

## COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission  
given for the purposes of section 87B of  
the *Competition and Consumer Act 2010*  
by Chemical Formulators Pty Ltd  
ACN 008 905 119

### Persons giving this Undertaking

1. This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Chemical Formulators Pty Ltd ACN 008 905 119 (**Chemform**) of Level 4, 35-37 Havelock Street, West Perth, Western Australia, for the purposes of section 87B of the *Competition and Consumer Act 2010* (**the Act**).

### Background

2. Chemform is incorporated in Western Australia and carries on business in Australia as a manufacturer and supplier of commercial cleaning and sanitising products for use in industrial, commercial and institutional applications.
3. Chemform supplies products to approximately 25 distributors and approximately 430 end-users in industries including hospitality, health, mining, transport, aged care and abattoirs.
4. Following the receipt of a complaint, the ACCC conducted an investigation into alleged resale price maintenance (**RPM**) by Chemform in contravention of section 48 of the Act.

### Conduct

5. Between 5 October 2011 and 6 January 2012, Chemform entered into Distributor Agreements (**'the Distributor Agreements'**) with Rimtec, Costal Distributing, Staley Food & Packaging, Platinum Chemicals & Packaging Distributors, Ward Packaging and The Luscombe Syndicate (collectively referred to as **'the Distributors'**) for the supply of Chemform products.
6. The Distribution Agreements contained the following term (**RPM Clause**):

*"Recommended Price Lists: These are recommended prices only.  
There are 3 tiers in the price lists, which are as follows:  
Distributor: is the buying price for all distributors.  
Reseller: is the minimum price distributors shall sell into any account, also recommended for larger businesses with high volumes of chemical sales.  
Retail: this level is for smaller business with lower volumes of chemical sales.  
The Distributor may choose to sell above this price to reflect freight costs or may offer discounts for quantity purchase or for marketing reasons.  
Should the distributor or its agents encounter an end-user which is purchasing Chemform products from another supplier, then the Distributor agrees not actively [sic] pursue the chemical business unless specifically requested to do so by the end-user.  
In any event, Chemform products should not be discounted to influence the end user's decision, as this action will only then devalue the Chemform brand."*

7. From at least 5 October 2011, Chemform provided the Distributors with price lists which contained 'reseller' prices for Chemform products which, when read in conjunction with the RPM Clause contained in the Distributor Agreements, was likely to be understood by the Distributors as the price below which Chemform products are not to be sold.
8. On 15 February 2012, Peter Tzavellas of Chemform sent an email to Mark Scott of Cobalt Blue Australasia (**Cobalt**), a distributor of Chemform products, which included the following statement:

*"Unfortunately our review of Cobalt's activity over the last 12 months indicates that it has ignored an important clause in our distributor agreement. This is:*

*Should the distributor or its agents encounter an end-user which is purchasing Chemform products from another supplier, then the Distributor agrees not actively [sic] pursue the chemical business unless specifically requested to do so by the end user.*

*In any event, Chemform products should not be discounted to influence the end user's decision.*

*It is our strong opinion that the special pricing was never to be used to compete against any Chemform accounts ie; (Lakes Resort) and especially not to influence the customer's decision.*

*Finally, let me advise you that our review has showed that we are not heading in the same direction, nor reflect the business gained ... and therefore the special pricing afforded to you will cease as of the 29<sup>th</sup> February.*

*As of the 1<sup>st</sup> of March 2012 Cobalt will be on the same pricing structure as all our distributors, see attached."*

9. On 1 April 2012, Chemform increased the price at which it offered to supply Chemform products to Cobalt, as a result of Cobalt offering to supply Chemform products to a customer, namely the Lakes Resort, at a price less than the price specified by Chemform.
10. The ACCC considers that by engaging in the conduct described in paragraphs 5 to 9 above, Chemform has engaged in RPM in contravention of section 48 of the Act in that Chemform:
  - a. between 5 October 2011 and 6 January 2012, entered into a Distributor Agreement with each of the Distributors and each Distributor Agreement contained the RPM Clause, being a term to the effect that the Distributor would not sell Chemform products supplied by Chemform at a price less than the price specified by Chemform being conduct within the meaning of section 96(3)(c) of the Act;
  - b. from at least 5 October 2011, provided the Distributors with price lists which contained 'reseller' prices for Chemform products supplied to the Distributors by Chemform, which, in conjunction with the RPM Clause contained in the Distributor Agreement, constituted a statement of a price that was likely to be understood by the Distributors as the price below which Chemform products were not to be sold, being conduct within the meaning of section 96(3)(f) of the Act;

