

UNDERTAKING TO THE COMMISSIONER FOR FAIR TRADING

By
Tyre and Auto Pty Ltd
ACN 164 707 484

Person Giving Undertaking

1. This undertaking is given to the Commissioner for Fair Trading of the Australian Capital Territory (**ACT**) by Tyre and Auto Pty Ltd ACN 164 707 484, ABN 57 164 707 484 (**TAPL**) of Level 11, 40 The Esplanade, Perth, Western Australia for the purpose of section 218 of the Australian Consumer Law (ACT) (*the ACL*).

Background

2. On 1 May 2013, the Commissioner for Fair Trading (the Commissioner) accepted an undertaking under section 218 of the Australian Consumer Law from Kmart Australia Limited (Kmart). A copy of that undertaking (the Kmart undertaking) is attachment A to this undertaking.
3. The Kmart undertaking was given in relation to the activities of Kmart Tyre and Auto Service (KTAS), a division of Kmart that provides automotive services, including registration inspections.
4. Kmart is transferring the KTAS business to TAPL from 1 July 2014, including the 11 premises in the ACT.
5. Kmart, TAPL and the Commissioner agree that the responsibility for the undertaking should transfer to TAPL.

Commencement

6. This undertaking comes into effect when:
 - (a) the undertaking is executed by TAPL; and
 - (b) the Commissioner accepts the undertaking so executed.

Undertakings

7. TAPL undertakes for the purpose of section 218 of the ACL that it will not, in trade or commerce in the ACT, represent to consumers who have presented their vehicles for registration testing that their vehicles' brakes comply with ACT Registration Standards unless the brakes have been tested using a vehicle decelerometer that complies with the requirements of Part 2.1.3 of Chapter 2.1 of Schedule 2 of the Vehicle Registration Regulation, and the decelerometer produces a result slip which indicates that the brakes have passed the test.
8. TAPL undertakes for the purpose of section 218 of the ACL to:
 - (a) maintain the compliance manager referred to in paragraph 19(a) of the Kmart undertaking with the same duties and equivalent resourcing as described in that paragraph.

- (b) Maintain the compliance program referred to in paragraph (b) of the Kmart undertaking.
- (c) Ensure that the training referred to in paragraph 19(d) of the Kmart undertaking is delivered to the equivalent staff in its organization at least once every two years.
- (d) Engage an independent compliance professional to review and report on the compliance Program for Authorised Examiners implemented by KTAS two years after its implementation. That report will be provided to the ORS.
- (e) Implement all reasonable recommendations made by the Compliance Manager as a result of the audit.

Duration

9. These undertakings have effect until 1 May 2015.

Acknowledgments

10. TAPL acknowledges that:
- (a) The ORS will make this Undertaking publicly available including by publishing it on the ORS website;
 - (b) The ORS will, from time to time, make public reference to the Undertaking including in news media statements and in ORS publications; and
 - (c) This Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed by Tyre and Auto Pty Ltd ACN 164 707 484, ABN 57 164 707 484 in accordance with section 127 of the *Corporations Act 2001*:



Director



Director/Secretary

Dated this 27th day of June 2014.

ACCEPTED by the ACT Commissioner for Fair Trading pursuant to section 218 of the Australian Consumer Law (ACT).



Brett Phillips
ACT Commissioner for Fair Trading

Dated this 30 day of June 2014.

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UNDERTAKING TO THE COMMISSIONER FOR FAIR TRADING

By

Kmart Australia Limited

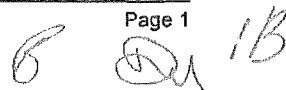
ACN 004 700 485

Person Giving Undertaking

1. This undertaking is given to the Commissioner for Fair Trading of the Australian Capital Territory (*ACT*) by Kmart Australia Limited ACN 004 700 485, ABN 73 004 700 485 Ltd (*Kmart*) of Level 3, 690 Springvale Road Mulgrave Victoria 3170 for the purpose of section 218 of the Australian Consumer Law (*ACT*) (*the ACL*). Kmart gives this undertaking on behalf of Kmart Tyre and Auto Service (*KTAS*), a division of Kmart.

