

TRADE PRACTICES ACT 1974

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

BY

**NARNIA INVESTMENTS PTY LTD ACN 101 469 103
AND SIMON CHARLES CLARKE**

PARTIES GIVING UNDERTAKING

1. This Undertaking is given to the Australian Competition and Consumer Commission (“**the ACCC**”) by Narnia Investments Pty Ltd (ACN 101 469 103) (“**Narnia**”) of Level 2, 50 Burwood Road, Hawthorn, in the State of Victoria and Simon Charles Clarke (“**Mr Clarke**”) of in the State of Victoria under section 87B of the *Trade Practices Act 1974* (Cth) (“**the TPA**”).

BACKGROUND

2. Narnia was formerly the franchisee of Advanced Hair Studio Hobart (“**AHS Hobart**”) which provided hair replacement goods and services to consumers. On 31 August 2004 AHS Hobart entered into a contract with a consumer, Mr Andrew Hack (“**Mr Hack**”) totalling \$15,500. At the time Mr Clarke was National Sales Manager with Advanced Hair Studio Pty Ltd (“**AHS Pty Ltd**”) with responsibility for training Advanced Hair Studio sales staff.
3. Mr Clarke offered Mr Hack a special deposit arrangement whereby Mr Hack only had to pay \$3,000 to AHS Hobart before commencing to receive hair replacement treatment, rather than having to pay the full deposit amount of \$7,750 specified in the contract. Once Mr Hack had paid AHS Hobart the \$3,000 deposit and the hair piece had been ordered he would then have been liable to pay AHS Hobart the balance of the money owing on the contract, namely, \$12,500. Clause 3 of Mr Hack’s contract with AHS Hobart enabled Mr Hack to terminate the contract at any time prior to having paid the \$3,000 deposit and to receive a full refund of any deposit instalments paid to AHS Hobart (“**the termination and refund provision**”).
4. From time to time between 31 August 2004 and approximately July 2005, Mr Hack, a disability support pensioner with serious physical and mental health illnesses, paid to AHS Hobart irregular, small deposit payments totalling \$1,800. By July 2005 Mr Hack had misplaced his copy of his contract with AHS Hobart and was not aware of the termination and refund provision in his contract.
5. In early 2006 Mr Hack’s mother (“**Mrs Hack**”) contacted AHS Hobart on behalf of Mr Hack, informing AHS Hobart of her son’s mental and physical illnesses and limited financial circumstances. Mrs Hack asked AHS Hobart to release Mr Hack from the contract and to refund Mr Hack his deposit monies totalling \$1,800. Mrs Hack was not aware of the termination and refund

provision in Mr Hack's contract. AHS Hobart informed Mrs Hack that Mr Hack's contract could not be terminated even though no hair replacement treatment for Mr Hack had begun, and that Mr Hack remained legally obligated under the contract to AHS Hobart.

6. Subsequently during 2006 Mrs Hack made further unsuccessful requests to AHS Hobart and directly to Mr Clarke that Mr Hack be released from his contract and his deposit monies refunded.
7. On 31 October 2006, after Mr Clarke was contacted by the Hobart Community Legal Service (HCLS) on behalf of Mr Hack, Mr Clarke claimed that AHS Hobart had, out of its own pocket, paid Mr Hack's full deposit of \$7,750 to an AHS parent company, namely, AHS Pty Ltd. Mr Clarke claimed that AHS Pty Ltd had only agreed to reimburse \$4,000 of the \$7,750 to AHS Hobart and, taking into account Mr Hack's deposit payments to AHS Hobart totalling \$1,800, this still left AHS Hobart \$1,950 "out of pocket" which AHS Hobart required Mr Hack to pay within 30 days if Mr Hack wished to be released from his contract with AHS Hobart. None of these claims were true. Mr Clarke refused to release Mr Hack from his contract with AHS Hobart and refused to refund Mr Hack his \$1,800 deposit in accordance with the termination and refund provision in Mr Hack's contract.
8. In early 2007 Mr Hack and his mother made a complaint to the ACCC about the refusal by Mr Clarke and AHS Hobart to release Mr Hack from the contract with AHS Hobart and to refund Mr Hack his \$1,800 deposit. During the course of the ACCC's investigation into the matter, Mr Clarke admitted to the ACCC that, at the time he refused to release Mr Hack from the contract and refund Mr Hack his \$1,800 deposit, he was aware of Mr Hack's legal rights under the termination and refund provision of the contract. Mr Clarke also admitted that he had fabricated claims that he had made to Mr Hack's mother and to HCLS about AHS Hobart having itself paid Mr Hack's full deposit of \$7,750 to AHS Pty Ltd and consequently being "out of pocket" in relation to Mr Hack. Mr Clarke advised the ACCC that he had fabricated the claim about being "out of pocket" so that he could retain Mr Hack's \$1,800 deposit.
9. Narnia and Mr Clarke acknowledge that their conduct in refusing to release Mr Hack from his contract with AHS Hobart and refusing to refund Mr Hack's \$1,800 deposit, in circumstances where Narnia and Mr Clarke were aware of Mr Hack's rights in relation to the termination and refund provision in Mr Hack's contract, was misleading and deceptive in contravention of section 52 of the TPA.
10. As part of a settlement agreement with the ACCC, Narnia and Mr Clarke has undertaken to refund Mr Hack's \$1,800 deposit and to pay Mr Hack \$10,000 in compensation for the emotional trauma suffered by Mr Hack as a result of the conduct of Narnia and Mr Clarke. Of the \$10,000 compensation to be paid to Mr Hack, it was agreed between the parties that \$5,000 was to be paid by Narnia and Mr Clarke to Mr Hack, via the ACCC, by 31 July 2007 with the balance to be paid in conjunction with subsequent court proceedings that the ACCC expected to bring against Narnia and Mr Clarke. On 31 July 2007 a bank cheque for \$5,000 was forwarded by Narnia and Mr Clarke to the ACCC and passed on to Mr Hack.

