



TRADE PRACTICES ACT 1974

UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION GIVEN PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974

BY

KIRIN DIRECT MARKETING PTY LTD

ACN 004 618 875

BACKGROUND

1. Kirin Direct Marketing Pty Ltd (“Kirin”), ACN 004 618 875, of Level 1, Argyle Centre, 18 Argyle Street, The Rocks, New South Wales, Australia, is a company incorporated in New South Wales. It is a distributor of the partwork series’ *Building the Bounty* and *Building the Cutty Sark* for Ediciones Del Prado SA, also known as Del Prado Publishing (“Del Prado”), a foreign corporation within the meaning of the *Trade Practices Act 1974* (“the Act”).
2. In 1999 Kirin (then known as Weldon By Mail Pty Ltd) began distributing the *Building the Bounty* series in Australia on behalf of Del Prado. Kirin provides fulfilment house services to Del Prado, including warehousing, order taking and payment processing throughout Australia.
3. On 15 October 2002, the Australian Competition and Consumer Commission (“the Commission”) wrote to Kirin in relation to a complaint received from a subscriber to the *Building the Bounty* series that he had received the first four issues of the *Building the Cutty Sark* series in the mail in May 2002, along with an invoice for \$45.40, which he had not requested.

4. Kirin advised the Commission that, with the last edition of the *Building the Bounty* series, it sent subscribers material advertising the *Building the Cutty Sark* series. One document was a form headed "Cutty Sark - An Exclusive offer to Del Prado subscribers" ("the Cutty Sark offer") which stated "If you DO NOT want to take advantage of this offer simply contact us on the following phone number (02) 9979 0222 Or, fill in the attached form and send it back to us in the reply envelope."
5. A second, separate promotional letter included in that package stated: "If you would like to take advantage of this offer simply contact us on (02) 9979 0222 or, send in the order form enclosed ... *Building the Cutty Sark* is only available on subscription, and is not available through your newsagent at present."
6. Kirin has advised the Commission that the first instalment of the *Building the Cutty Sark* series and an invoice for \$45.40 were sent to "(p)eople who received the final dispatch of '*Building the Bounty*' and did not advise us that they wanted to opt out from receiving the initial issues of the Cutty Sark on approval." The information it initially supplied to subscribers to the *Building the Bounty* series did not refer to the *Building the Cutty Sark* series. The two series are discrete products.
7. The complainant states that he did not receive the Cutty Sark offer but did get the second promotional letter which he chose not to complete and return as he did not wish to purchase the product.
8. Kirin has advised the Commission that it sent out 876 dispatches of the final part of the *Building the Bounty* series containing the Cutty Sark offer. 253 customers returned the form advising that they did not wish to receive the *Building the Cutty Sark* series. A further 423 customers returned the *Building the Cutty Sark* series after it had been received. 159 customers paid for the first part of the *Building the Cutty Sark* series and 31 customers paid for the first part but have since cancelled the series.
9. Kirin accepts that it was not able to rely upon the failure of subscribers to the *Building the Bounty* series to respond to the Cutty Sark offer as constituting a request by that person to be sent the *Building the Cutty Sark* series.
10. Kirin also accepts that it acted on behalf of Del Prado in sending the *Building the Cutty Sark* series and an invoice for \$45.4050 to persons as referred to in paragraph 6 and that, by way of the invoice, Del Prado, asserted a right to payment for unsolicited goods without having reasonable cause to believe that there was a right to payment, which is conduct of the kind that is prohibited by section 64 of the Act.

11. Following an investigation into the conduct referred to above, the Commission reached the view that Kirin, despite not appreciating that the conduct contravened the Act, had been knowingly concerned in, or party to or involved in a contravention of section 64 of the Act by Del Prado, within the meaning of sections 75B, 80 and 87 of the Act. Kirin accepts that not knowing that either Del Prado's conduct contravened the Act, or that its own conduct rendered it liable under the Act, does not excuse its liability under the Act.

In order to address the Commission's concerns, Kirin has agreed to give the Commission undertakings pursuant to section 87B of the Act, which are set out below.

COMMENCEMENT OF UNDERTAKING

12. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Kirin; and
 - (b) the Commission accepts the Undertaking so executed.

