

## **TRADE PRACTICES ACT 1974**

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

by

Power Balance Australia Pty Ltd

ACN 136 576 997

whose principal place of business is

Unit 2, 173 Salmon Street, PORT MELBOURNE, VICTORIA 3207

### **PERSONS GIVING THIS UNDERTAKING**

This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Power Balance Australia Pty Ltd ACN 136 576 997 6 Montgomery Court Kilsyth Vic 3137 (**Power Balance Australia**)

(1) for the purposes of section 87B of the *Trade Practices Act, 1974* (**Act**).

### **BACKGROUND**

- (2) Power Balance Australia was appointed as the exclusive Australian distributor of Power Balance products in Australia in June 2009 and has been selling Power Balance wristbands and pendants (collectively **Products**) since July 2009. The products are available for sale through a distribution network in Australia.
- (3) The Products are worn as a wristband, around the ankle or as a pendant sitting close to the body.
- (4) From August 2009, Power Balance Australia has made a number of representations
  - (a) on the Power Balance Australia website,
  - (b) on packaging,
  - (c) at various exhibitions, and
  - (d) from May 2010 through specialist sports magazine advertising (**Magazine Representations**)

regarding the Products, stating that:

- 'Power Balance holograms are embedded with frequencies that react positively with your body's natural energy field to improve balance, strength and flexibility'
- 'Power Balance holograms are designed to work with your body's natural energy field'
- 'Power Balance is Performance Technology'

- 'Performance Technology'

**(Representations).**

- (5) At the time of making the Representations, and as at the date of this Undertaking, Power Balance Australia did not and does not have:
  - (a) any credible scientific evidence that supports the Representations; and therefore
  - (b) any reasonable grounds for making the Representations.
- (6) Section 52 of the Act prohibits a corporation in trade or commerce from engaging in conduct which is misleading or deceptive or likely to mislead or deceive. Further, section 51A of the Act states that where a corporation makes a representation with respect to any future matter and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- (7) The ACCC considers that by engaging in the conduct set out in paragraph (4) above, Power Balance Australia contravened section 52 of the Act on the basis that:
  - (a) Power Balance Australia had no reasonable grounds for making the Representations; and
  - (b) consumers are likely to have been misled or deceived by the Representations to the effect that by wearing the Products, their balance, strength and flexibility would improve when this was not the case.
- (8) In response to the ACCC's concerns, Power Balance Australia:
  - (c) admits that the conduct described in paragraph 4 breached section 52 of the Act; and
  - (d) offers this Undertaking to the ACCC.

**COMMENCEMENT OF UNDERTAKING**

- (9) This Undertaking comes into effect when:
  - (i) the Undertaking is executed by Power Balance Australia; and
  - (ii) the ACCC accepts the Undertaking so executed.
- (10) Upon the commencement of this undertaking, Power Balance Australia undertakes to assume the obligations set out in paragraph 11 below.

**UNDERTAKINGS**

- (11) Subject to this paragraph, Power Balance Australia undertakes, for the purposes of section 87B of the Act:
  - (a) that from the date of this Undertaking coming into effect, it will not, in trade or commerce, in respect of the Products, make any claims to the effect that the Products:
    - i. will improve the user's balance, strength and flexibility; or
    - ii. are 'designed to work with the body's natural energy field';

- iii. nor, in conjunction with the Products, make claims that 'Power Balance is Performance Technology' or use the phrase "Performance Technology"

**(Claims)**

unless Power Balance Australia has first obtained a written report from an independent testing body that has tested the Products pursuant to a properly-designed, randomised, double-blind scientific study or clinical trial and that report provides a statistically significant basis for making any of the Claims;

- (b) that within 14 days of this Undertaking coming into effect, it will remove the Representations from the Power Balance Australia website at [www.powerbalance.com.au](http://www.powerbalance.com.au);
- (c) to publish, at its own expense, once, in magazines as listed in Annexure A, a corrective advertisement in the form set out in Annexure B to this Undertaking (**Corrective Advertisement**);
- (d) In respect of each such magazine, Power Balance Australia will use all reasonable endeavours to ensure that the Corrective Advertisement will be published within 30 days of the date of this Undertaking, taking into account the magazine publication deadlines for receipt of materials;
- (e) to publish at its own expense, once within 14 days of the commencement of this Undertaking coming into effect, in the Australian newspaper, in the front section of that newspaper, a Corrective Advertisement in a quarter page size;
- (f) to provide the ACCC with proof within 14 days of each Corrective Advertisement being published;
- (g) that from the commencement of this Undertaking, it will not manufacture or import Products containing the words "performance technology";
- (h) that on or before 1 February 2011 it will cease supplying Products containing the words "performance technology" to retailers and that any such Products that are supplied to retailers before 1 February 2011 will have the words "performance technology" blacked out on the packaging of the Products;
- (i) to offer to retailers from 1 February 2011 onwards to replace all stock of the Products that contain the words "performance technology" with stock that does not contain the words "performance technology";
- (j) to use all reasonable endeavours to replace collateral marketing and promotional material in its possession or control that contains the words "performance technology" (**old collateral material**) with new collateral marketing and promotional material that does not contain the words "performance technology" within 1 month of the date of commencement of this Undertaking during which time Power Balance Australia may continue to use the old collateral material;
- (k) to publish, within 14 days of the date of commencement of this Undertaking on the Power Balance Australia website [www.powerbalance.com.au](http://www.powerbalance.com.au) home page a prominent link headed 'Corrective Advertisement' which, when clicked on, will display the Corrective Advertisement and maintain that link for a period of six months thereafter. The Corrective Advertisement will remain open on the user's browser until he or she closes the link;

