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28 November 2007

BY DELIVERY

The Commissioner
Australian Competition and Consumer Commission
Level 3
500 Queen Street
BRISBANE QLD 4000

Our ref
GC:LWF:MAG:650248
Your ref

Contact
Luke Fox
Tel
(07) 3014 6584
Fax
(07) 3221 0479
Email
lfox@mcw.com.au
Partner
Glenn Caligaris

Dear Commissioner

NOTIFICATION OF EXCLUSIVE DEALING: JEMELLA AUSTRALIA PTY LTD

We act *Jemella Australia Pty Ltd*. On behalf of our client we **enclose**:

1. Notification under section 93(1) of the *Trade Practices Act 1974 (Cth)*; and
2. Our client's cheque in the amount of \$2,500 as payment of the required fees.

If you have any questions in relation to this notification or require any further information please do not hesitate to contact our Luke Fox on 07 3014 6584.

Yours faithfully
McInnes Wilson Lawyers



Glenn Caligaris
Partner



Luke Fox
Solicitor

Enclosures:

1. Notification
2. Cheque

Partners

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John Hamilton
Matthew Lyons
Mylton Burns
Allison Langford
Scott Falvey
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Form G

Commonwealth of Australia

Trade Practices Act 1974 — subsection 93 (1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:

Jemella Australia Pty Ltd ABN 50 104 455 138 (Jemella) N93236

- (b) Short description of business carried on by that person:

Jemella distributes imported ghd-branded hair care and beauty products to authorised hair salons who resell to consumers at the retail level.

- (c) Address in Australia for service of documents on that person:

*Greg Whatling
Managing Director
Jemella Australia Pty Ltd
Level 2, 40 Edward Street
BRISBANE QLD 4000*

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

All ghd-branded hair care and beauty products, including the ghd hairstyling iron

- (b) Description of the conduct or proposed conduct:

Jemella proposes to sell ghd products to authorised stockists on condition that the authorised stockists do not re-sell ghd products through the internet.

A copy of the proposed terms of sale are attached to this Form at Annexure B (particularly Clause 7 of the terms of sale).

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:

New and existing authorised stockists of ghd products

(b) Number of those persons:

(i) At present time:

Substantially in excess of 50

(ii) Estimated within the next year:

Substantially in excess of 50

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable

4. Public benefit claims

(a) Arguments in support of notification:

Jemella believes the notified conduct will generate a number of public benefits as set out in Annexure A.

(b) Facts and evidence relied upon in support of these claims:

The facts and evidence in support of the claimed public benefits are set out in Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

The relevant markets are identified in Annexure A.

6. Public detriments

(a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:

(Refer to direction 9)

The identified detriment is that consumers will be unable to purchase ghd products on the internet as set out in Annexure A.

(b) Facts and evidence relevant to these detriments:

The facts and evidence relevant to the identified detriment are set out in Annexure A

7. Further information

(a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

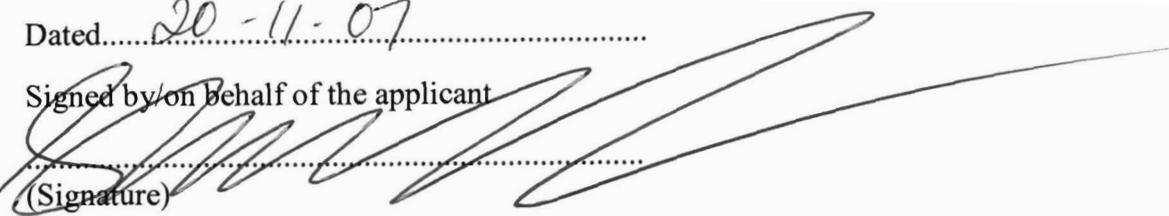
*Greg Whatling
Managing Director*

*Jemella Australia Pty Ltd
Level 2, 40 Edward Street
BRISBANE QLD 4000*

Phone: (07) 3218 4400

Dated.....*20-11-07*.....

