

## TRADE PRACTICES ACT 1974

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

BY

MICROSOFT PTY LIMITED

ACN 002 589 460

## BACKGROUND

- 1 Microsoft Pty Limited ("**Microsoft**"), which has its principal offices at 65 Epping Road, North Ryde, New South Wales is the representative in Australia and a wholly-owned subsidiary of Microsoft Corporation, a corporation incorporated under the laws of the State of Delaware in the United States of America.
- 2 In March 1996, Microsoft arranged a promotion which offered 20 hours of free Internet access from On Australia ("**the Offer**") to purchasers of Microsoft Windows 95 Upgrade ("**the Product**") subject to certain conditions. The conditions of the Offer were stated on information brochures for the benefit of retailers and on point of sale material for consumers which Microsoft forwarded to the distributors of Microsoft software for supply to retailers and other resellers. The conditions were also printed on the inside of the stickers which were to be attached by retailers and other resellers to the packaging of the Product. The conditions included the expiry date of the Offer and the need for the purchaser to have either a Mastercard or Visa Card credit account to take advantage of the Offer.
- 3 By letter dated 20 September 1996, Microsoft was informed by the Australian Competition and Consumer Commission (the ACCC) that the ACCC had received a complaint alleging that Microsoft may have engaged in conduct in breach of the Trade Practices Act 1974 ("**the Act**") by failing to reveal, until after the purchase of the Product had taken place, the requirement for the purchaser of the Product to be a holder of either a Mastercard or Visa Card credit account to take advantage of the Offer.
- 4 By letter to Microsoft dated 5 November 1996, the ACCC expressed its concern that Microsoft had also failed to reveal the expiry date of the Offer until after the purchase of the Product had taken place. The ACCC claimed that Microsoft may have breached sections 52, 53(c) and 53(g) of the Act.

5 Although Microsoft had advised the distributors of the date when the Offer was to expire, the  
ACCC found that some retailers were still selling the Product with the promotion sticker on it  
after the expiry date of the Offer.

6 As a result of the ACCC's concerns, Microsoft has responded by taking the following steps:

- (a) Microsoft sent a letter to each of the distributors for distribution to all retailers instructing them to remove immediately all adhesive stickers and all point of sale material associated with the Offer;
- (b) Microsoft arranged for an insert to be included in the next edition of "Sales Partner Magazine", which was published on or about 3 December 1996 and which has a distribution of about 23,000 copies to distributors and resellers of Microsoft products in Australia. The insert requests sales partners to remove the promotional sticker and all promotional material relating to the Offer as soon as possible;
- (c) Microsoft included a slide in its November/December presentations to resellers in Sydney, Canberra, Melbourne, Perth, Brisbane and Townsville, to alert resellers to the need to remove any stickers or promotional material in relation to the Offer. The presentations targeted up to 3,700 resellers of Microsoft products and were completed on 3 December 1996;
- (d) Microsoft made special arrangements with On Australia to allow consumers who bought the Product with the promotional sticker on it to have access to the Offer even if they do not have a Mastercard or Visa Card;
- (e) Microsoft extended the Offer to those consumers who bought the Product with the promotional sticker on it prior to 31 December 1996. The original Offer applied to consumers who purchased the Product before 30 September 1996;
- (f) Microsoft placed an insert in the December/January issue of "Communique" magazine which has recently been sent to "Communique" members. The insert apologises to any consumers who may have been misled and informs consumers of the extension of the Offer; and

(g) Microsoft placed a notice on its Internet website and on the Microsoft Network home page with On Australia, to remain until at least 31 December 1996. The notice informs consumers of the extension of the Offer.

7 Microsoft acknowledges that all material conditions of a promotional offer to consumers should be available to a consumer before the consumer makes a decision to purchase the product the subject of the promotional offer. Accordingly, Microsoft has agreed to give the following undertakings.

### **UNDERTAKINGS**

Microsoft undertakes for the purposes of section 87B of the Act that prior to or until 30 June 1997 (unless otherwise stated), whether by itself, its employees or agents, it will:

- 1 Review product registrations prior to 31 December 1996 in an attempt to identify consumers who may have been misled.
- 2 Advise any consumers identified as a result of the review of product registrations and any complainants of the availability of the special arrangements with On Australia and the extension of the Offer to consumers who purchased the Product prior to 31 December 1996 with the promotional sticker on it.
- 3 Improve arrangements for any complaints received by distributors or resellers to be passed on to it, so that complainants may be satisfied.
- 4 Review its current promotions and its procedures for the trade practices vetting of future promotions.
- 5 Review the complaint gathering procedures to improve the flow of complaints back from consumers and resellers to Microsoft, including a review of Microsoft's feedback telephone line.
- 6 Review its procedures and response times so that enquires and complaints from the ACCC and other sources will be acted upon by Microsoft more quickly and efficiently in the future.
- 7 In conjunction with the ACCC, develop proposals for improving communication channels between Microsoft and the ACCC.

8 Supplement the existing trade practices compliance programs which Microsoft already conducts for its staff by holding trade practices training sessions for executives and other staff of Microsoft as set out in the attached schedule.

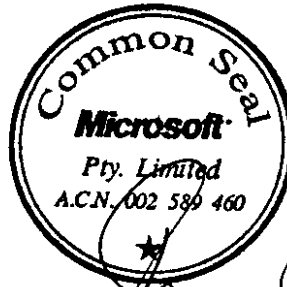
**ACKNOWLEDGMENTS**

Microsoft acknowledges that the ACCC will make this undertaking available for public inspection.

