

COMPETITION AND CONSUMER ACT 2010

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

by

ZeniMax Media Inc

and

ZeniMax Europe Limited

and

ZeniMax Australia Proprietary Limited

ACN 165 946 690

Persons giving this undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by ZeniMax Media Inc. (Company Number 3045659) (**ZeniMax Inc**), ZeniMax Europe Limited (Company Number 06333300) (**ZeniMax Europe**) and ZeniMax Australia Pty Ltd (ACN 165 946 690) (**ZeniMax Australia**) (together, **ZeniMax**) of, respectively:

- (a) 1370 Piccard Drive, Rockville, in the state of Maryland, United States;
- (b) 1st floor, West Wing, Davidson House, Forbury Square, Reading, Berkshire, United Kingdom RG1 3EU; and
- (c) Level 2, 19 Rialto Lane, Manly, in the State of New South Wales 2095, Australia;

for the purposes of section 87B of the Competition and Consumer Act 2010 (the **Act**).

Jurisdiction

2. ZeniMax Inc and ZeniMax Europe submit to the jurisdiction of the Federal Court of Australia solely in relation to the enforcement of this undertaking.
3. Unless and until notified in writing by ZeniMax Inc or ZeniMax Europe to the ACCC of the appointment of another person as agent within Australia, each of ZeniMax Inc and ZeniMax Europe irrevocably appoint ZeniMax Australia as their agent for the purposes of any service of process in relation to this undertaking.

Background

4. Bethesda.net is ZeniMax's online game publishing and delivery platform for digital versions of Bethesda games played on the personal computer. Bethesda.net can be used to download computer game software and/or facilitate the sale of ZeniMax full-game software licenses and accompanying online services of such games directly to consumers online throughout the world.
5. For customers located in Australia, Bethesda.net can be accessed via <https://bethesda.net> (the **Bethesda Store**).

6. From 10 June 2018, ZeniMax made available for sale, including on its Bethesda Store, an online video game titled Fallout 76. The Fallout 76 game was available to play from 14 November 2018.

Australian Consumer Law

7. The Australian Consumer Law (ACL), being Schedule 2 of the Act commenced on 1 January 2011. The ACL contains statutory guarantees in Division 1 of Part 3-2 which provides consumers with a basic, guaranteed level of protection for goods and services which they acquire (the **statutory consumer guarantees**). Consumers who are supplied with goods or services that fail to meet the statutory consumer guarantees are entitled to certain remedies under Part 5-4 of the ACL. These statutory consumer guarantees cannot be excluded, restricted or modified.
8. The ACCC has periodically raised concerns that some suppliers were making false or misleading representations to Australian consumers about their statutory consumer guarantee rights in relation to:
 - (a) the circumstances in which the statutory consumer guarantees apply; and
 - (b) the remedies available to consumers where goods or services do not meet the statutory consumer guarantees.
9. Section 18 of the ACL 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.
10. Section 29(1)(m) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2 of the ACL).

Conduct of concern

11. The ACCC has received complaints alleging that ZeniMax made statements to certain Australian consumers which were likely to have contravened sections 18 and/or 29(1)(m) of the ACL. In particular, the ACCC considers that:
 - (a) certain statements made by customer support representatives engaged by or on behalf of ZeniMax to Bethesda Store customers in response to complaints by those customers that the Fallout 76 game they had purchased through the Bethesda Store or third party retailers was faulty; and
 - (b) certain statements made in customer support documents for the Fallout 76 game that were displayed to users of the Bethesda Store,

were likely to have conveyed false or misleading representations to the effect that:
 - (c) Australian consumers had no entitlement to any refunds from ZeniMax for Fallout 76 games purchased through the Bethesda Store which had been downloaded;

- (d) ZeniMax had modified or restricted statutory consumer guarantees/warranties in relation to Fallout 76 games purchased by Australian consumers through the Bethesda Store which had been downloaded;
 - (e) Australian consumers had no entitlement to any refunds from ZeniMax for Fallout 76 games purchased from third party retailers; and/or
 - (f) ZeniMax had modified or restricted statutory consumer guarantees/warranties in relation to Fallout 76 games purchased by Australian consumers through third party retailers.
12. ZeniMax acknowledges that the conduct outlined in paragraphs 11(a) – (f) is likely to have misled certain Australian consumers about their rights under the ACL in connection with the statutory consumer guarantees and is likely to have contravened sections 18 and 29(1)(m) of the ACL.
13. ZeniMax has agreed to resolve the ACCC's concerns by the provision of this undertaking.