Signed by/on behalf of the applicant


.....
(Signature)

Stephen Gregory Whatling
(Full Name)

Jemella Australia Pty Ltd
(Organisation)

Managing Director
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

Annexure A

1. BACKGROUND

- (a) Jemella Australia Pty Ltd (**Jemella**) distributes imported ghd-branded hairstyling products. The main ghd product is the ghd hairstyling iron, but Jemella also distributes “wet” products (shampoos, conditioners and other hair treatments) and other hairstyling products (hairdryers, brushes etc).
- (b) Jemella Ltd (Jemella’s parent company, incorporated in the United Kingdom) is the owner of a number of registered trade marks relating to the ghd products, including the mark “GHD” (Registration No. 951664).
- (c) Jemella is the sole authorised user of the GHD mark (and the other trade marks relating to the ghd products) in Australia and New Zealand.
- (d) The ghd hairstyling iron is a “professional” hairstyling iron and is distributed almost solely through professional hair salons (**authorised stockists**). The ghd hairstyling iron has the reputation as the best hairstyling iron available and retails at a price substantially higher than most hairstyling irons (also known as hair straighteners).
- (e) There are currently a substantial number of persons selling counterfeit ghd products and passing them off as genuine ghd products to consumers. The overwhelming majority of those counterfeits are being sold on the internet.
- (f) Jemella proposes to impose a restriction on the manner in which authorised stockists are able to resell ghd products sold to them by Jemella. The primary purposes in doing so are:
 - (i) To minimise the prospects of consumers being misled into purchasing inferior counterfeit products which are unlikely to have the necessary electrical approvals for sale in Australia, and which consumers believe to be the genuine, high quality ghd product.
 - (ii) To promote intra-brand competition between authorised stockists, particularly in relation to the supply of ancillary services to customers (and potential customers).

2. NOTIFIED CONDUCT

- (a) The proposed conduct is the imposition of a term of sale of ghd products by Jemella to authorised stockists prohibiting the authorised stockists from selling ghd products on the internet (including through eBay).
- (b) Jemella is concerned that the proposed restriction may amount to exclusive dealing pursuant to s 47(2) of the *Trade Practices Act 1974* (Cth) (TPA) because it may be a supply of goods to a person on the condition that that person does not re-supply the goods to particular persons or in particular places (ie on the internet) (s47(2)(f) TPA).
- (c) If the proposed restriction is considered to constitute exclusive dealing, Jemella believes that it would not have the effect and is not likely to have the effect of substantially lessening competition in any market. As referred to above, Jemella does not have the purpose of substantially lessening competition.

3. THE RELEVANT MARKET

- (a) Jemella has identified three possible markets:
 - (i) The retail market for the supply of hair and beauty products in Australia (a very wide market);
 - (ii) The retail market for the supply of electrical haircare appliances in Australia (a narrower market); and
 - (iii) The retail market for the supply of electrical hairstyling irons in Australia (an even narrower market).
- (b) Jemella’s share in the retail market for the supply of hair and beauty products in Australia is minimal (estimated at substantially less than 5%). Jemella’s share in the retail market for the supply of electrical haircare appliances in Australia is approximately 6%.¹
- (c) For the purposes of this Notification, Jemella is prepared to consider the effects of the notified conduct on the retail market for hairstyling irons in Australia. In the event that the appropriate market is the wider market for hair and beauty products or electrical haircare appliances, than Jemella submits that the effect (if any) on competition would be even less.
- (d) The participants in the retail market for hairstyling irons in Australia and their respective market shares are as follows:²

Brand	Market Share (2006) (%)
Remington	28
ghd	13
Vidal Sasoon	12
Breville	8
Wahl	6
Sunbeam	5
Babyliss	3
Ronson	1
Tiffany	1
Others	23

4. THE RESTRICTION WOULD NOT SUBSTANTIALLY LESSEN COMPETITION IN THE RELEVANT MARKET

- (a) Conduct that is exclusive dealing as defined in s47(2) only breaches the TPA if it has the purpose, effect or likely effect of substantially lessening competition (s47(10) TPA).
- (b) In the event that the restriction would constitute exclusive dealing, Jemella submits that there would not be a substantial lessening of competition in the retail market for the supply of hairstyling irons in Australia because:
 - (i) Jemella’s market share for hair care appliances is approximately 6%.³

¹ Refer *The Household Appliances Market in Australia, 2006* BIS Shrapnel Pty Limited (**BIS Report**).