UNDERTAKINGS

13. Kirin undertakes that it will not:
 - (a) engage in conduct that constitutes demanding or otherwise asserting a right to payment for unsolicited goods in contravention of section 64 of the Act
 - (b) be knowingly concerned in, party to or otherwise involved in conduct that constitutes demanding or otherwise asserting a right to payment for unsolicited goods in contravention of section 64 of the Act.
14. Kirin undertakes that it will not send letters, other communications or other documentation to customers or potential customers in similar terms or of similar effect to the Cutty Sark offer, namely that the customer or potential customer must advise the company if he or she does not wish to receive a product, in the absence of which advice, the customer will be deemed to have agreed to purchase the product and the product sent to the customer with a demand for payment.
15. Within 14 days of the date of this Undertaking coming into effect, Kirin will send a letter on Kirin Direct Marketing Pty Ltd letterhead in the form and terms of Annexure A to this Undertaking to each person who received the *Building the Cutty Sark* series after having not responded to the Cutty Sark offer, and who paid for the first instalment of the *Building the Cutty Sark* series. The letter will offer a refund of the amount paid for the first instalment to those recipients of the letter who cancelled the series and did not receive any further instalments.

16. Within 14 days of the date of this Undertaking coming into effect, Kirin will send a letter on Kirin Direct Marketing Pty Ltd letterhead in the form and terms of Annexure B to this Undertaking to each person who received the Cutty Sark offer, other than those persons who are to be sent a letter in the form and terms of Annexure A referred to in paragraph 15 above.
17. Within three months of this Undertaking coming into effect, Kirin will provide the Commission with a schedule containing the names and addresses of all persons to whom the letter in the form and terms of Annexure A was sent under paragraph 15 above and details of any refunds made to any of those persons, including the identity of the persons receiving refunds.
18. Kirin will, at its own expense:
 - (a) within three months of the date of this Undertaking coming into effect, use its best endeavours to design, implement and make provision to maintain and audit a trade practice compliance program ("Compliance Program") that, while appropriate to the size and nature of Kirin's business, is consistent with the Australian Standard for Compliance Programs, AS-3806, relating to those provisions of the Act which are relevant to the conduct of Kirin's business, including section 64. The Compliance Program shall be maintained for a period of not less than 3 years;
 - (b) prior to the implementation of the Compliance Program, ensure the Compliance Program is approved by a suitably qualified compliance professional with expertise in trade practices law who is independent of Kirin and has no conflict of interest in providing this service to Kirin ("Compliance Professional");
 - (c) retain the Compliance Professional to provide the Commission with a report confirming that the Compliance Program has been implemented and is in accordance with this Undertaking. This report will be provided to the Commission within four months of the date of this Undertaking coming into effect;
 - (d) cause a review of the Compliance Program to be undertaken by the Compliance Professional annually from the date of this Undertaking for a period of 3 years. The Compliance Professional shall conduct the reviews and report to the Commission within 30 days of each annual review to confirm that the review has been conducted.
19. These undertakings will be operative for five years commencing from the date the undertakings are executed by both parties.

ACKNOWLEDGEMENTS

Kirin acknowledges that

- the Commission will make these undertakings available for public inspection.
- the Commission may issue a media release about this undertaking and may, from time to time, publicly refer to the undertaking.
- this undertaking in no way derogates from the rights and remedies available to any other person arising from any conduct of Kirin to which any provision of the Act may apply, including sections 64, 75B, 80 and 87.

In Witness whereof this Undertaking has been executed)
by **KIRIN DIRECT MARKETING PTY LTD**)
by *JULIA LESLEY WOKES*, Director)
and *CHRISTOPHER RICHARD WOKES*, Secretary/Director,)
whose signatures appear below in the presence of:)

[Signature]
.....
Director

JULIA LESLEY WOKES
.....
Print Name

Executed by)
in the presence of:)

[Signature]
.....
Signature of Witness

KIRSTEN WOKES
.....
Name of Witness

[Signature]
.....
Secretary/Director

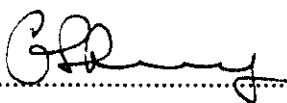
CHRIS WOKES
.....
Print Name

[Signature]
.....
Signature of Witness

KIRSTEN WOKES
.....
Name of Witness

This *27th* day of *APRIL* 2004.

