

CONSUMER AFFAIRS VICTORIA

SECTION 218 of the AUSTRALIAN CONSUMER LAW (VICTORIA)

ENFORCEABLE UNDERTAKING

The commitments in this Undertaking are offered to the Director of Consumer Affairs Victoria by:

**PENGUIN AUSTRALIA PTY LTD
(ACN 162 605 745)**

of L M 707 Collins Street, Docklands, Victoria

The Director

1. The office of the Director of Consumer Affairs Victoria is provided for under section 107 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) ("the Act"). The holder of that office is responsible for the administration of the Act, the Australian Consumer Law ("the ACL"), which has been enacted as a law of Victoria under Part 2.2 of the Act and known as the Australian Consumer Law (Victoria) ("the ACL (Vic)"), together with Victoria's other consumer protection legislation.
2. The Director, as a regulator for the purposes of the ACL (Vic), may accept a written undertaking from any person in connection with any matter in respect of which the Director has a power or function, including a contravention of the ACL (Vic), as a means of resolving contraventions of the ACL (Vic).

Penguin Australia Pty Ltd

3. Penguin Australia Pty Ltd ("Penguin") ACN 162 605 745 is an Australian proprietary company, which was registered on 22 April 2013. The company has its registered office and principal place of business at L M 707 Collins Street, Docklands Victoria.
4. The company carries on business, in trade or commerce, as a book publisher, and operates as an Australian subsidiary of the global entity Penguin Random House.

Legislation

5. On 1 January 2011, the ACL, set out in Schedule 2 to the *Competition and Consumer Act 2010* (C'th), came into effect. Part 2.2 of the Act applies the ACL as a law of Victoria, which is known as the ACL (Vic).
6. Section 18 of the ACL (Vic) provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
7. Section 29(1) of the ACL (Vic) relevantly provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or in connection with the promotion by any means of the supply or use of goods:
 - “(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services;
 - (f) make a false or misleading representation concerning:
 - (i) a testimonial by any person; or
 - (ii) a representation that purports to be such a testimonial; relating to goods or services;
 - (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits”.

The Investigation

8. In or around March 2015, Consumer Affairs Victoria commenced an investigation into the conduct of Inkerman Road Nominees Pty Ltd ACN 164 850 748 (then known as Belle Gibson Pty Ltd) in relation to possible contraventions of the *Fundraising Act 1998*.
9. In or around May 2015, Consumer Affairs Victoria commenced an investigation into the conduct of Annabelle Gibson (known as Belle Gibson) and her company, Inkerman Road Nominees Pty Ltd, in relation to alleged contraventions of the ACL (Vic), namely, an investigation as to whether Belle Gibson and her company had, in trade or commerce, engaged in conduct that was in contravention of the ACL

(Vic) in connection with the supply or possible supply of goods (being a book entitled "The Whole Pantry" and a smartphone "app" known as "The Whole Pantry App") (the 'goods') or in the promotion or advertising of the supply or use of the goods.

10. In particular, the Director was concerned to investigate whether Belle Gibson and her company had, in connection with the sale and promotion of the goods breached sections 18 and 29 of the ACL (Vic) by making false or misleading representations to the effect that:
 - (a) Belle Gibson had, and continued to, suffer from cancer;
 - (b) Belle Gibson had determined to eschew conventional cancer treatments such as chemotherapy and radio-therapy;
 - (c) Belle Gibson had embarked on a quest to heal herself of cancer "naturally"; and
 - (d) part of the proceeds from the sale of the goods were being donated to nominated charities or causes, including charities and/or organisations which support global health and wellbeing, protect the environment and provide education to the needy.
11. The book entitled 'The Whole Pantry' and identified by ISBN 978-1-921383-98-4 ("The Whole Pantry") was published by Penguin in around October 2014.
12. The investigation was subsequently expanded to include consideration of the following matters:
 - (a) whether Belle Gibson and her company had contravened section 21 of the ACL (Vic); and
 - (b) whether Penguin had, in conjunction with Belle Gibson and her company, contravened sections 18 and/or 29 of the ACL (Vic) or whether Penguin had been involved in any such possible contraventions.