² Refer BIS Report

³ Refer BIS Report page 260

- (ii) Jemella's market share for hairstyling irons is approximately **13%**, compared to Remington (28%), Vidal Sasson (12%) and others (23%).
 - (iii) About 26% of hairstyling irons are sold through hair salons (Jemella's target market) with the remainder being sold through retailers such as Myer, David Jones, Big W and others.⁴
 - (iv) There is substantial competition existing between salons in the retail market for hair care appliances and hairstyling irons as well as competition between salons and other retailers.
- (c) That said, Jemella acknowledges that a number of consumers are currently purchasing ghd hairstyling irons through the internet and that the proposed restriction on authorised stockists will limit the internet as a source of purchasing ghd hairstyling products.
- (d) The percentage of consumers purchasing genuine ghd hairstyling irons through the internet is unknown but Jemella considers that relatively few consumers do so at this stage. The overwhelming majority of ghd products purchased on the internet appear to be unsafe counterfeits.
- (e) There are a substantial number of authorised stockists of ghd products throughout Australia and consumers are able to easily access genuine ghd products from their local salons.
- (f) As a precautionary measure and in order to ensure that Jemella does not engage in exclusive dealing in breach of the TPA, Jemella has notified its intention to enter into the proposed agreements with authorised stockists.

5. THE PUBLIC BENEFITS OUTWEIGH ANY DETRIMENT

5.1 Summary

- (a) In the event that the ACCC considers that:
- (i) The proposed restriction constitutes exclusive dealing under s47(2)(f) of the TPA; and
 - (ii) The proposed restriction is likely to have the effect of substantially lessening competition,

Jemella submits that the public benefits outweigh any possible detriments such that the proposal should be allowed to stand and the ACCC should not revoke the Notification.

- (b) The benefits achieved by the proposed restriction will include:
- (i) The minimisation of unsafe counterfeit products being sold by fraudulent scammers and assistance to Jemella in identifying unsafe counterfeit products.
 - (ii) The fostering of intra-brand competition, particularly in relation to pricing and the provision of ancillary services in relation to ghd products, and ensuring consumers are well-informed about ghd products.

- (c) The detriments that have been identified by Jemella are:

⁴ Note that the BIS Report does not specifically refer to sales through the internet

- (i) New ghd products will not be available for sale on the internet in Australia (at least from Australian sources) other than through Jemella's website (refer detailed explanation below).

5.2 Minimisation of unsafe counterfeit products sold to consumers

- (a) There are currently a substantial number of inferior and unsafe counterfeit "ghd" hairstyling irons being sold in Australia. According to Jemella's investigations the overwhelming majority of those counterfeit products are sold through the internet, including on eBay.
- (b) Jemella is receiving numerous complaints from frustrated consumers on a daily basis in relation to inferior counterfeit ghd products purchased on eBay and the internet. Those consumers are frustrated that they have been misled into buying a product they thought was a genuine ghd product but is actually an inferior counterfeit.
- (c) Jemella has undertaken testing of some of the counterfeit products returned to it. Those counterfeits:
 - (i) are of substantially inferior quality to the genuine ghd products and are generally delivered to Jemella within weeks of being purchased;
 - (ii) are believed to be unsafe for use because of the poor quality of the insulation and electrical components of the products; and
 - (iii) do not have the appropriate electrical safety approvals for sale in Australia (or anywhere else).
- (d) It is extremely difficult to identify counterfeit products on the internet because the sellers can simply use photographs of genuine products and copy descriptions from genuine products.
- (e) Jemella currently makes "trap purchases" from suspected sellers. That process is expensive and inefficient and generally does not protect the consumers who purchase the counterfeits before Jemella can identify the sellers as frauds.
- (f) The restriction of authorised stockists from selling genuine ghd products on the internet will allow Jemella to more quickly and easily identify all persons selling new or bulk items on the internet as selling counterfeits (or breaching the terms of sale).
- (g) The counterfeits are generally manufactured in inferior factories using inferior componentry and simply made to have the same appearance as the genuine ghd hairstyling iron so that they can be passed off as genuine products. The cost of manufacturing the counterfeits is about one-fifth of the manufacturing cost of a genuine ghd hairstyling iron.
- (h) Jemella submits that the Notification should be allowed to stand in the interests of protecting consumers from unsafe products and that that will also have the effect of improving the protection of the intellectual property rights to which Jemella is entitled.