11. The expected court proceeding was commenced in the Federal Court of Australia on 20 August 2008 (No. TAD 33 of 2008) and it is anticipated that consent orders to finalise the proceeding will be made by the court on 23 April 2009. The orders will include an order that Narnia and Mr Clarke pay the ACCC's costs of the proceeding in the sum of \$12,785.
12. For the purpose of completing the payment of the balance of compensation to Mr Hack, namely \$5,000, refunding Mr Hack's \$1,800 deposit, and paying the ACCC's legal costs, Narnia and Mr Clarke give the following Undertaking to the ACCC pursuant to section 87B of the TPA.

UNDERTAKING

13. Narnia and Mr Clarke hereby undertake the following to the ACCC for the purposes of section 87B of the TPA:
14. Narnia and Mr Clarke collectively undertake to pay Mr Hack the sum of \$6,800 and ACCC the sum of \$12,785 by monthly instalments of a minimum \$500.
 - 14.1. Payments will be appropriated to the amount owing to Mr Hack until that amount is paid in full and, thereafter, will be appropriated to payment of the ACCC's legal costs.
 - 14.2. The monies to be paid to Mr Hack will be paid by bank cheque made payable to Mr Hack. Each cheque will be provided to the ACCC which will onforward it to Mr Hack.
 - 14.3. The payment of the total amount of \$6,800 to Mr Hack is to be completed by no later than 30 June 2010.
15. Upon default in any monthly payment, at the discretion of the ACCC the full amount unpaid will become payable on demand.
16. Should Mr Clarke commit an act of bankruptcy, the full amount outstanding will be payable forthwith.

COMMENCEMENT OF UNDERTAKING


17. This Undertaking comes into effect on the date on which:
 - 17.1. the Undertaking is executed by Narnia and Mr Clarke; and
 - 17.2. the ACCC accepts the Undertaking so executed.

ACKNOWLEDGEMENT

18. Narnia and Mr Clarke acknowledge the ACCC's right to make this Undertaking available for public inspection and notes that the ACCC may, at its discretion, from time to time, publish and publicly refer to this Undertaking.

EXECUTION PAGE

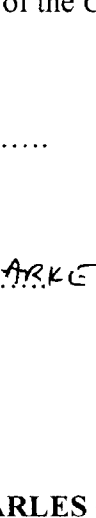
EXECUTED by **NARNIA INVESTMENTS PTY LTD (ACN 101 469 103)** in accordance with section 127(1) of the *Corporations Act 2001* by authority of its director:


.....
Signature of director

SIMON CHARLES CLARKE
Name of director (block letters)


Date: 23 April 2009

EXECUTED by **SIMON CHARLES CLARKE**


.....
Signature of Simon Charles Clarke

Date: 23 April 2009

ACCEPTED by the **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** pursuant to section 87B of the *Trade Practices Act 1974*


.....
(Graeme Julian Samuel)
Chairman
Australian Competition and Consumer Commission

Date: 30th April 2009