The Statements

13. The Whole Pantry contained the following statements:

- (a) at the age of 20, Belle Gibson had been diagnosed with “malignant brain cancer” and had been given an extremely poor prognosis (6 weeks to 4 months to live);
- (b) Belle Gibson had initially tried conventional medical treatments such as radio-therapy and chemotherapy;
- (c) Belle Gibson subsequently had eschewed conventional medical treatments and had embarked on a “quest” to heal herself naturally through “nutrition and holistic medicine”;
- (d) the diet and natural treatments adopted by Belle Gibson had proved successful in extending her life and the quality of her life;
- (e) the knowledge and personal insights which Belle Gibson had gained in the course of her “quest” were contained in her book, “The Whole Pantry”; and
- (f) a large part of “everything” Belle Gibson’s company earned (including through the sale of the book) was donated to “charities and organisations which support global health and wellbeing, protect the environment and provide education” to the under-privileged.

- (“the statements”).

14. In March 2015, Penguin required Belle Gibson to substantiate the statements contained in The Whole Pantry and set out in paragraph 13 above. On the failure of Belle Gibson to substantiate these statements, Penguin immediately withdrew the book from distribution and compensated those consumers who had returned the book to the place of purchase.

Acknowledgement that the Statements Have No Basis in Fact

15. Penguin acknowledges that the statements set out in paragraph 13 above have not been substantiated by Belle Gibson and, to its knowledge, have no basis in fact. Further, Penguin acknowledges that it did not require the statements set out in paragraph 13(a) to (f), inclusive, to be substantiated by Belle Gibson prior to the publication of *The Whole Pantry*.
16. Penguin also acknowledges that the statements were not true in that:
 - (a) Belle Gibson did not suffer from cancer;
 - (b) Belle Gibson had not tried conventional medical treatments;
 - (c) any program of nutrition and holistic medicine embarked upon by Belle Gibson was not related to any genuine medical condition; and
 - (d) Belle Gibson and her company did not donate any “large” part of the proceeds of the sale of the goods to charities or causes.

Contraventions of the ACL (Vic) by Penguin

17. The Director of Consumer Affairs Victoria is concerned that *The Whole Pantry* was directed to a readership which included people who:
 - (a) had been diagnosed with cancer or life-threatening illness;
 - (b) had a fear of developing cancer;
 - (c) had a family history of cancer; and/or
 - (d) were friends or relatives of persons suffering from cancer.
18. The Director considers that these people were unusually susceptible, in that their illnesses, fears, family history or close relationship to cancer sufferers, pre-disposed them to being influenced by the statements set out in paragraph 13 above.
19. Further, Penguin knew that sales of the book would benefit from Belle Gibson’s reputation as a cancer survivor.
20. In these circumstances, the Director of Consumer Affairs Victoria considers that by publishing *The Whole Pantry*, which contained the untrue statements, Penguin

engaged in misleading or deceptive conduct in breach of section 18 of the ACL (Vic) and made false or misleading representations in breach of section 29(1)(e)-(g) of the ACL (Vic).

Consequences of contraventions of the ACL (Vic)

21. A person who contravenes section 18 of the ACL (Vic) may, inter alia, be rendered subject to non-punitive orders under section 246 of the ACL (Vic) in order to ensure that the person does not engage in similar or related conduct in the future.
22. A person who contravenes section 29 of the ACL (Vic) is liable under section 224 of the ACL (Vic), upon a proven contravention by a Court, to a civil pecuniary penalty in respect of each contravention, of not more than:
 - (a) \$220,000 in the case of an individual; or
 - (b) \$1.1 million in the case of a body corporate.