5.3 Increasing intra-brand competition

- (a) In Jemella's view the restriction on internet sales will encourage salons to compete on the intra-brand level, including value added services such as demonstrations on when and how to best use the ghd products and

explanations on what other products should be used with the ghd hairstyling iron.

- (b) Jemella requires its authorised stockists to be able to provide value added services (including detailed explanations on how to get the best results from the ghd hairstyling iron). Those services ensure that consumers get the most benefit out of their purchase.

5.4 Detrimental effect on internet sales

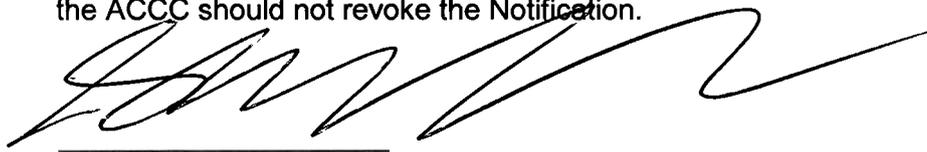
- (a) The detriment identified by Jemella is that people who cannot conveniently access an authorised stockist will have limited options. Those options include:
 - (i) To purchase a different brand hairstyling iron;
 - (ii) To travel to an authorised stockist or to telephone an authorised stockist and arrange for the product to be delivered; or
 - (iii) To purchase from the ghd website (www.ghdhair.com.au).
- (b) However, Jemella has authorised stockists in all major cities throughout Australia and is continually expanding the number of salons authorised to stock ghd products.
- (c) Accordingly, Jemella submits that the detriment identified could only affect a very small number of consumers. Also, Jemella is concerned that those consumers who cannot conveniently access an authorised stockist are more likely to purchase through the internet – and be misled into purchasing an inferior counterfeit.

6. CONCLUSION

Jemella submits that:

- (a) The notified conduct will have substantial benefits to consumers in that they are much less likely to be misled into purchasing an inferior counterfeit product;
- (b) The notified conduct will cause little detriment to consumers or any other persons; and
- (c) the ACCC should not revoke the Notification.

Signed:



Name: Stephen Gregory Whatling

Position: Managing Director, Jemella Australia Pty Ltd

Date: 20 November 2007

Annexure B

PROPOSED STANDARD TERMS OF SALE

1. General

- (a) The seller and the buyer agree that the goods and all other products sold or provided by the seller to the buyer are provided on the terms and conditions set out in these terms of sale.
- (b) In these terms of sale:
 - (i) "seller" means Jemella Australia Pty Ltd (ACN 104 455138) which is the supplier of the goods;
 - (ii) "buyer" means a buyer of goods from the seller;
 - (iii) "goods" means the products and services supplied by the seller to the buyer.
- (c) These terms of sale prevail over any previous terms of sale and these terms of sale prevail over all conditions of the buyer's order to the extent of any inconsistency (unless otherwise agreed in writing by the seller).
- (d) If the seller waives any breach of these terms of sale (which waiver must be in writing) the waiver will not affect the seller's right to exercise its rights under these terms of sale at any future time.
- (e) These terms of sale may be varied by the seller by notice in writing to the buyer. The terms of sale (as varied) shall be applicable from the date of an order for goods placed by the buyer after the date on which written notice of such variation is provided to the buyer and an order for goods from the buyer after notice of a variation shall be deemed to be acceptance of the terms of sale as varied.
- (f) In the event that the whole or any part or parts of these terms of sale should be held to be void or unenforceable in whole or part such provision or part thereof shall to that extent be severed from these terms of sale but the validity and enforceability of the remainder of these terms of sale will not be affected.
- (g) The buyer and the seller acknowledge and agree that the contract for the sale of the goods is made in Queensland and the parties submit any disputes arising between them (including any proceedings for the recovery of any amount owing by the buyer to the seller as a result of a supply of goods by the seller to the buyer) to the Courts of Queensland.

