



TRADE PRACTICES ACT 1974

UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B

BY

ULTRA TUNE AUSTRALIA PTY LIMITED
ACN 065 214 708

BACKGROUND

1. Ultra Tune Australia Pty Ltd ("Ultra Tune") is incorporated in the State of New South Wales. Ultra Tune's principal activity is the franchising of a system for the identification, lay out and operation of service centres for the servicing and electronic tuning of motor vehicles ("Ultra Tune Service Centres"). Ultra Tune also licences the use of the trade name and mark "Ultra Tune" and a distinctive colour scheme for use at the Ultra Tune Service Centres. There are approximately 120 Ultra Tune Service Centres in New South Wales, Victoria, Queensland and Western Australia (a separate company operates Ultra Tune Service Centres in South Australia and the Northern Territory). Ultra Tune commenced trading on 1 July 1994 having acquired the rights to this business activity from Ultra Tune Systems (Australia) Pty Limited (now UTSA (in liquidation) "UTSA").
2. On 28 November 1988 J & L.M. Ward (Johny and Lesley Ward) entered into a franchise agreement ("the Ward's franchise agreement") with UTSA for the Winston Hills franchise site. The Ward's franchise agreement is current until 28 November 1998 and was acquired by Ultra Tune when it took over the rights to UTSA franchise agreements effective from 1 July 1994. In connection with their business the Ward's have a computer system operating at the Winston Hills site key elements of which are supplied or specified by Ultra Tune.
3. The computer system is an integral part of the Ward's business. It is used for booking in cars, generating invoices and keeping records of customer details, service history and the cost of each job. It is also used for all the end of day procedures including tallying money, totalling invoices and sales for the day, working out the banking and completing reports for Ultra Tune. Part of the computer system operated by the Wards from about 1992 was known as the Magic system. This system also had a function which enabled it to calculate the weekly royalty fee.

4. Under Clause 6.5 of the franchise agreement the Wards are required to "abide by any designation or decision of the Franchisor with respect to equipment including but without limitation any computer equipment specified as necessary by the Franchisor ...".

5. In the Ultra Tune newsletter, "*Back on the Road Again*", Issue 7 - Christmas 94 under the heading of "SalesMate starts motoring" it was stated:

"Mr Smith [Ultra Tune's General Manager Retail Operations] envisages that the roll out of SalesMate will take place during January and February of next year for Centres on the new Franchise Agreement, new Centres or Centres whose current hardware requires replacement."

6. In a complaint to the Commission Mr Ward stated that in or about May 1995 the Ward's computer system known as "Magic" crashed. Mr Ward contacted Ultra Tune for assistance. A senior officer of Ultra Tune told Mr Ward "... now would be an ideal time to convert to the new software". The new software is known as SalesMate. The new software was installed on or about 17 July 1995. Unknown to the Wards the software contained a lockout date. Once the lockout date was passed, the system was designed in such a way that it could only be accessed if a specific password was entered into the system.

7. In or about the beginning of August 1995 a screen containing a lock out warning notice appeared on the system. Mr Ward contacted Ultra Tune and statements were made to him to the effect that he would have to sign a new franchise agreement with Ultra Tune in order to regain access to the SalesMate system. The new franchise agreement was less advantageous to the Wards, and involved a higher royalty payment to Ultra Tune.

8. At no time prior to the installation of the SalesMate system were the Wards advised that there was a lock out date, nor that they would have to sign a new franchise agreement to continue with its use.

9. Following an investigation by the Australian Competition and Consumer Commission ("the Commission") Ultra Tune was informed by the Commission on 13 February 1996 that the Commission considered that Ultra Tune had, since May 1995, engaged in misleading and deceptive conduct and unconscionable conduct in relation to its dealings with the Wards. The Commission considered that Ultra Tune's conduct constituted a breach of sections 51AA, 52 and 53(g) of the Trade Practices Act in that by:

(a) failing to inform Mr Ward of the existence of a lockout code in the computer software supplied to him and known as SalesMate; and

- (b) refusing to supply the password to Mr Ward to enable him to reactivate the SalesMate system until he had signed a new franchise agreement providing for an increased royalty payment

it engaged in misleading conduct and unconscionable conduct.

