

**COMPETITION AND CONSUMER ACT 2010**

**VARIATION TO UNDERTAKING TO THE AUSTRALIAN COMPETITION AND  
CONSUMER COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B**

**BY**

**TWM Imports Pty Ltd**

**ACN 061 735 699**

**Background**

1. On 26 April 2012 the Australian Competition and Consumer Commission (the **ACCC**) accepted an Undertaking given by TWM Imports Pty Ltd ACN 061 735 699 (**TWM**) of 5-15 James Court, Tottenham, in the State of Victoria pursuant to section 87B of the *Competition and Consumer Act 2010* (the **Act**) (the **Undertaking**).
2. The purpose of this Variation to the Undertaking is to correct factual and typographical errors in the original Undertaking.
3. The ACCC is satisfied that the variation sought is appropriate in the circumstances.

**Commencement of this Variation to Undertaking**

4. This Variation comes in effect when:
  - a. the Variation is executed by TWM; and
  - b. the ACCC accepts the Variation so executed.

**Variation to Undertaking**


5. The Undertaking is varied as follows:
  - a. delete all the wording contained in paragraphs numbered (1) to (16) in the Undertaking (the **Deletion**); and
  - b. replace the Deletion with the wording contained in Attachment 1.

**Acknowledgements**

6. TWM acknowledges that:
  - a. the ACCC will make this Variation available for public inspection; and
  - b. the ACCC will, from time to time, refer to this Variation including in news media statements and in ACCC publications.

**Executed by**

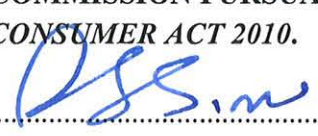
TWM Imports Pty Ltd (ACN 061 735 699) pursuant to section 127(1) of the *Corporations Act 2001*.

  
.....  
Secretary/Director

.....  
Director

This 29<sup>th</sup> day of November 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 11<sup>th</sup> day of 12 2012

## **ATTACHMENT 1**

### **Person giving this undertaking**

- (1) This undertaking is given to the Australian Competition and Consumer Commission (**the ACCC**) by TWM Imports Pty Ltd ACN 061 735 699 (**TWM**) of 5-15 James Court, Tottenham, in the State of Victoria for the purposes of section 87B of the *Competition and Consumer Act 2010* (**the Act**).

### **Background**

- (2) TWM is incorporated in Australia and carries on a business as an importer and wholesaler of woodwork, metal work machinery, cables, motors, electric pumps, generators, power tools and jacks.
- (3) The ACCC is responsible for, amongst other things, enforcing compliance with the Australian Consumer Law (consisting of Schedule 2 to the Act) (**the ACL**). Relevantly:
  - (a) 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;
  - (b) section 29(1)(a) 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 that goods are of a particular standard; and
  - (c) section 106(1) of the ACL provides that a person must not, in trade or commerce, supply consumer goods of a particular kind if:
    - (i) a safety standard for consumer goods of that kind is in force; and
    - (ii) those goods do not comply with the standard.
- (4) The safety standard in force for hydraulic trolley jacks is the Australian/New Zealand Standard AS/NZS 2516:2004 *Hydraulic Trolley Jacks* as varied by Consumer Protection Notice No. 10 of 2008 (**Safety Standard**).
- (5) The Safety Standard prescribes requirements for the design, construction, performance and labelling of hydraulic trolley jacks designed to raise vehicles. These requirements are very important and are aimed at reducing the incidence of injuries and death occurring.
- (6) Clause 6.7 of the Safety Standard provides certain performance requirements for eccentric load testing. Clause 7.1 of the Safety Standard requires the Jack to be permanently and legibly marked in English with certain warning, safe usage and device information.

### **The Conduct and alleged breaches of the Australian Consumer Law**

- (7) Between February 2009 and July 2011, TWM supplied, in trade or commerce, 271 Hydraulic Trolley Jacks (model no. VP8681) (**Jacks**), that:
- (a) did not comply with the following clauses of the Safety Standard:
    - (i) clause 6.7 (Eccentric Load Test) in that the Jacks became unstable during eccentric load testing; and;
    - (ii) clause 7.1 (Warnings) in that the Jacks were not permanently and legibly marked in English with certain markings required by the Safety Standard, namely:
      - (A) the labelling on the Jacks failed to state the nominated capacity of the Jack as “working load...kg” as required by clause 7.1(a) of the Safety Standard;
      - (B) the warning notice on the label of the Jacks, bearing the words as shown in Figure 2 of the Safety Standard, were in letters that were 2mm high and not at least 5mm high as required by clause 7.1(b) of the Safety Standard;
      - (C) the labelling on the Jacks stated “to lift place vehicle in park, apply brakes and block wheels” instead of “the unlifted wheels of the vehicle should be chocked” as required by clause 7.1(c)(i) of the Safety Standard;
      - (D) the labelling on the Jacks stated “always centre the load on saddle of jack avoid off centred load” instead of “the load should be centrally located on the head cap” as required by clause 7.1(c)(ii) of the Safety Standard;
      - (E) the labelling on the Jacks omitted the statement “no person should remain in a vehicle that is being lifted” contrary to clause 7.1(c)(iii) of the Safety Standard;
      - (F) the labelling on the Jacks stated “please consult the owners manual before jacking of the vehicle” instead of “the vehicle manufacturer owner’s manual should be consulted prior to the lifting of the vehicle” as required by clause 7.1(c)(iv) of the Safety Standard; and
      - (G) the labelling on the Jacks omitted the statement “the hydraulic trolley jack should be used for lifting and lowering only” contrary to clause 7.1(c)(v) of the Safety Standard; and
  - (b) were affixed with labelling which falsely or misleadingly represented that the Jacks complied with the Safety Standard.
- (8) On 6 July 2011, in the course of conducting a product safety survey, the ACCC purchased one Jack from each of two retailers. The ACCC examined the Jacks and formed the view they did not comply with clause 7.1 of the Safety Standard.
- (9) Performance testing of one of the Jacks conducted in September 2011 confirmed this non-compliance with clause 7.1 of the Safety Standard. Further, the results indicated