- c. on 15 February 2012, by sending an email that included the statement set out at paragraph 8 above, induced or attempted to induce Cobalt not to sell Chemform products supplied to it by Chemform at a price less than the price specified by Chemform, being conduct within the meaning of section 96(3)(b) of the Act; and
- d. on or about 1 March 2012, by increasing the price at which it supplied or offered to supply Chemform products to Cobalt, withheld supply of Chemform products from Cobalt, within the meaning of section 98(1)(b) of the Act, such withholding being conduct within the meaning of section 96(3)(d) of the Act.

### **Resolution**

- 11. In response to the ACCC's concerns and in recognition of its likely contraventions of the Act, Chemform:
  - a. admits that by engaging in the conduct described in paragraphs 5 to 9 above, Chemform is likely to have engaged in RPM in contravention of section 48 of the Act;
  - b. indicated that on 6 July 2012 that it had amended its Distributor Agreement by deleting the RPM Clause; and
  - c. has offered to give the Undertaking in the terms set out below for the purposes of section 87B of the Act.

### **Commencement of the Undertaking**

- 12. This Undertaking comes into effect when:
  - a. the Undertaking is executed by Chemform; and
  - b. the ACCC accepts the Undertaking so executed.
- 13. Upon the commencement of the Undertaking, Chemform undertakes to assume the obligations set out in paragraphs 14 to 18 below.

### **Undertakings**

#### ***Conduct***

- 14. Chemform undertakes, for the purposes of section 87B of the Act, that it will not, for a period of 3 years from the date of the commencement of the Undertaking, in trade or commerce:
  - a. enter into an agreement, or offer to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by Chemform;
  - b. induce, or attempt to induce, a second person not to sell, at a price less than a price specified by Chemform, goods supplied to the second person by Chemform;

- c. withhold the supply of goods to a second person for the reason that the second person has sold, or is likely to sell, goods supplied to that person by Chemform, at a price less than a price specified by Chemform as the price below which the goods are not to be sold; and
- d. use, in relation to any goods supplied, or that may be supplied, by Chemform to a second person, a statement of price that is likely to be understood by that person as the price below which the goods are not to be sold.

#### ***Revise Distributor Agreement***

15. Chemform undertakes for the purposes of section 87B of the Act, that it will, at its own expense and within 28 days of the Undertaking taking effect, revise its Distributor Agreement to ensure that it does not contain a term which is, or would be, that the distributor will not sell Chemform products at a price less than a price specified, or that would be specified, by Chemform (**Revised Distributor Agreement**).

#### ***Letter to Distributors***

16. Chemform undertakes for the purposes of section 87B of the Act, that it will, at its own expense and within 28 days of the date of the Undertaking taking effect, cause a copy of the letter set out at Annexure A (the Letter) to be sent to each distributor that was a party to an agreement with Chemform containing the RPM clause, and to which Chemform supplies Chemform products, which:
- a. informs them about Chemform's conduct which was likely to have contravened the Act and of the ACCC's concerns regarding such conduct;
  - b. advises them that they are free to set the minimum price at which they advertise, offer to sell, or sell Chemform products;
  - c. encloses a copy of the Revised Distributor Agreement that Chemform will now be using in its dealings with distributors; and
  - d. informs them that Chemform will not rely upon, seek to enforce or expect the distributor to comply with the clause in their Distributor Agreement titled: 'Clause 6 Recommended List Prices' and which is set out at paragraph 6 above.
17. Chemform undertakes for the purposes of section 87B of the Act, that it will, at its own expense and within 14 days of the Letter being sent, provide the ACCC with a list of all Distributors to whom a copy the Letter was sent.