10. Ultra Tune's substantive response was contained in a letter from its solicitors dated 5 March 1996. This letter was not received by the Commission until 15 March 1996 having been inadvertently directed to an incorrect GPO box number. In its response Ultra Tune's solicitors stated that the SalesMate system was supplied to the Wards in the context of negotiations for the Wards to enter into a new franchise agreement at a new site at Castle Hill as well as the existing site at Winston Hills. The letter also stated:

"[Ultra Tune] attempted to negotiate with Mr Ward regarding the matter indicating that, if he were prepared to enter into a new franchise agreement in relation to his existing franchise location, this would put him on an equal footing with all other franchisees and he could continue to have access to the new SalesMate system."

The Commission did not accept Ultra Tune's response and in its letter dated 29 March 1996 the Commission again outlined its concerns in relation to the conduct of Ultra Tune.

In a letter dated 3 April 1996, received by facsimile transmission at approximately 5.20pm, Ultra Tune confirmed that it had:

- (a) delivered the required password to the Wards; and
- (b) arranged, at its expense, for the data in respect of the SalesMate system installed with the Wards to be updated on or before 29 April 1996.

and sought a meeting to discuss the remaining issues of concern to the Commission.

In order to remove the Commission's concerns, Ultra Tune has agreed to give to the Commission the Undertaking which is set out below.

UNDERTAKING

Ultra Tune undertakes for the purposes of section 87B of the Act, 1974 that it will hereafter, whether by itself, its employees or agents:

1. ensure that the Wards have continued access to the SalesMate system during the currency of the Ward's franchise agreement at Winston Hills;
2. continue to supply to the Wards all passwords needed to activate the SalesMate system;
3. refrain from any attempt to increase the percentage of royalty fees payable by the Wards to Ultra Tune during the currency of the Ward's existing franchise agreement, unless the Wards of their own volition choose to enter into a new franchise agreement, whether in order to secure a new franchise site or otherwise;
4. at its own expense arrange for the data in respect of the SalesMate system installed with Mr Ward to be updated on or before 29 April 1996;
5. forward a letter to Mr Ward in the terms of paragraphs numbered 1 - 4 above;
- 5A. identify the individuals who have responded within 28 days of despatch of the letter referred to in Undertaking 10, and inform the Commission within 7 days thereafter of the identity of any such franchisees who have been so identified, as of that date, so that any existing problem of a similar nature to the Wards may be resolved to the reasonable satisfaction of the Commission by 30 June 1996;
6. supply, at Ultra Tune's cost price, the SalesMate system to all franchisees which request it, in relation to their current Ultra Tune Service Centres, and in relation to all such franchisees with a current franchise agreement, the supply is not to be made conditional upon the franchisee agreeing to enter into a new franchise agreement for that Ultra Tune Service Centre;
7. provide each franchisee which has acquired the SalesMate system with the password(s) necessary to operate the system during the currency of their franchise agreement, such password(s) to be provided not later than 5 working days before the date on which any lockout mechanism contained in the SalesMate system is due to activate.
8. prior to supply of the SalesMate system inform franchisees concerning the existence or effect of any condition relating to the supply of the SalesMate system, including:

- (a) that the software is supplied for the use of legitimate Ultra Tune franchisees only;
- (b) all software is supplied on the basis of acknowledgment by the franchisee of any copyright of any authors and owners of copyright in the software;
- (c) that the franchisee enters into the then current form of Ultra Tune's Software Licence Agreement;
- (d) that should for any reason that agreement not be formalised, by the act or omission of the franchisee, within three (3) months of its installation, then the software must be returned to Ultra Tune and the reasonable costs associated with its installation or use or the restoration of any previous systems will be borne by the franchisee;
- (e) the software supplied is for a single workstation licence only;
- (f) the software supplied is licensed for the period of the franchisee's existing agreement;
- (g) the software programming has built into it security devices which have the effect of:
 - (i) preventing it being used on more than one workstation at a time;
 - (ii) **preventing its use for more than a three month period unless a key (password) is supplied;**
- (h) that Ultra Tune will continue to supply these passwords to the franchisees on a three monthly basis, not later than 5 working days before the date on which any lockout mechanism contained in the SalesMate system is due to activate, provided that the franchisee remains as a current franchisee at the location where the software is used;
- (i) There will be a charge for the licence for the SalesMate software by Ultra Tune. Ultra Tune will negotiate a price for those components of the software purchased from the third party suppliers such that the price paid by the franchisees to Ultra Tune for the SalesMate system will be less than the normal recommended retail price of those suppliers;

- (j) From time to time Ultra Tune will offer to subsidise the cost of the licence of the SalesMate software as an incentive to the franchisee to enter into agreements with Ultra Tune including new forms of franchise agreements. Any such offer will only be made in writing and will clearly and prominently advise franchisees of all the conditions of any such offer. Under those circumstances Ultra Tune would only require the franchisee to enter into those agreements if the franchisee took advantage of the subsidy.
- 8A. not place Ultra Tune franchisees under unconscionable pressure in the course of negotiating with Ultra Tune over the terms of franchise agreements, or revised franchise agreements, the need for a new or revised franchise agreement; and for the provision of any computer system;
9. at its own expense conduct, within three (3) months of this undertaking, seminars for all franchisees concerning their rights and obligations under the Trade Practices Act, such seminars to be conducted by staff of the Commission, the Commission's normal charges of this to be met by Ultra Tune, and/or suitably qualified legal practitioner(s) acceptable to the Commission and in a form approved by the Commission;
10. within 30 days of the date of this undertaking Ultra Tune send a letter to all its franchisees, in terms acceptable to the Commission, enclosing a copy of the executed undertakings, and briefly explaining their import;
11. within 10 days of the date of the letter referred to in paragraph 10 above supply to the Commission a copy of the aforementioned letter and a list of names and addresses of all Ultra Tune franchisees to whom it was sent.
12. within two (2) months of signing this undertaking develop for consideration by the Commission a Trade Practices Compliance program with the following characteristics:
- (a) Aim
- to create a culture of compliance throughout Ultra Tune and to prevent, so far as is reasonably possible, any contraventions of the Act by Ultra Tune, its directors, employees or agents.
- (b) Policy

the formal adoption, or re-affirmation, by Ultra Tune, of a policy of strict compliance with both the letter and spirit of the Act within Ultra Tune and the adoption, or re-affirmation, and enforcement of sanctions against any director, employee or agent who is knowingly or recklessly concerned in a contravention of the Act.

(c) Compliance Infrastructure

The appointment of an appropriately qualified named senior executive as the Ultra Tune Compliance Officer with overall responsibility for trade practices compliance.

(d) Coverage

The compliance program is to cover all directors, employees and agents of Ultra Tune whose duties could result in them being concerned in conduct that might breach the Act ("relevant staff").

(e) Education

Development and implementation of an education program calculated to have the relevant staff conversant with the provisions of the Act to a level where:

- (i) general staff can avoid obvious contraventions and can identify more complex potential trade practices problems for referral to the appropriate person in the Ultra Tune compliance infrastructure;
- (ii) persons with responsibilities within the Ultra Tune compliance infrastructure can effectively carry out those responsibilities; and
- (iii) the Ultra Tune Compliance Officer can address more complex trade practices issues and (if that person is not legally qualified and able to give the relevant advice) identify issues which require referral to Ultra Tune's solicitors.

(f) Ultra Tune will make whatever changes to the draft program that the Commission may reasonably require and will then prepare and submit to the Commission a trade practices compliance program which shall be a document

comprising the draft program with all changes reasonably required by the Commission incorporated therein.