Acknowledgment of the Breach

23. Penguin acknowledges that by publishing the statements set out in paragraph 13 above in the book it engaged in conduct which contravened sections 18 and 29(1)(e)-(g) of the ACL (Vic).
24. Penguin seeks to further address the acknowledged contraventions by offering this undertaking to the Director of Consumer Affairs Victoria.

Undertakings

25. In July 2015, Penguin introduced a Competition and Consumer Law Compliance, Education and Training Program. Penguin also provided all relevant editorial and marketing staff with a Risk Management Checklist for Health Claims. Penguin now undertakes to the Director, pursuant to section 218 of the ACL (Vic), that the company will within 30 days of the commencement of this undertaking enhance and maintain for a period of not less than three years from the date of the commencement of this undertaking, its Compliance, Education and Training Program so that it complies with Annexure A of this undertaking designed to ensure that Penguin, its officers, agents and employees will not:

- (a) make or publish any claim, statement or representation concerning the medical history or condition of any person, or in connection with the promotion of any book which might reasonably influence any other person to undertake or adopt a particular course of treatment (whether in addition to or in substitution of any other medical treatment), without obtaining the prior written advice of a medical practitioner, substantiating each such claim, statement or representation; and
 - (b) make or publish any statement in connection with "alternative" or "natural" or "nutritional" or "holistic" therapies or remedies for the treatment of any illness without also publishing a prominent notice to the effect that the said therapies or remedies are not "evidence based" therapies or remedies and are not proven to provide any medical benefit.
26. Further, Penguin undertakes that, within 30 days of the commencement of this undertaking, it will pay the sum of thirty thousand dollars (\$30,000) to the Victorian Consumer Law Fund, created under section 134 of the Act.
27. Penguin acknowledges that if the Director, or the Director's authorised delegate, considers that Penguin has breached any of the terms of this Undertaking, without limiting any other available enforcement action, an application may be made to a Court for an order under section 218(4) of the ACL (Vic).

Commencement of the Undertaking

28. This undertaking commences ("commencement date") on the day the Undertaking, having been signed by Penguin through a proper officer, is accepted and signed by the Director.
29. This undertaking remains in effect for a period of 3 years or until the company has complied with all its obligations set out in this Undertaking, whichever occurs last, unless earlier varied or withdrawn by the Director.

Public Nature of Undertaking

30. Penguin, through its proper officer, hereby:
- (a) acknowledges that, pursuant to section 218 of the ACL (Vic), the Director will register this Undertaking in the Register of Undertakings on the

Consumer Affairs Victoria website and the Undertaking will be available for public inspection;

- (b) acknowledges that the Director and/or the Minister for Consumer Affairs Victoria may, from time to time, publicly refer to this Undertaking; and
- (c) acknowledges that this Undertaking in no way minimises or extinguishes any right or remedy available to any other person arising from the conduct acknowledged in this undertaking

EXECUTION

Signed by:

Director

(PRINT NAME)

BRIONY LEWIS

In the presence of:

Witness:

(PRINT NAME)

Lai Siang Lee

LAISANG LEE

Accepted by the Director of Consumer Affairs Victoria pursuant to section 218 of the ACL (Vic).

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Mr Simon Cohen
Director, Consumer Affairs Victoria

DATED: 22 April 2016

ANNEXURE “A”**COMPLIANCE AND EDUCATION / TRAINING PROGRAM****Interpretation****1. In this Annexure:**

- a. “ACL (Vic)” means the Australian Consumer Law as applied as the law of Victoria by Part 2.2 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*;
- b. “Compliance Officer” means the person appointed under paragraph 2 below;
- c. “Compliance Policy” means the policy defined in paragraph 5 below;
- d. “Compliance Program” means the Compliance and Education / Training Program in this Annexure;
- e. “Compliance Trainer” means the person appointed in accordance with paragraph 9 below;
- f. “Contravening Conduct” means the conduct identified in paragraph 23 of the undertaking;
- g. “the undertaking” means the undertaking offered to and accepted by the Director of Consumer Affairs Victoria under section 218 of the ACL (Vic);
- h. “the company” means Penguin Australia Pty Ltd (ACN 162 605 745)
- i. “Relevant Provisions” means sections 18 and 29 of the ACL (Vic) – which were contravened by the Contravening Conduct;
- j. “Respondent’s Program” means the steps taken by the company to comply with the requirements of the undertaking in relation to the Compliance Program; and
- k. “Training” means the training required by paragraph 8 of this annexure below.