that the Jacks did not comply with clause 6.7 of the Safety Standard in relation to a performance requirement for eccentric load testing.

- (10) TWM admits that from around February 2009 to July 2011 it supplied 271 Jacks that failed to comply with the Safety Standard.
- (11) TWM also admits that, in relation to conduct it engaged in on or after 1 January 2011:
  - (a) by representing that the Jacks complied with the Safety Standard when they did not:
    - (i) it engaged in conduct that was misleading or deceptive or was likely to mislead or deceive in contravention of section 18 of the ACL;
    - (ii) it made false and misleading representations in relation to the Jacks' compliance with the Safety Standard in contravention of section 29(1)(a) of the ACL; and
  - (b) it supplied Jacks which failed to comply with the Safety Standard in contravention of section 106(1) of the ACL.
- (12) TWM acknowledges that the Safety Standard aims to reduce the risk of injury and death and that the compliance program it had in place during the period it supplied the Jacks was deficient as it failed to eliminate, so far as possible, the risk of TWM's non-compliance with the Safety Standard.
- (13) Upon becoming aware of the ACCC's concerns, TWM ceased supply of the Jacks and initiated a national voluntary product safety recall.

#### **Commencement of undertaking**

- (14) This undertaking comes into effect when:
  - (a) the undertaking is executed by TWM; and
  - (b) the ACCC accepts the undertaking so executed.
- (15) Upon the commencement of this undertaking, TWM undertakes to perform the obligations set out in paragraphs 16 and 17 below.

#### **Undertakings**

- (16) TWM undertakes for the purposes of section 87B of the Act that:
  - (a) subject to paragraph 17 below, for a period of 3 years commencing from the date of this Undertaking coming into effect, it will not supply any hydraulic trolley jack subject to any safety standard for the purposes of Division 1 of Part 3-3 of the ACL (**Mandatory Safety Standard**); and
  - (b) within two months of this Undertaking coming into effect, it will dispose of all stock of the Jacks (model number VP8681) in its possession by destroying the Jack and providing verification of its destruction to the ACCC within 2 business days of the destruction.

- (17) TWM further undertakes for the purposes of section 87B of the Act that if, within 3 years, commencing from the date of this Undertaking coming into effect, it resumes supply of hydraulic trolley jacks subject to a Mandatory Safety Standard:
- (a) for a period of 3 years commencing from the date on which it resumes supply (**Resumption Date**):
    - (i) it will not, whether by itself, its officers, servants, agents or howsoever otherwise, supply such jacks unless it has first:
      - (1) obtained written evidence, obtained within the preceding 12 months, from a person with National Association of Testing Authorities accreditation to test for compliance with the safety standard, which confirms that that model of hydraulic trolley jack complies with the Mandatory Safety Standard; and
      - (2) within the preceding 12 months, visually inspected a sample of at least 5 hydraulic trolley jacks produced in the same batch as the said hydraulic trolley jack to ensure the sample jacks are labelled or marked in accordance with the safety standard;
    - (ii) it will not, whether by itself, its officers, servants, agents or howsoever otherwise, represent that any hydraulic trolley jack complies with any safety standard, to which it is subject for the purposes of Division 1 of Part 3-3 of the ACL, when it does not; and
    - (iii) it will, within two (2) business days of any request from the ACCC, provide the ACCC with copies of any test reports it has in its possession in relation to any hydraulic trolley jacks that it supplies or has supplied;
  - (b) it will notify the ACCC of its resumption of supply of hydraulic trolley jacks within 5 business days of the Resumption Date;
  - (c) it will establish and implement a Trade Practices Compliance Program (**Compliance Program**) in accordance with the requirements set out in “**Annexure A**”, being a program designed to minimise TWM’s risk of future breaches of the ACL and in particular sections 18, 29(1)(a) and 106(1) of the ACL and to ensure its awareness of the responsibilities and obligations in relation to the requirements of sections 18, 29(1)(a) and 106(1) of the ACL within 3 months of the Resumption Date;
  - (d) it will maintain and continue to implement the Compliance Program for a period of 3 years from the Resumption Date; and
  - (e) it will provide, at its own expense, a copy of any documents required by the ACCC in accordance with **Annexure A**.