- (g) that it will implement the trade practices compliance program within three (3) months of the Commission advising of the changes it requires to the draft program and that the trade practices compliance program will remain in force, subject to the requirements of paragraph 16, for a minimum period of five years from the signing of this undertaking;

13. institute an effective Complaint Handling system by:

- (a) adopting a complaints handling system that complies with Australian Standard AS 4269 - 1995 (Complaints handling);
- (b) appointing a Customer/Franchisee Complaints Manager and supplying his/her name to the Commission within two (2) months of the date of signing this undertaking;
- (c) taking all reasonable steps to ensure that all present and future relevant staff notify the Customer/Franchisee Complaints Manager of all complaints received from:
 - (i) franchisees relating to the supply of goods and services including the supply of computer services by or on behalf of Ultra Tune to its franchisees; and
 - (ii) consumers regarding the supply of goods or services sold or offered for sale through Ultra Tune and/or the Ultra Tune Service Centres;
- (d) take all reasonable steps to ensure that Ultra Tune, its directors, employees and agents, will attempt to resolve such complaints to the satisfaction of consumers and franchisees within 30 days of receipt;
- (e) taking all reasonable steps to ensure that Ultra Tune, its directors, employees and agents notify the Customer/Franchisee Complaints Manager whether or not a complaint has been resolved and if not, why not;

- (f) maintaining a record of complaints and the outcome of such complaints and classifying and analysing complaints received in order to allow for the identification and rectification of systematic and recurring problems.
14. At the end of the first, second and fourth twelve (12) month period following the signing of this undertaking, Ultra Tune will cause an independent auditor (who shall be an independent accountant or solicitor approved by the Commission) to review and report on:
- (a) Ultra Tune's compliance with these undertakings over the preceding twelve (12) months;
 - (b) the implementation of the trade practices compliance program and the complaint handling system and the achievement of its objectives over the preceding twelve (12) months; and
 - (c) any recommended changes to the trade practices compliance program and the complaint handling system that may be necessary to ensure achievement of its objectives.
15. Ultra Tune will cause the independent auditor to complete the review and to provide a copy of his or her report to Ultra Tune and to the Commission within thirty (30) days of the end of each twelve (12) month period.
16. Ultra Tune will incorporate into the trade practices compliance program and the complaint handling system, and implement as part of those programs, all changes to it that are recommended by the independent auditor in his or her report and are also approved by the Commission in writing.
17. Ultra Tune will within three (3) months of the date of this undertaking apply to become subject to the Franchising Code of Practice.

ACKNOWLEDGMENTS

Ultra Tune acknowledges that the Commission will make this undertaking available for public inspection.

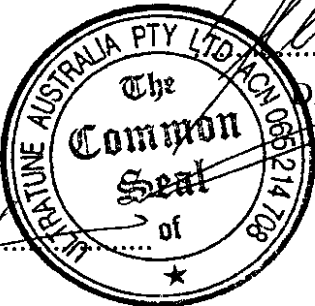
Ultra Tune further acknowledges that the Commission will from time to time publish and publicly refer to this undertaking at its discretion.

Ultra Tune further acknowledges that this undertaking in no way derogates from the rights and remedies available to any person arising from the alleged conduct.

Ultra Tune further acknowledges that the reports referred to in paragraph 12 and the trade practices compliance program as in force from time to time will be held with this undertaking on the Commission's public register.

The Commission acknowledges that Ultra Tune and the Wards will enter into negotiations in good faith with regard to protection of the copyright in the SalesMate software.

THE COMMON SEAL of ULTRA)
TUNE AUSTRALIA PTY LTD)
ACN 065 214 708 is affixed in)
accordance with its articles of)
association in the presence of:)

.....
Secretary *[Signature]*  Director *[Signature]*

this *Sixth* day of *May* 1996

.....
(Professor Allan Fels)
Chairman

this *8th* day of *May* 1996