which constituted:
  - (a) misleading and deceptive conduct in relation to the savings to be made on the purchase of the product; and
  - (b) a false or misleading representation with respect to the price of the product,in contravention of respectively, sections 52 and 53(e) of the Trade Practices Act 1974 ("the Act").
3. Kmart and the ACCC have agreed to resolve the proceedings by:
  - (a) Kmart giving undertakings to the Court and consenting to orders in the terms of Annexure A hereto; and
  - (b) Kmart giving and the ACCC accepting undertakings for the purposes of section 87B of the Act, in the terms contained herein.

**UNDERTAKINGS**

KMART UNDERTAKES to:

- A. conduct at its own expense, an internal review of its trade practices compliance program with the object of creating and maintaining a trade practices compliance program compliant with Australian Standard AS-3806. In summary, as a result of the internal review, Kmart will:
1. demonstrate commitment to both a policy of compliance and embedding a culture of compliance throughout the organisation.
  2. analyse and respond to the trade practices matters resulting in this undertaking.
  3. identify risk areas for trade practices breaches and develop systems to eliminate or minimise these risks.
  4. communicate to all staff that it is a term of their contract of employment that no employee will knowingly breach the Trade Practices Act.
  5. provide practical and verifiable training for all relevant staff and management so that breaches and potential breaches may be prevented or otherwise detected, referred and acted upon.
- B. provide an initial progress report on the review of its trade practices compliance program to the ACCC on or before 30 April 1999. This progress report will report on Kmart's implementation of the compliance program and the achievement of its objectives over the preceding months as well as any recommended changes to the compliance program that may be necessary to ensure achievement of its objectives.
- C. cause, at its own expense, an independent audit of its compliance program to be conducted at the frequency and at such times as are specified in Item E of this undertaking. The cost of the conduct of each such audit will be capped at thirty thousand dollars (\$30,000) unless it is not possible to effectively carry out the audit at that cost. Each audit shall be carried out by a suitably qualified compliance professional who is a member of the Australian Compliance Professionals Association or otherwise suitably qualified to conduct an audit of Kmart's compliance system and acceptable to the ACCC ("the auditor").

D. The auditor shall review and report on -

1. Kmart's adherence to the undertaking;
2. The implementation of the compliance program and the achievement of its objectives over the preceding twelve months, including:

**Commitment**

- a) The establishment of a mechanism to ensure that compliance matters are brought to the attention of the Managing Director, Kmart.
- b) Appointment of a Compliance Manager or Senior Manager with overall responsibility for compliance systems.
- c) Implementation of adequate procedures to check for trade practices compliance.
- d) Ensuring that compliance procedures are understood by staff and other relevant third parties eg agents, distributors and advertising representatives.

**Policy & Procedures**

- a) The existence of a written policy of commitment to compliance which articulates how this policy will be carried out.
- b) Implementation of procedures so that the policy is well understood throughout Kmart.
- c) Implementation of procedures to assess compliance against predetermined objectives and assessment criteria.

**Management Responsibility**

- a) Determination of the processes involved in establishing, implementing and maintaining the compliance program and the roles and responsibilities of management, staff and other stakeholders.
- b) Ensuring that line managers are responsible for compliance in their immediate area.

**Resources & Authority**

- a) Ensuring that the Senior Executive responsible for compliance systems has:
- authority, recognition and support within the organisation;
  - access to all levels of the organisation to ensure compliance;
  - overall responsibility for design, integrity and updating of the programme; and
  - ready access to the Managing Director, Kmart.
- b) Ensuring that staff have access to the necessary materials including compliance manuals and training, reference material and databases.
- c) Ensuring that any external compliance service providers have the resources and expertise to carry out the required tasks.

**Continuous Improvement**

- a) Implementation of procedures to ensure that the program has regular ongoing reviews.

**Operating procedures for compliance**

- a) Integration of compliance considerations into:
- computer systems;
  - forms;
  - contracts;
  - administrative procedures;
  - financial evaluations; and
  - management performance evaluations.

**Training**

- a) Development and execution of a practical and easily understood compliance training system throughout all relevant parts of Kmart which is:
- integrated into induction courses as appropriate;
  - reviewed annually;
  - participatory;
  - verifiable by third parties;
  - framed to reflect areas of risk; and
  - integrated into line and senior management development.

**Complaints Handling System**

- a) Implementation of a visible and accessible complaints handling system which complies with Australian Standard AS-4269.

**Record Keeping**

- a) Maintenance of an accurate record of compliance failures and complaints and of the rectification of such failures and complaints.

**Employee Compliance**

- a) Development of a policy for compliance with the Act by employees which is widely disseminated.
- b) Ensuring that compliance is integrated into performance reviews for employees.

**Identification and Rectification**

- a) Development of a system to identify and classify compliance failure so that systemic and recurring problems are rectified.

**Reporting**

- a) Ensuring that compliance problems are rapidly reported to the Compliance Manager.

**Monitoring & Review**

- a) Introduction of a system to monitor and review the effectiveness of the compliance program.

**Accountability**

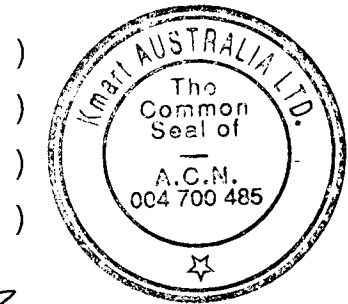
- a) Ensuring that the Compliance Manager is accountable to the Managing Director, Kmart.
3. Any recommended changes to the compliance program that may be necessary to ensure achievement of its objectives.
- E. The date for the completion of the first audit, and the provision of the auditor's report to the ACCC shall be 12 months from the date of acceptance of the undertaking. A second audit report shall be prepared and presented by or on the second anniversary of the provision of the first audit report to the ACCC.
  - F. The ACCC shall review the recommendations contained in each audit report. Subject to ACCC approval, and if reasonably practicable, Kmart shall implement those recommendations. In the event that Kmart does not implement a recommendation (including any part thereof) on the basis that it is not reasonably practicable, Kmart shall:
    - a) document why it is not reasonably practicable to implement the recommendation; and
    - b) devise alternative means to achieve the objective upon which the recommendation was based and, subject to ACCC approval, implement the same.

**ACKNOWLEDGMENTS**

1. Kmart acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct described in paragraph 2 hereof.
2. Kmart acknowledges the ACCC's right to make this undertaking available for public inspection and notes that the ACCC will, at its discretion, from time to time, publish and publicly refer to this undertaking.

**IN WITNESS OF THIS UNDERTAKING:**

**THE COMMON SEAL** of  
**KMART AUSTRALIA LIMITED**  
 was affixed hereunto by authority  
 of the Board of Directors in the presence of:



*Peter Calder*  
 .....

Director  
 Name (printed): **PETER LAWRENCE CALDER**  
 This            day of November, 1998

*Keith Lindsay Irvine*  
 .....  
 Secretary  
 Name (printed)  
**KEITH LINDSAY IRVINE**

Accepted by the **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974**

*Allan Fels*  
 .....

Allan Fels  
 Chairperson  
 This            *8* day of,            *November*            1998.