Background

2. KTAS operates 11 premises within the ACT.
3. KTAS carries on the business of providing retail automotive services including vehicle repairs, servicing and tyre sales. KTAS also carries out registration inspections and operates 11 approved inspection stations in the ACT.
4. **Approved inspection stations** are the premises at which authorised examiners may perform vehicle inspections for registration purposes. Those premises are approved under Division 6.3.3 of the *Road Transport (Vehicle Registration) Regulation 2000 (Vehicle Registration Regulation)*.
5. KTAS employs qualified mechanics, some of whom are also authorised examiners appointed under Division 6.3.2 of the Vehicle Registration Regulation to perform vehicle inspections for registration purposes in the ACT (**authorised examiners**).
6. If an authorised examiner inspects or tests a vehicle, the authorised examiner must issue a certificate of inspection for the vehicle, certifying either that the vehicle, its parts and equipment comply with the applicable vehicle standards or that the vehicle, its parts or equipment do not comply and stating the ways in which it does not comply (**certificates of inspection**).
7. The **applicable vehicle standards** are set out in Schedule 1 of the Vehicle Registration Regulation.
8. Schedule 1, section 1.136 of the Vehicle Registration Regulation sets out requirements for the performance of braking systems.
9. During 2012, the Office of Regulatory Services (**ORS**) conducted routine audits of Certificates of Inspection to monitor compliance with regulatory requirements (**the Audits**).
10. ORS audit officers observed that some certificates of compliance did not attach brake test result slips. ORS then conducted site visits at KTAS approved inspection stations and interviewed authorised examiners in relation to their brake testing practices (**the Site Visits**).
11. During the period of 1 May 2012 to 31 October 2012 (**the Relevant Period**), it is alleged that some authorised examiners who worked at the following listed outlets as 'approved

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inspection stations' under the authorised examiner scheme have either acknowledged that they carried out brake tests in a manner not acceptable to the ORS or are unable to produce documentary proof to substantiate that brake tests were carried out in accordance with the requirements of the ORS on a number of vehicles presented for inspection:

- Kmart Tyre & Auto Service Wanniasa;
 - Kmart Tyre & Auto Service Phillip;
 - Kmart Tyre & Auto Service Westfield Belconnen; and
 - Kmart Tyre & Auto Service Braddon.
12. As a result of the Audits and Site Visits, the ORS expressed concern that certain provisions of the Vehicle Registration Regulation may not have been complied with at four of KTAS' approved inspection stations during the Relevant Period, and that, as a result of the conduct described in paragraph 11 above, KTAS may have contravened section 29(1)(b) of the ACL.
13. Upon being advised that ORS held concerns that KTAS' inspections did not comply with the Vehicle Registration Regulation, KTAS responded to the ORS' concerns and immediately initiated an internal investigation. The Managing Director of KTAS wrote to each KTAS Authorised Examiner and KTAS Store Manager in the ACT and confirmed in writing the importance of conducting vehicle registration tests — in particular brake tests.
14. In addition:
- (a) the Managing Director of KTAS has issued a statement to all staff which commits him and the KTAS Leadership Team to the improvements described in paragraph 19 below. The statement:
 - (i) Affirmed KTAS' commitment to compliance and the implementation of an improved Compliance Program;
 - (ii) Informed staff of the pending appointment of a Compliance Manager; and
 - (iii) Informed staff of the importance of their role in the creation and maintenance of a culture of compliance and reporting.
 - (b) KTAS has revised its existing Code of Conduct having regard to the issues raised by the ORS. The revised Code of Conduct has been provided to all current KTAS employees and will be provided to all future KTAS employees; and
 - (c) KTAS has established and implemented a KTAS Whistleblower Policy, which has been provided to all current KTAS employees and will be provided to all future KTAS employees.
15. KTAS has cooperated with the ORS' investigation and, in addition to the steps it has already taken, wishes to address the Commissioner for Fair Trading's concerns by offering this undertaking in accordance with section 21B of the ACL.
16. In addition to offering the Undertaking, KTAS has advised the Commissioner for Fair Trading that it will make a contribution to the NRMA – ACT Road Safety Trust in the sum of \$50,000.

Commencement

17. This undertaking comes into effect when:
- (a) the undertaking is executed by KTAS; and
 - (b) the Commissioner accepts the undertaking so executed.

Undertakings

18. Kmart undertakes for the purpose of section 218 of the ACL that it will not, through its division KTAS, in trade or commerce in the ACT, represent to consumers who have presented their vehicles for registration testing that their vehicles' brakes comply with ACT Registration Standards unless the brakes have been tested using a vehicle decelerometer that complies with the requirements of Part 2.1.3 of Chapter 2.1 of Schedule 2 of the Vehicle Registration Regulation, and the decelerometer produces a result slip which indicates that the brakes have passed the test.
19. Kmart undertakes for the purpose of section 218 of the ACL to:
- (a) Recruit a Compliance Manager with authority and accountability for the management of the Compliance Program for Authorised Examiners (and compliance more generally in the KTAS business). The Compliance Manager will:
 - (i) Report to the Chief Financial Officer of Kmart who will ensure the Compliance Manager is provided with the resources and executive support required;
 - (ii) Have the following duties:
 - (A) Conducting a review of accountability and reporting systems in the ACT with respect to KTAS' Authorised Examiners; and
 - (B) Implementing any changes necessary to ensure employee concerns and complaints are escalated to the appropriate level.
 - (b) Prepare a specific Compliance program for current and future authorised examiners in the ACT, including:
 - (i) Training as described in paragraph 19(d) below; and
 - (ii) Specific procedures to assist KTAS to meet the ORS' expectations in relation to the conduct of motor vehicle registration examinations and the retention and provision of documents.