Microsoft further acknowledges that the ACCC will from time to time publish and publicly refer to this undertaking at its discretion.

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

THE COMMON SEAL of )  
MICROSOFT PTY LIMITED )  
ACN 002 589 460 is affixed in )  
accordance with its articles of association )  
in the presence of: )



*[Signature]*  
.....  
Signature of authorised person

*[Signature]*  
.....  
Signature of authorised person

CHRIS KELLNER  
.....  
Office held

COMPANY SECRETARY  
.....  
Office held

MANAGING DIRECTOR  
.....  
Name of authorised person (block letters)

JONATHAN SYMONS  
.....  
Name of authorised person (block letters)

Dated this 12 day of December 1996

*[Signature]*  
.....  
(Professor Allan Fels)  
Chairman

## **SCHEDULE**

### **SUPPLEMENTARY TRADE PRACTICES TRAINING SESSIONS**

#### **AIM**

To ensure a culture of compliance within Microsoft, and to prevent, so far as is reasonably possible, any contraventions of the Act by Microsoft.

#### **COVERAGE**

The supplementary training sessions will cover all senior executives of Microsoft, and all other employees of Microsoft whose duties could result in them being concerned in conduct that might breach the Act, including management, sales and marketing staff and product support staff (relevant staff).

#### **SUPPLEMENTARY TRAINING SESSIONS**

The supplementary training sessions will be calculated to have the relevant staff conversant with the provisions of the Act to a level where they can avoid obvious contraventions and can identify more complex potential trade practices problems for referral to the corporate attorney.

Commencing as soon as practicable, Microsoft will provide supplementary training for the relevant staff by holding a series of training sessions on trade practices compliance for which mandatory attendance of relevant staff will be required.

The sessions will each be approximately 1 hour to 1.5 hours in length and will include a general explanation of the relevant trade practices law, an explanation of the application of trade practices principles to “real life” factual situations, followed by a “question and answer” session where attendees can ask questions about specific situations which they may have encountered and seek clarification of any matters raised during the talk.

Slides which will summarise the main points of each talk will be made available on the Microsoft Law and Corporate Affairs webpage after each session.

A written guideline paper will also be available after each session which will summarise the relevant trade practices law of each talk and will incorporate key issues raised during the discussion session of the talk.

A desk brochure which will outline key guidelines will be handed out at the first session.

The subject matter of the training sessions is currently proposed to be as follows:

## 1 **Misleading and Deceptive Conduct**

- General explanation of the objects of the Act and the role of the ACCC.
- Outline of Part V of the Act with particular attention on sections 52 and 53.
- The application of the provisions to advertising, promotion and packaging issues.
- Qualification of representations which may be based on certain assumptions.
- The importance of ensuring that material conditions of special offers are disclosed clearly on the external packaging of the relevant product and elsewhere as appropriate.
- Reinforcing the importance of, and necessity for, all marketing and promotional material being vetted by Microsoft legal staff.
- Representations about the availability of products - "Vapourware".
- Representations about warranties.
- Explanation of the importance of setting up strong mechanisms to ensure that the distribution channel gives all relevant promotional material to retailers and that retailers give consumers point of sale material prior to the purchase.
- The capture and handling of consumer complaints to retailers or to Microsoft direct in relation to allegations of misleading and deceptive conduct or product faults.
- Working together - importance of ensuring that information of relevance to consumers is passed to colleagues who may need to be aware of it to avoid a breach of the Act.
- Penalties under Part V of the Act.

## 2 **Channel Pricing and Conduct**

- Outline of Part IV of the Act with particular attention to sections 45 and 46.
- The talk will outline key concepts such as "market", "purpose", "substantial lessening of competition".

- Application of section 46.
- Application of section 45 (including unlawful price fixing).
- Exclusionary provisions and boycotts.
- Legality of special deals with retailers.
- Co-operative marketing funds.
- Penalties under Part IV of the Act.

### **3 Pricing and Discounting**

- Outline of sections 47 and 48 of the Act.
- Revision of key definitions and concepts from session 2.
- Resale price maintenance.
- Rebates and discounting.
- Meaning of ERP and calculation.

### **4 Packaging Products for Promotions**

- Outline of section 47 - tying arrangements, exclusive dealing and non-collusion.
- Application of section 47 - for example, to mobile telephones.
- Packaging of products - Microsoft policy.
- Pricing issues.
- Alteration of OEM product by the distribution channel.

### **5 Price Discrimination and Predatory Pricing**

- Outline of sections 45 and 46 of the Act and application to Microsoft's business.
- Exploration of the Robinson - Patman Act.

## 6 Overview

- General review of the subject matter of the training sessions with emphasis on particular topics requested by staff.

### **TIMEFRAME FOR COMPLETION OF COMPLIANCE TALKS**

Microsoft will complete seminars 1 to 3 for all relevant staff by 31 May 1997 and will complete seminars 4 to 6 by 31 October 1997.

### **REVIEW OF TRADE PRACTICES COMPLIANCE**

Microsoft will provide an initial progress report on its trade practices compliance programs to the ACCC on or before 30 June 1997 and a further progress report on or before 30 November 1997.