2. Price of goods

- (a) The price of goods supplied by the seller to the buyer shall be:
 - (i) As agreed in writing between the seller and the buyer;
 - (ii) If no price is agreed in writing, as specified in the seller's price list last issued prior to the date of the buyer's order for those goods;
 - (iii) Subject to the above, as determined by the seller.
- (b) Unless otherwise stated, all prices quoted by the seller net, exclusive of Goods and Services Tax (**GST**) and the cost of any insurance, transport or special packing and packing materials used in relation to the goods and such expenses are at the buyer's expense.
- (c) No request for goods may be cancelled except with the seller's consent in writing and on terms which will indemnify the seller against all losses suffered as a result of such cancellation.

3. Delivery and Storage

- (a) The buyer waives any claim for shortage of any goods delivered if a claim (in writing) in respect of short delivery has not been lodged with the seller within two (2) days from the date of the delivery to the buyer.
- (b) The seller is not liable for any loss, damage or delay occasioned to the buyer or its customers arising from late or non-delivery of the goods.
- (c) The seller may at its option deliver the goods to the buyer in any number of instalments.
- (d) Delivery will be deemed to have occurred when on-loaded at the seller's premises and all goods shall be at the risk of the buyer after on-loading.

4. Warranty and Trade Practices Act

- (a) Except as provided in these terms of sale, all express and implied warranties, guarantees and conditions under statute or general law as to merchantability, description, quality, suitability or fitness of the goods for any purpose or as to design, assembly, installation, materials or workmanship or otherwise are expressly excluded and the seller is not liable for physical or financial injury, loss or damage or for consequential loss or damage of any kind arising out of the supply, layout, assembly, installation or operation of the goods (including as a result of the negligence of the seller or its employees or agents).
- (b) The seller's liability for damaged or defective goods (including as a result of a breach of a condition or warranty implied by law and not excluded by these terms of sale) is limited to:
 - (i) In the case of goods, any one or more of the following (at the option of the seller):
 - (A) The replacement of the goods or the supply of equivalent goods; or
 - (B) The repair of the goods; or
 - (C) The payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (D) The payment of the cost of having the goods repaired; or
 - (E) The repayment of the amount paid for the goods;
 - (ii) In the case of services:
 - (A) The supplying of the services again; or
 - (B) The payment of the cost of having the services supplied again.
- (c) The seller's liability under s 74H of the *Trade Practices Act 1974* (Cth) is expressly limited to a liability to pay the buyer an amount equal to:
 - (i) The cost of replacing the goods; or
 - (ii) The cost of obtaining equivalent goods; or
 - (iii) The cost of having the goods repaired,whichever is the lowest amount.

5. Payment

- (a) Subject to this Clause 5 the purchase price of the goods is payable in accordance with the seller's invoice issued for those goods.
- (b) Where the seller has agreed to provide credit to the buyer the buyer shall pay the purchase price of the goods in accordance with the terms of that credit.
- (c) Where credit is provided by the seller to the buyer then, subject to the terms of that credit (which terms must be in writing), the purchase price in relation to goods supplied

to the buyer is payable on or before the thirtieth day after the dispatch of the goods from the seller to the buyer.