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


.....

Chairman

This 10th day of May 2004.

ANNEXURE A

Dear [customer]

Kirin Direct Marketing Pty Ltd – Building the Cutty Sark partwork series

I am writing to you as a recipient of the *Building the Cutty Sark* partwork series. Kirin Direct Marketing distributed these series in Australia on behalf of Del Prado Publishing.

With the last dispatch of the *Building the Bounty* series sent to you, you should have received material advertising the *Building the Cutty Sark* series. This material included an offer headed “Cutty Sark - An Exclusive offer to Del Prado subscribers” which stated “If you DO NOT want to take advantage of this offer simply contact us on the following phone number (02) 9979 0222 Or, fill in the attached form and send it back to us in the reply envelope.” (“the Cutty Sark offer”)

The Australian Competition and Consumer Commission (“the Commission”) has raised with Kirin Direct Marketing its concerns that goods sent to a consumer as a result of the consumer not responding to the Cutty Sark offer are unsolicited goods. The Commission is concerned that any demand for payment for those goods would constitute the assertion of a right to payment for unsolicited goods by Del Prado Publishing, in contravention of section 64 of the *Trade Practices Act 1974*.

The Commission considers that, by sending out this material and invoices on behalf of Del Prado, Kirin, despite not appreciating that the conduct contravened the Act, was knowingly concerned in or party to a contravention of section 64 of the Act by Del Prado. Kirin accepts that not knowing that either Del Prado’s conduct contravened the Act, or that its own conduct rendered it liable under the Act, does not excuse its liability under the Act. To satisfy the concerns raised by the Commission, Kirin has agreed to give certain court enforceable undertakings to the Commission in which, amongst other things, Kirin has undertaken to not engage in similar conduct in the future.

Kirin has also undertaken to offer a refund to all persons who received the first instalment of the *Building the Cutty Sark* series after having not responded to the Cutty Sark offer, paid for the first instalment of the series, then cancelled the series and did not receive any further instalments.

Please find enclosed our cheque in full reimbursement of moneys paid for the *Building Cutty Sark* series. If you have any enquiries about this matter please contact Kirin Direct Marketing on (02) >>>> >>>>>>.

Yours faithfully,

Rainer Krause
Chief Executive

ANNEXURE B

Dear [customer]

Kirin Direct Marketing Pty Ltd – Building the Cutty Sark partwork series

I am writing to you as a recipient of our offer to take up the *Building the Cutty Sark* partwork series. Kirin Direct Marketing distributed these series in Australia on behalf of Del Prado Publishing.

With the last dispatch of the *Building the Bounty* series sent to you, you would have received material advertising the *Building the Cutty Sark* series. This material included an offer headed “Cutty Sark - An Exclusive offer to Del Prado subscribers” which stated “If you DO NOT want to take advantage of this offer simply contact us on the following phone number (02) 9979 0222 Or, fill in the attached form and send it back to us in the reply envelope.” (“the Cutty Sark offer”)

The Australian Competition and Consumer Commission (“the Commission”) has raised with Kirin Direct Marketing its concerns that goods sent to a consumer as a result of the consumer not responding to the Cutty Sark offer are unsolicited goods. The Commission is concerned that any demand for payment for those goods would constitute the assertion of a right to payment for unsolicited goods by Del Prado Publishing, in contravention of section 64 of the *Trade Practices Act 1974*.

The Commission considers that by sending out this material and invoices on behalf of Del Prado, Kirin, despite not appreciating that the conduct contravened the Act, was knowingly concerned in or party to a contravention of section 64 of the Act by Del Prado. Kirin accepts that not knowing that either Del Prado’s conduct contravened the Act, or that its own conduct rendered it liable under the Act, does not excuse its liability under the Act. The Commission accepts that Kirin was not aware that the conduct of Del Prado constituted a contravention of section 64 of the Act and that, through its conduct, Kirin was knowingly concerned in, or party to the contravention of section 64 of the Act by Del Prado.

To satisfy the concerns raised by the Commission, Kirin has agreed to give certain court enforceable undertakings to the Commission in which, amongst other things, Kirin has undertaken to not engage in similar conduct in the future.

We regret any inconvenience caused by our actions.

Yours faithfully,

Rainer Krause
Chief Executive