- (l) to offer for a period of six months from the date of commencement of this Undertaking to refund, upon return of a genuine Product, the whole of the purchase price together with postage, upon proof of purchase (which will include a credit card record or store barcode) from an authorised reseller in Australia;
- (m) to establish and implement a Trade Practices Compliance Program in accordance with the requirements set out in Annexure D within 3 months of the date of this Undertaking coming into effect, being a program designed to minimise Power Balance's risk of future breaches of section 52 and to ensure its awareness of the responsibilities and obligations in relation to the requirements of section 52 of the Act; and
- (n) to maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this Undertaking coming into effect.


## **ACKNOWLEDGMENTS**

(12) Power Balance acknowledges that:

- (i) the ACCC will make this Undertaking publicly available, including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (ii) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications; and
- (iii) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.


**EXECUTED BY**

Power Balance Australia Pty Ltd ACN 136 576 997 and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.

  
.....  
Secretary/Director [**Signed**]  
.....  
Director [**Signed**]

This 2<sup>nd</sup> day of DECEMBER 2010

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
PURSUANT TO SECTION 87B OF THE *TRADE PRACTICES ACT 1974*.**

  
.....  
Graeme Julian Samuel [**Signed**]  
Chairman

This 22<sup>nd</sup> day of December 2010

## Annexure A

List of Magazines in which the Advertisement in Annexure B is to be run

# ADVERTISING

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### Magazines for corrective advertising

### Average of Deadline dates

1. Rugby League Player	20 <sup>th</sup> two months prior
2. Inside Sport	23 <sup>rd</sup> two months prior
3. Tracks	7 <sup>th</sup> two months prior
4. Australian Golf Digest	20 <sup>th</sup> two months prior
5. Alpha	24 <sup>th</sup> two months prior
6. Runners World	13 <sup>th</sup> two months prior
7. Veritas	20 <sup>th</sup> two months prior
8. Australian Shape	21 <sup>st</sup> two months prior
9. Australian Yoga Journal	15 <sup>th</sup> three months prior
10. Australian Golf	20 <sup>th</sup> two months prior
11. Men's Fitness	20 <sup>th</sup> two months prior
12. Blitz Martial Arts	26 <sup>th</sup> two months prior
13. Iron Man	20 <sup>th</sup> two months prior
14. Kickboxer	22 <sup>nd</sup> two months prior
15. Inside MMA	24 <sup>th</sup> two months prior
16. Triathlon & Multisport	5 <sup>th</sup> of the month prior
17. Australian Natural Health	23 <sup>th</sup> two months prior
18. Oxygen	14 <sup>th</sup> of the month prior
19. Ultra	10 <sup>th</sup> of the month prior
20. Soccer International	16 <sup>th</sup> of the month prior

Turnaround on a change to creative typically takes 3 – 5 days.

## Annexure B

# Corrective Advertisement



## Power Balance wristbands

In our advertising we stated that Power Balance wristbands improved your strength, balance and flexibility.

We admit that there is no credible scientific evidence that supports our claims and therefore we engaged in misleading conduct in breach of s52 of the *Trade Practices Act 1974*.

If you feel you have been misled by our promotions, we wish to unreservedly apologise and offer a full refund.

To obtain a refund please visit our website [www.powerbalance.com.au](http://www.powerbalance.com.au) or contact us toll-free on 1800 733 436

This offer will be available until 30 June 2011. To be eligible for a refund, together with return postage, you will need to return a genuine Power Balance product along with proof of purchase (including credit card records, store barcodes and receipts) from an authorised reseller in Australia.

This Corrective Notice has been paid for by Power Balance Australia Pty Ltd and placed pursuant to an undertaking to the Australian Competition and Consumer Commission given under section 87B of the *Trade Practices Act, 1974*.