Commencement of undertaking

14. This Undertaking comes into effect when:
- (a) the Undertaking is executed by ZeniMax Australia, ZeniMax Inc and ZeniMax Europe; and
 - (b) the ACCC accepts the Undertaking so executed,
- (the **Commencement Date**).
15. Upon the commencement of this Undertaking, ZeniMax undertakes to assume the obligations set out in paragraphs 16 to 22 below.

Undertakings

16. ZeniMax undertakes that, for a period of three (3) years commencing on the date of this Undertaking coming into effect, it will not make any representation to an Australian consumer in relation to a Fallout 76 game purchased through the Bethesda Store that:
- (a) ZeniMax has a no refunds policy for Fallout 76 games purchased via the Bethesda Store that have been downloaded that excludes any right that an Australian consumer may have to a refund under the consumer guarantee provisions of the ACL;
 - (b) Australian consumers are not entitled under any circumstances to a refund from ZeniMax for Fallout 76 games purchased via the Bethesda Store that have been downloaded;
17. ZeniMax undertakes that, for a period of three (3) years commencing on the date of this Undertaking coming into effect, it will not make any representation to an Australian consumer in relation to a Fallout 76 game purchased from a third party retailer that:

- (a) ZeniMax has a no refunds policy for Fallout 76 games purchased from third party retailers that excludes any right that an Australian consumer may have to a refund under the consumer guarantee provisions of the ACL; and/or
- (b) Australian consumers are not entitled under any circumstances to a refund from ZeniMax for Fallout 76 games purchased from third party retailers.

Customer Service Documents

18. ZeniMax undertakes that within 120 days of the Commencement Date, ZeniMax will amend the following consumer documents and webpages in order to address the ACCC's concerns as set out in this Undertaking:
- (a) Customer Service scripts and instructions in relation to Fallout 76 refund requests; and
 - (b) the Bethesda Store Support Documents titled:
 - (i) "What should I do if I want to modify my purchase of Fallout 76?"; and
 - (ii) "Who should I contact about billing issues with Fallout 76 on Playstation 4?"

Refunds

19. ZeniMax undertakes for the purposes of this undertaking that within 90 days of the Commencement Date it will take reasonable steps to contact each Australian customer who contacted ZeniMax between 24 November 2018 and 1 June 2019 to request a refund in relation to their purchase of a Fallout 76 game and who has not already been provided a refund, offering to provide a refund to that customer in relation to that purchase. If a customer accepts ZeniMax's offer of a refund during the 90-day notice period, ZeniMax will then provide the refund within 20 business days of receiving the acceptance from the customer or, if ZeniMax requires any details from the customer in order to issue the refund, then within 20 business days of receiving those details from the customer. Players who accept refunds will lose their entitlement to access and play the game.

Reporting to the ACCC

20. Within 180 days of the Commencement Date, ZeniMax will advise the ACCC in writing of:
- (a) the total number of Australian customers ZeniMax has offered refunds to in fulfilment of its undertaking outlined in paragraph 19;
 - (b) the total number of Australian customers who responded to ZeniMax as a result of ZeniMax contacting the customer in fulfilment of its undertaking outlined in paragraph 19; and
 - (c) the total number of Australian customers to which ZeniMax has provided refunds in fulfilment of its undertaking outlined in paragraph 19 and the total amount of those refunds.