Compliance Officer

2. The company must, within 28 days of the commencement of the undertaking, appoint a director or a senior employee with suitable qualifications or experience as a Compliance Officer with responsibility for ensuring that the Compliance Program is effectively established, maintained and administered in accordance with the requirements of the undertaking. The company must, within seven (7) days of appointing a Compliance Officer, notify the Director in writing of having done so, and provide the Compliance Officer's name and qualification details.
3. The company must take all reasonable steps to ensure that for the duration of the undertaking the Compliance Officer discharges his or her responsibility of ensuring that the Compliance Program is effectively established, maintained and administered in accordance with the requirements of the undertaking.
4. The company must take all reasonable steps to ensure that the Compliance Officer reports in writing to the company's directors every six months with respect to the ongoing maintenance and administration of the Compliance Program.

Compliance Policy

5. The company must, through its Compliance Officer within 60 days of the commencement of the undertaking, establish a policy ("Compliance Policy"), which is communicated in writing to all employees involved in, insofar as it directly concerns the publishing or promotion by the company of any products distributed and sold by Penguin Australia Pty Ltd, the following:
 - a. a statement of commitment by the company to comply with the Relevant Provisions;
 - b. a direction to all such employees to report any compliance related issues and compliance concerns to the Compliance Officer;
 - c. a statement guaranteeing that employees or any other person involved in that part of the company's publishing business, making a complaint or report in relation to the company's compliance with the Relevant

Provisions, will not be prosecuted or disadvantaged in any way by reason of their complaint or report and that their complaint or report will be kept confidential and secure; and

- d. a statement that the company will take disciplinary action against any persons who are knowingly or recklessly concerned in a contravention of the Relevant Provisions and will not indemnify them.

The company must, within seven (7) days of its Compliance Officer establishing a Compliance Policy, provide to the Director a written copy of that Compliance Policy.

- 6. The company must take all reasonable steps to ensure that the Compliance Program is maintained and administered in a manner that is consistent with the Compliance Policy for the duration of the undertaking.
- 7. The company will provide a copy of the Compliance Policy to all new staff at the commencement of their employment with the company.

Training

- 8. The company must take all reasonable steps to ensure that all directors, officers, employees, and representatives of the company, whose duties could result in them being concerned with conduct that may contravene the Relevant Provisions, receive practical training regarding the Relevant Provisions of the ACL (Vic) ("Training") no less than once annually.
- 9. The Training must be conducted by either a suitably qualified compliance professional or legal practitioner with expertise in the ACL (Vic).
- 10. The company must instruct the Compliance Trainer to design the Training, and must take all reasonable steps to ensure that the Training is designed to ensure that the persons at the Training are made aware of:
 - a. the responsibilities and obligations of the company in relation to the Relevant Provisions;

- b. the potential consequences of contravening the Relevant Provisions;
- c. the areas of the company's business where it is at risk of contravening the Relevant Provisions; and
- d. the content of the Compliance Program.

11. The company must provide the Compliance Trainer, for the purposes of conducting the Training, with a copy of:

- a. the undertaking; and
- b. the Compliance Policy.

12. The company must take all reasonable steps to ensure that an awareness of the Compliance Program forms part of the induction of all new employees, whose duties could result in them being concerned with conduct that may contravene the Relevant Provisions.

13. The company must maintain copies of the documents, referred to in paragraph 11 above, at its principal place of business and at all other places at which it carries on business during the currency of the undertaking.