Once finalised, KTAS will provide the ORS with copies of such procedures.
 - (c) Review and, where required, revise its job descriptions to reinforce that all managers are accountable for compliance in their areas of responsibility.
 - (d) Ensure that the following training is provided by the Compliance Manager, or a suitably qualified legal or compliance professional:
 - (i) To the KTAS Leadership Team, State Managers and Regional Managers: Training in Competition and Consumer Law by 30 September 2013, and then at least once every two years.

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- (ii) To the ACT-based Regional Managers, Store Managers and Authorised Examiners: Training within the next six months (or within six months of their appointment), and again at least once every two years, in:
- (A) Authorised premises equipment and its maintenance/calibration;
 - (B) Procedure for conducting vehicle inspections, including brake testing;
 - (C) Completion of Certificate of Inspection and associated record-keeping; and
 - (D) Sections 18 and 29(1)(b) of the ACL.

KTAS will provide to the ORS written confirmation of the attendance of the above employees at the initial training.

- (e) Engage an independent compliance professional to review and report on its compliance Program for Authorised Examiners six months, twelve months, and two years after implementation. Each report will be provided to the ORS.
- (f) Implement all reasonable recommendations made by the Compliance Manager as a result of the audit.

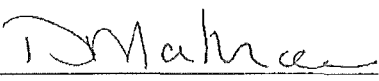
Duration

20. These undertakings have effect for a period of 2 years.

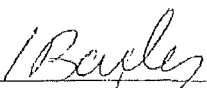
Acknowledgments

21. Kmart acknowledges that:
- (a) The ORS will make this Undertaking publicly available including by publishing it on the ORS website;
 - (b) The ORS will, from time to time, make public reference to the Undertaking including in news media statements and in ORS publications; and
 - (c) This Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed by Kmart Australia Limited ACN 004 700 485, ABN 73 004 700 485 Ltd in accordance with section 127 of the *Corporations Act 2001*:



Director - David Matheson



Director/Secretary Ian Bailey

Dated this 30 day of APRIL 2013.

ACCEPTED by the ACT Commissioner for Fair Trading pursuant to section 218 of the Australian Consumer Law (ACT).



Brett Phillips
ACT Commissioner for Fair Trading

Dated this / day of May 2013.





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30 April 2013

Mr Jon Quiggin
Director
Registrations and Fair Trading
Office of Regulatory Services
Level 3 Callam Offices Easty Street
Woden ACT 2606

By Hand

Strictly Confidential

Dear Mr Quiggin

Kmart Tyre & Auto Service

The Commissioner for Fair Trading of the Australian Capital Territory (*Commissioner*), through the Office of Regulatory Services (*ORS*), has investigated the conduct of authorised examiners employed by Kmart Tyre and Auto Service, a division of Kmart Australia Limited (*Kmart*). KTAS has cooperated with the enquiries of the ORS and, as a result of the ORS' concerns resulting from its investigation, Kmart has offered to the Commissioner and the Commissioner has accepted on 30 April 2013 an undertaking for the purpose of section 218 of the Australian Consumer Law (ACT) (the *ACL*), in connection with that conduct.

In addition, Kmart and the Commissioner (on behalf of himself and the ORS) agree that they will only publish publicly or make public statements about the ORS investigation, the undertaking or its terms as follows:

1. in the case of the Commissioner or the ORS, by:
 - (a) publishing the undertaking on the Website, but only for the duration of the undertaking;
 - (b) way of a media release in the form set out in Schedule 1, and oral or written comments by the Commissioner or his nominated spokesperson from the ORS, consistent with the form of words set out in Schedule 1 and the terms of the undertaking;
2. in the case of Kmart and KTAS, by way of media statement in the form set out in Schedule 2, and oral or written comments by KTAS' nominated spokesperson, consistent with the form of words set out in Schedule 2 and the terms of the undertaking.

Please sign and date the enclosed copy of this letter and return it to us.

Yours sincerely



Guy Russo

Signed for and on behalf of Kmart Australia Limited

Signed by the Commissioner for Fair Trading of the Australian Capital Territory:



Brett Phillips

ACT Commissioner for Fair Trading

Date: 1 May 2013