Consumer Law Compliance Program

21. ZeniMax undertakes to, at its own expense:

- (a) within 120 days of the Commencement Date, establish and implement an Australian Consumer Law Compliance Program (**Compliance Program**) in accordance with the requirements set out in **Annexure A**, being a program designed to minimise ZeniMax's risk of future contraventions of the ACL;
- (b) maintain and continue to implement the Compliance Program for a period of three (3) years from the Commencement Date of this Undertaking (the **Term**); and
- (c) provide a copy of any documents required by the ACCC in accordance with **Annexure A**.

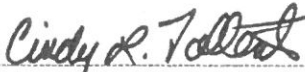
Acknowledgments

22. ZeniMax acknowledges that:

- (a) 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;
- (b) the ACCC may, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

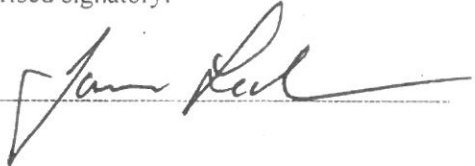
Executed by

ZeniMax Media Inc. (Company Number 3045659) by its authorised signatory:


Signature

CINDY L. TALLENT
Name EVP, CFO & TREASURER

10 October 2019
Date



JAMES L. LEDER
PRESIDENT & COO

10 OCTOBER 2019

ZeniMax Europe Limited (Company Number 06333300) by its authorised signatory:


Signature

CINDY L. TALLENT
Name DIRECTOR

10 October 2019
Date



JAMES L. LEDER
DIRECTOR


10 OCTOBER 2019

ZeniMax Australia Pty Ltd (ACN 165 946 690 pursuant to section 127(1) of the Corporations Act 2001 by:


Signature of director

CINDY L. TALLENT
Name of director

10 October 2019
Date



Signature of a director/company secretary

SIMON ALTY
Name of a director/company secretary

17 OCTOBER 2019
Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of
the *Competition and Consumer Act 2010*

A handwritten signature in black ink, appearing to read 'RGS', followed by a horizontal dashed line.

Rodney Graham Sims
Chairman

This 31st day of October 2019

ANNEXURE A

CONSUMER LAW COMPLIANCE PROGRAM

ZeniMax Australia will establish a Consumer Law Compliance Program (**Compliance Program**) that applies, where relevant, to ZeniMax Australia, ZeniMax Inc and ZeniMax Europe and complies with each of the following requirements:

Appointments

1. Within 30 days of the Commencement Date, ZeniMax Australia will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as a Compliance Officer with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained (the **Compliance Officer**).
2. Within 60 days of the Commencement Date, ZeniMax Australia will appoint a suitably qualified external compliance professional or legal practitioner with expertise in Australian consumer law (the **Compliance Advisor**) to assist ZeniMax to establish and implement the Compliance Program.

Compliance Policy

3. ZeniMax Australia will, within 90 days of the Commencement Date, issue an internal policy statement which will include an outline of ZeniMax Australia's, ZeniMax Inc's and ZeniMax Europe's commitment to compliance with the Australian Consumer Law (**ACL**) (the **Compliance Policy**).
4. ZeniMax Australia will ensure that the Compliance Policy contains:
 - 4.1 a statement of commitment to compliance with the ACL;
 - 4.2 an outline of how ZeniMax Inc, ZeniMax Europe and ZeniMax Australia will promote compliance with the ACL;
 - 4.3 a requirement for all staff to report any ACL compliance issues (including ACL compliance concerns) to the Compliance Officer;
 - 4.4 a guarantee that whistle blowers with ACL compliance concerns will not be prosecuted or disadvantaged in any way and that their reports will be kept confidential and secure; and
 - 4.5 a statement that ZeniMax Inc, ZeniMax Europe and ZeniMax Australia will take action internally against any person who is knowingly or recklessly concerned in a contravention of the ACL.