#### ***Compliance Program***

18. Chemform undertakes for the purposes of section 87B of the Act that it will at its own expense:
- a. establish and implement a Competition and Consumer Law Compliance Program in accordance with the requirements set out in 'Annexure B' (**Compliance Program**), being a program designed to minimise Chemform's risk of future breaches of section 48 of the Act and to ensure its awareness of its responsibilities and obligations in relation to the requirements of Part IV of the Act;

- b. for a period of 3 years from the date of the Undertaking taking effect, maintain and continue to implement the Compliance Program; and
- c. provide a copy of any documents required by the ACCC in accordance with the Compliance Program.

### Acknowledgments

19. Chemform acknowledges that:

- a. the ACCC will make the 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. the Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

### Executed by

Chemical Formulators Pty Ltd ACN 008 905 119 pursuant to section 127(1) of the *Corporations Act 2001*.

  
.....  
Director

  
.....  
Director

This 23rd day of October 2012

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION PURSUANT TO SECTION 87B OF THE *COMPETITION AND  
CONSUMER ACT 2010***

  
.....

Rodney Graham Sims  
Chairman

This 30th day of October 2012

## Annexure A

[To be placed on Chemical Formulators Pty Ltd letterhead]

[Date]

[Name of Distributor]

[Address]

Dear [addressee]

### **Resale price maintenance conduct by Chemical Formulators Pty Ltd**

The Australian Competition and Consumer Commission ('ACCC') has recently conducted an investigation into alleged Resale Price Maintenance by Chemical Formulators Pty Ltd ('Chemform'). This investigation concluded that in its dealings with distributors, Chemform was likely to have engaged in conduct constituting Resale Price Maintenance. Resale Price Maintenance is prohibited by section 48 of the *Competition and Consumer Act 2010*.

The prohibition on Resale Price Maintenance essentially prevents suppliers from specifying a minimum price below which a person may not sell or advertise goods for sale.

Our distributor agreement with you, specifically Clause 6 titled 'Recommended List Prices', sought to do this. Chemform cannot and will not force you to comply with this clause. To address this issue, please find enclosed a new distributor agreement which does not seek to control the minimum price at which distributors decide to sell Chemform products and which we will be using in our future dealings with distributors.

We would also like to inform you that in addition to amending our agreements with distributors in response to the ACCC's concerns, Chemform has committed to:

- Not engaging in Resale Price Maintenance in the future; and
- Implementing a training and compliance program to ensure that this does not happen again.

A complete outline of what Chemform has committed to do can be found on the ACCC's website at <http://www.accc.gov.au/content/index.php?id/1025048>.

You should also be aware that Resale Price Maintenance may involve one or more of the following actions by a supplier:

- Attempting to induce a person not to sell the supplier's products at a price less than a price specified by the supplier; or
- Using, in relation to goods supplied by the supplier, a statement of a price that is likely to be understood as the price below which the goods are not to be sold; or
- Making it known that the supplier will not supply a person unless they agree not to sell below the supplier's specified price.

The object of the Resale Price Maintenance prohibition is to create conditions in which the Australian public will benefit from traders competing with each other unfettered by minimum price restraints imposed upon them by suppliers of goods.

Chemform would like to reiterate that it cannot require a distributor not to sell Chemform products below a price set by Chemform. Any recommendation by Chemform regarding prices at which its products should be sold is a recommendation only. You are not obliged to sell Chemform products at the prices recommended by Chemform.

You can obtain more information about the requirements of the *Competition and Consumer Act 2010* from the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).

If you have any questions regarding this letter, please contact [name of Chemform contact person] on [phone number].

Yours sincerely

[Name and title of authorised person]

## **Annexure B**

### **AUSTRALIAN COMPETITION AND CONSUMER LAW COMPLIANCE PROGRAM**

Chemical Formulators Pty Ltd ('Chemform') will establish a Competition and Consumer Law Compliance Program ('Compliance Program') that complies with each of the following requirements:

#### **Appointment**

1. Within one month of the date of the Section 87B Undertaking coming into effect, Chemform will appoint a Director or a Senior Manager of the business to be responsible for the development, implementation and maintenance of the Compliance Program ('Compliance Officer').