- (d) The seller may at any time vary, terminate or suspend any right of the buyer to purchase goods on credit, provided that such variation, termination or suspension shall not apply to any goods or services supplied on credit prior to the date of the variation, termination or suspension.
- (e) The seller shall be entitled, without liability to the buyer, to cancel any order or delivery of an order if:
 - (i) The buyer becomes insolvent or other steps are taken for the dissolution or bankruptcy of the buyer; or
 - (ii) The buyer breaches any of these terms of sale.

6. Rights in relation to goods

- (a) The seller reserves ownership of the goods and the buyer irrevocably gives the seller the following rights in relation to the goods until all accounts owed by the buyer to the seller on any account whatsoever are fully paid:
 - (i) To enter the buyer's premises (or the premises of any associated company or agent where the goods are located) without liability for trespass or any resulting damage and retake possession of the goods; and
 - (ii) To keep or resell any goods repossessed pursuant to this Clause 6.
- (b) If the goods are resold by the buyer, the buyer shall hold such part of the proceeds of any such sale as represents the invoice price of the goods sold in a separate identifiable account as the beneficial property of the seller and shall pay such amount to the seller upon request. Notwithstanding this Clause 6 the seller shall be entitled to maintain an action against the buyer for the purchase price of the goods.

7. Sale of goods by Buyer

- (a) Unless otherwise agreed in writing by the seller the goods are being supplied to the buyer for direct sale to consumers for personal use.
- (b) The buyer acknowledges and agrees that it shall not:
 - (i) Appoint any other person to resell the goods; or
 - (ii) Sell the goods to any person who intends to (or who the buyer reasonably believes intends to) resell the goods; or
 - (iii) Sell the goods on or through the internet; or
 - (iv) Sell (or advertise) the goods by way of auction including any online auction on the internet.

8. Intellectual Property

- (a) All intellectual property (including without limitation any copyrights, trademarks and designs) in the goods and any marketing, promotional or other material used in connection with the sale of the goods by the seller or the buyer remains the property of the seller.
- (b) The buyer is granted a licence to use the intellectual property to the extent necessary to sell the goods to consumers in accordance with the marketing policies of the seller and for no other purpose.

9. Point of Sale Material

- (a) The buyer acknowledges that:

- (i) The seller is the owner or authorised user of the intellectual property in all marketing, promotional or other material (referred to as "point of sale material"); and
 - (ii) all point of sale material created for or by seller remains the sole property of the seller (including but not limited to any intellectual property in the point of sale material); and
 - (iii) the buyer is licensed only to display the point of sale material in accordance with the directions of the seller and in the premises of the buyer and is not licensed to use the point of sale material in any other way; and
 - (iv) any breach of the licence granted to the buyer is a serious breach of these terms of sale and shall entitle the seller to immediately suspend or terminate any arrangement with the buyer including any credit facility granted by the seller to the buyer; and
 - (v) the buyer shall use and display the seller's point of sale material in accordance with the seller's directions; and
 - (vi) the buyer shall not, in relation to the advertising for sale and sale of the goods, use any promotional material which includes any of the seller's intellectual property other than the seller's point of sale material or any other promotional material approved by the seller in writing.
- (b) The buyer shall destroy or make available for collection the point of sale material in the event the buyer no longer wishes to use the point of sale material and shall otherwise comply with all directions of the seller in relation to the point of sale material.

10. Returned Goods

- (a) If the seller accepts returned goods from the buyer the seller may make such acceptance subject to the following conditions:
- (i) The buyer must return the goods to the seller's place of business (at the cost of the buyer);
 - (ii) Any credit issued by the seller will be issued to the original buyer only; and
 - (iii) The goods must be returned within the later of:
 - (A) Sixty (60) days of the buyer's receipt of the goods from the seller; and
 - (B) Thirty (30) days of the date on which a customer of the buyer returns the relevant goods to the buyer,
- and the seller must replace such goods at no additional cost to the buyer or the customer (as the case may be) as soon as reasonably possible.
- (b) The seller may set off against any money owing under these terms of sale to the buyer any money owing by the buyer to the seller.

Signed: _____

Name: Stephen Gregory Whatling

Position: Managing Director, Gemella Australia Pty Ltd

Date: 20 November 2007