Staff Training

5. Within 90 days of the Commencement Date, ZeniMax Australia will ensure that all employees, representatives and agents of ZeniMax Australia, ZeniMax Inc and ZeniMax Europe, whose duties include communicating with Australian consumers or dealing with their inquiries or complaints, receive training that focuses on compliance with the provisions of the ACL regarding consumer guarantees and misleading or deceptive conduct in relation to consumers' rights and remedies under the consumer guarantees provisions (including sections

18 and 29(1)(m)), with such training to be provided at least once each year for the Term of the Consumer Compliance Program (**Compliance Training**).

6. ZeniMax Australia must ensure that the training is developed by a suitably qualified compliance professional or legal practitioner with expertise in Australian consumer law.
7. ZeniMax Australia will take reasonable steps to ensure that awareness of the provisions of the ACL regarding consumer guarantees and misleading or deceptive conduct in relation to consumers' rights and remedies under the consumer guarantees provisions (including sections 18 and 29(1)(m)) form part of the induction of all new employees and representatives of ZeniMax Australia, ZeniMax Inc and ZeniMax Europe whose duties include communicating with Australian consumers or dealing with their inquiries or complaints.

Complaints Handling System

8. Within 90 days of the Commencement Date, ZeniMax Australia will ensure that a review is undertaken of ZeniMax's complaints handling system and will, to the extent required, enhance existing procedures for responding to ACL-related complaints (**Complaints Handling System**).
9. ZeniMax Australia will take reasonable steps to ensure relevant staff and customers are made aware of the Complaints Handling System.

Risk Review

10. ZeniMax Australia will ensure:
 - 10.1 within 180 days of the Commencement Date, the Compliance Officer, with the assistance of the Compliance Advisor, will conduct an ACL risk review (**Risk Review**) which sets out in the form of a written report:
 - 10.1.1 any areas of ZeniMax's promotion or supply of products to Australian customers which are at risk of not complying with the provisions of the ACL regarding the consumer guarantees, or misleading or deceptive conduct in relation to consumers' rights and remedies under the consumer guarantees (including sections 18 and 29(1)(m));
 - 10.1.2 the procedures put in place by ZeniMax in relation to the promotion or supply of products to Australian customers to minimise the risk of not complying with the provisions or contravening the provisions of the ACL which relate to consumer guarantees or misleading or deceptive conduct in relation to consumers' rights and remedies under the consumer guarantees (including sections 18 and 29(1)(m));
 - 10.1.3 any material gaps in ZeniMax's existing procedures for managing these risks;
 - 10.1.4 recommendations for any actions to be taken to address these risks, and
 - 10.2 As soon as reasonably practicable following the Risk Review, implement any reasonable and appropriate recommendations made by the Risk Review.

Reports to Senior Management

11. ZeniMax Australia will ensure that the Compliance Officer, with the assistance of the Compliance Advisor, reports to ZeniMax Australia's, ZeniMax Inc's and ZeniMax Europe's senior management on the continuing effectiveness of the Compliance Program on an annual basis for the Term of the Consumer Law Compliance Program (**Compliance Review**). The Compliance Review must include findings on whether there are any material deficiencies in ZeniMax's Compliance Program, or whether there are or have been any instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s.
12. ZeniMax will implement promptly and with due diligence any recommendations to address a Material Failure which form part of the Compliance Review outlined in paragraph 11.

Provision of Compliance Program documents to the ACCC

13. ZeniMax Australia will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five (5) years from the Commencement Date.
14. If requested by the ACCC during the Term of the Consumer Law Compliance Program and the following 2 years, ZeniMax Australia will, at its own expense, cause to be produced and provided to the ACCC copies of all documents (excluding any legally privileged documents) evidencing the Compliance Program and its implementation, including:
 - 14.1 the Compliance Policy;
 - 14.2 a written statement or certificate from the suitably qualified compliance professional or legal practitioner with expertise in Australian consumer law who conducts the Compliance Training referred to in paragraph 5, verifying that such training has occurred;
 - 14.3 the outcomes of the Complaints Handling System review;
 - 14.4 the Risk Review;
 - 14.5 any Compliance Report submitted to ZeniMax Australia's, ZeniMax Inc's or ZeniMax Europe's senior management in compliance with paragraph 11.