## Annexure C

### TRADE PRACTICES COMPLIANCE PROGRAM

#### LEVEL 2

Power Balance Australia will establish a Trade Practices Compliance Program (**the Compliance Program**) that complies with each of the following requirements:

#### 1. Appointments

- 1.1. Within one month of the date of the Undertaking coming into effect [Power Balance Australia will appoint a Director or a Senior Manager of the business to be responsible for the development, implementation and maintenance of the compliance program (**the Compliance Officer**).

#### 2. Compliance Officer Training

- 2.1. Power Balance Australia will ensure that, within 3 months of the Undertaking coming into effect, the Compliance Officer attends practical trade practices training focusing on section 52 of the TPA
- 2.2. Power Balance Australia shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law;
- 2.3. Power Balance Australia within 14 days of completion of training, will provide the Commission with a written statement from the compliance professional or legal practitioner confirming the completion of the training conducted in accordance with 2.1 and 2.2 above.

#### 3. Staff Training

- 3.1. Power Balance Australia will cause all employees of Power Balance Australia whose duties could result in them being concerned with conduct that may contravene section 52 of the TPA to receive regular (at least once a year) practical training administered by the Compliance Officer (once trained) or a qualified, compliance professional or legal practitioner with expertise in trade practices law, that focuses on section 52 of the TPA.



4. **Complaints handling** – Power Balance Australia will:
  - 4.1. develop procedures for recording, storing and responding to trade practice complaints within 2 months of the Undertaking coming into effect; and
  - 4.2. provide the Commission with an outline of the complaint handling system within 2 months of the Undertaking coming into effect.
5. Power Balance Australia will ensure that the Compliance Officer reports to their director(s) or governing body every 6 months on the continuing effectiveness of the Compliance Program.
6. **Review** – Power Balance Australia shall, at its own expense, cause an annual review of the Compliance Program elements (**the Review**) to be carried out in accordance with each of the following requirements:
  - 6.1. **Scope of the Review** – Power Balance Australia shall ensure that the Review is broad and rigorous enough to:
    - 6.1.1. provide Power Balance Australia and the Commission with a supportable verification that Power Balance Australia has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of Power Balance Australia
    - 6.1.2. provide the Review Report and opinions detailed at point 8 below; and
  - 6.2. **Independence of Reviewer** – Power Balance Australia shall ensure that the Review is carried out by a suitably qualified, independent compliance professional with expertise in trade practices law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
    - 6.2.1. did not design or implement the Compliance Program;
    - 6.2.2. is not a present or past staff member or director of Power Balance Australia
    - 6.2.3. has not acted and does not act for Power Balance Australia in any trade practices related matters;
    - 6.2.4. has not and does not act for or consult to Power Balance Australia or provide other services on trade practices related matters other than Compliance Program reviewing; and
    - 6.2.5. has no significant shareholding or other interests in Power Balance Australia,

6.3. **Evidence** - Power Balance Australia shall use its best endeavors to ensure that the Review is able to be conducted on the basis that the Reviewer has access to all relevant sources of information in Power Balance Australia's possession or control, including without limitation:

6.3.1. enquiries of any employees, representatives, agents and stakeholders of Power Balance Australia

6.3.2. documents created by Power Balance Australia's consultants, legal practitioners and accountants for use in [Power Balance Australia's Compliance Program;

6.4. Power Balance Australia shall ensure that the first Review is completed within one year and one month of this Undertaking coming into effect and that each subsequent Review is completed within one year thereafter

## 7. Reporting

7.1. Power Balance Australia shall use its best endeavours to ensure that the Reviewer sets out the findings of the Review in a Trade Practices Compliance Program Review Report, which will provide particular and specific information regarding the scope of the Review and the effectiveness of the Trade Practices Compliance Program including:

7.1.1. details of the evidence gathered and examined during the Review;

7.1.2. the name and relevant experience of the person appointed as Power Balance Australia's Compliance Officer;

7.1.3. the Reviewer's opinion on whether Power Balance Australia has in place effective staff training, complaints handling programs that comply with the requirements of the Undertaking; and

7.1.4. actions recommended by the Reviewer to ensure the continuing effectiveness of Power Balance Australia's Compliance Program.

7.2. Power Balance Australia shall ensure that each Trade Practices Compliance Program Review Report is completed and provided to Power Balance Australia within one month of completion of the Review.

7.3. Power Balance Australia will cause the Trade Practices Compliance Program Review Report to be provided to the Commission within 14 days of its receipt from the Reviewer.

- 7.4. Power Balance Australia shall implement promptly and with due diligence any recommendations made by the Reviewer or required by the Commission that are reasonably necessary to ensure that Power Balance Australia maintains and continues to develop the Compliance Program elements in accordance with the requirements of this Undertaking.
8. If requested by the Commission Power Balance Australia shall, at its own expense, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.
9. In the event the Commission has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Power Balance Australia shall, at its own expense and if requested by the Commission, cause and interim or additional Review to be conducted and cause the resulting Trade Practices Compliance Program Review Report to be provided to the Commission.