## Acknowledgments

- (18) TWM 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 will, 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.

## **Annexure A**

### **TRADE PRACTICES COMPLIANCE PROGRAM**

#### **LEVEL 2**

TWM Imports Pty Ltd (TWM) will establish a Trade Practices Compliance Program (**Compliance Program**) that complies with each of the following requirements:

#### **1. Appointments**

- 1.1. Within one month of the date of TWM resuming supply, it 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. TWM will ensure that, within 3 months of resuming supply, the Compliance Officer attends practical training in relation to the Australian Consumer Law (**ACL**) with particular focus on ACL provisions dealing with:
  - 2.1.1. the making of claims or representation about goods; and
  - 2.1.2. the supply of consumer goods which are subject to a prescribed safety standard.
- 2.2. TWM shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law;
- 2.3. TWM, within 14 days of completion of training, will provide the 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 2.1 and 2.2 above.



### **3. Staff Training**

3.1. TWM will cause all employees of TWM whose duties could result in them being concerned with conduct that may contravene any of the provisions of the ACL relating to the prohibition against:

3.1.1. making false or misleading representations about goods: and

3.1.2. supplying consumer goods which are subject to a prescribed safety standard

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 trade practices law that focuses on those provisions.

### **4. Complaints handling - TWM will:**

4.1. develop procedures for recording, storing and responding to trade practice complaints within 2 months of resuming supply; and

4.2. provide the ACCC with an outline of the complaint handling system within 2 months of resuming supply.

### **5. Product Safety – TWM will:**

5.1. maintain up-to-date copies, at its business premises, of all prescribed consumer product safety standards and prescribed consumer information standards that relate to products TWM supplies;

5.2. ensure that the products supplied that are subject to a prescribed safety and/or information standard under the Competition and Consumer Act, comply with the relevant standard;

5.3. design, implement and maintain recall procedures that enable products supplied by TWM that do not comply with prescribed safety and/or information standards under the Competition and Consumer Act to be efficiently and effectively withdrawn from the market and returned to TWM.

6. TWM will ensure that the Compliance Officer reports to their director(s) or governing body every 4 months on the continuing effectiveness of the Compliance Program.

7. **Review** – TWM 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:

7.1. **Scope of the Review** – TWM shall ensure that the Review is broad and rigorous enough to:

7.1.1. provide TWM and the ACCC with a supportable verification that TWM has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of TWM;

7.1.2. provide the Review Report and opinions detailed at point 8 below; and

7.1.3. provide TWM and the ACCC with a supportable verification that TWM has in place a product safety compliance program that complies with the requirements of the Undertaking and is suitable for the size and structure of TWM.

7.2. **Independence of Reviewer** – TWM 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:

7.2.1. did not design or implement the Compliance Program;

7.2.2. is not a present or past staff member or director of TWM;

7.2.3. has not acted and does not act for TWM in any trade practices related matters;

7.2.4. has not and does not act for or consult to TWM or provide other services on trade practices related matters other than Compliance Program reviewing; and

7.2.5. has no significant shareholding or other interests in TWM.

7.3. **Evidence** - TWM 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 TWM's possession or control, including without limitation:

7.3.1. enquiries of any employees, representatives, agents and stakeholders of TWM;

7.3.2. documents created by TWM's consultants, legal practitioners and accountants for use in TWM's Compliance Program;

7.3.3. all documents required to assess TWM's compliance with the relevant product safety/information standards under the Competition and Consumer Act.

7.4. TWM shall ensure that the first Review is completed within one year and one month of resuming supply and that each subsequent Review is completed within one year thereafter.

## **8. Reporting**

8.1. TWM 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:

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

8.1.2. the name and relevant experience of the person appointed as TWM's Compliance Officer;

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

8.1.4. actions recommended by the Reviewer to ensure the continuing effectiveness of TWM's Compliance Program.

8.2. TWM shall ensure that each Compliance Program Review Report is completed and provided to TWM within one month of completion of the Review.

8.3. TWM will cause the Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.

8.4. TWM 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 TWM maintains and continues to develop the Compliance Program elements in accordance with the requirements of this Undertaking.

9. If requested by the ACCC, TWM shall, at its own expense, provide copies of documents and information to the ACCC in respect of matters which are the subject of the Compliance Program. TWM shall provide any such documents and information within two (2) business days of being requested by the ACCC.

10. In the event the ACCC has sufficient reason to suspect that the Compliance Program is not being implemented effectively, TWM shall, at its own expense and if requested by the ACCC, cause and interim or additional Review to be conducted and cause the resulting Compliance Program Review Report to be provided to the ACCC.