#### **Compliance Officer Training**

2. Chemform will ensure that, within 3 months of the Section 87B Undertaking coming into effect, the Compliance Officer attends practical training focusing on Part IV of the *Competition and Consumer Act 2010* ('the Act'), specifically section 48.
3. Chemform shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in Competition and Consumer Law.
4. Chemform will, within 14 days of completion of training, provide the Australian Competition and Consumer Commission ('ACCC') with a written statement from the compliance professional or legal practitioner who conducts the training, confirming the completion of the training conducted in accordance with paragraphs 2 and 3 above.
5. All information required to be provided to the ACCC shall be addressed to the Compliance Monitoring Unit of the ACCC, either by email to [compliancemonitoring@accc.gov.au](mailto:compliancemonitoring@accc.gov.au) or by post to GPO Box 520, Melbourne VIC 3001.

#### **Staff Training**

6. Chemform will cause all employees of Chemform whose duties could result in them being concerned with conduct that may contravene section 48 of the Act, 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 Competition and Consumer Law, that focuses on section 48 of the Act.

#### **Complaints handling**

7. Chemform will develop procedures for recording, storing and responding to Competition and Consumer complaints within 2 months of the Section 87B Undertaking coming into effect.
8. Chemform will provide the ACCC with an outline of the complaint handling system within 2 months of the Section 87B Undertaking coming into effect.



## **Reports to Director**

9. Chemform 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.

## **Review**

10. Chemform shall, at its own expense, cause an annual review of the Compliance Program (**'the Review'**) to be carried out in accordance with each of the following requirements:

### *Scope of the Review*

- 10.1. Chemform shall ensure that the Review is broad and rigorous enough to:
  - a. provide Chemform and the ACCC with a supportable verification that Chemform has in place a Compliance Program that complies with the requirements of the Section 87B Undertaking and is suitable for the size and structure of Chemform; and
  - b. provide the Compliance Program Review Report and opinions detailed at paragraph 12 below.

### *Independence of Reviewer*

- 10.2. Chemform shall ensure that the Review is carried out by a suitably qualified, independent compliance professional with expertise in Competition and Consumer Law (**'the Reviewer'**). The Reviewer will qualify as independent on the basis that he or she:
  - a. did not design or implement the Compliance Program;
  - b. is not a present or past staff member or director of Chemform;
  - c. has not acted and does not act for Chemform in any Competition and Consumer Law related matters;
  - d. has not and does not act for or consult to Chemform or provide other services on Competition and Consumer Law related matters other than Compliance Program reviewing; and
  - e. has no significant shareholding or other interests in Chemform.

### *Evidence*

- 10.3. Chemform 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 Chemform's possession or control, including without limitation:
  - a. enquiries of any employees, representatives, agents and stakeholders of Chemform; and
  - b. documents created by Chemform's consultants, legal practitioners and accountants for use in Chemform's Compliance Program.
11. Chemform shall ensure that the first Review is completed within one year and one month of the Section 87B Undertaking coming into effect and that each subsequent Review is completed within one year of the first Review.

## **Reporting**

12. Chemform shall use its best endeavours to ensure that the Reviewer sets out the findings of the Review in a Compliance Program Review Report, which will provide particular and specific information regarding the scope of the Review and the effectiveness of the Compliance Program including:
  - a. details of the evidence gathered and examined during the Review;
  - b. the name and relevant experience of the person appointed as Chemform's Compliance Officer;
  - c. the Reviewer's opinion on whether Chemform has in place effective staff training and complaints handling programs that comply with the requirements of the Section 87B Undertaking; and
  - d. actions recommended by the Reviewer to ensure the continuing effectiveness of Chemform's Compliance Program.
13. Chemform shall use its best endeavours to ensure that each Compliance Program Review Report is completed and provided to Chemform within one month of completion of the Review.
14. Chemform will cause the Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.
15. Chemform shall implement promptly and with due diligence any recommendations made by the Reviewer or required by the ACCC that are reasonably necessary to ensure that Chemform maintains and continues to develop the Compliance Program elements in accordance with the requirements of the Section 87B Undertaking.
16. If requested by the ACCC, Chemform shall, at its own expense, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.
17. In the event the ACCC has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Chemform shall, at its own expense and if requested by the ACCC, cause an interim or additional Review to be conducted and cause the resulting Compliance Program Review Report to be provided to the ACCC.