

TRADE PRACTICES ACT 1974

AND

COMPETITION AND CONSUMER ACT 2010

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

by

Privity Pty Ltd Trading as Haircare Australia

ACN 007 887 729

Persons giving this undertaking

- (1) This Undertaking is given to the Australian Competition and Consumer Commission (**the ACCC**) by Privity Pty Ltd trading as Haircare Australia ACN 007 887 729 (**Privity**) of 1 Manton Street, Hindmarsh, in the state of South Australia for the purposes of:
 - a. section 87B of the Trade Practices Act 1974 (**the TPA**), as applied by Item 6 of Schedule 7 of the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*, for conduct engaged in by Privity prior to 1 January 2011; and
 - b. section 87B of the *Competition and Consumer Act 2010* (**the CCA**).

Background

- (2) Privity trading as Haircare Australia is a distributor of professional hair and beauty products to the Australian hair salon industry. Privity's head office and primary distribution centre is located in Adelaide, South Australia, with other distribution centres in Perth, Melbourne and Hobart. Privity engages sales representatives and product technicians across each state and territory in Australia retailing haircare products to over 5,500 salons and hairdressers.

Conduct

- (3) From 17 September 2010 to 3 December 2010 Privity distributed a product known as "Brazilian Blowout" (**the product**) throughout Australia which was advertised and promoted as being 'formaldehyde free'. The product is marketed as a hair straightening product which smoothes the hair and reduces frizz. The product's container described the product as being 'formaldehyde free' and Privity marketed the product as being formaldehyde free in a limited number of brochures that it distributed.
- (4) The product was sold to salons as a professional salon treatment, and is unlikely to have been sold to the public as a stand-alone product.

- (5) During late November 2010, an independent testing authority conducted a formaldehyde analysis on the product and found it to contain formaldehyde levels of 100,000mg/kg or 10%. The ACCC was concerned because there is a substantial degree of scientific evidence that formaldehyde can be a dangerous substance, can be toxic, allergenic and carcinogenic, and when inhaled can cause headaches, a burning sensation in the throat and difficulty with breathing.
- (6) The ACCC was concerned that the 'formaldehyde free' representations on the product and in the brochures would have misled consumers and salon owners as to the ingredients contained in the product.
- (7) The ACCC considers that by making the 'formaldehyde free' misrepresentation, Privity:
 - a. engaged in conduct, in trade or commerce, that was misleading or deceptive or was likely to mislead or deceive in contravention of section 52 of the TPA; and
 - b. engaged in conduct, in trade or commerce, in connexion with the supply of the product whereby it made a false or misleading representation concerning the composition of the product in contravention of section 53(a) of the TPA.

Admission

- (8) Privity acknowledges that the conduct described at paragraphs 3 to 7 is likely to have contravened the TPA (as applied by Item 6 of Schedule 7 of the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*).
- (9) Since being made aware of the ACCC's concerns, Privity has:
 - a. issued a voluntary recall of the product from all salons in Australia; and
 - b. actively recovered any product from salons supplied with the product, through its sales force such that of the 158 bottles of product sold to 132 salons over the two month trading period, 77 bottles were returned pursuant to the recall.
- (10) Privity states, and the ACCC accepts, that it initially promoted the product in reliance on representations from the manufacturer. In mid October 2010, following reported levels of formaldehyde in the product by authorities in the USA, testing revealed that the product contained methylene glycol which had been omitted from the material safety data sheet by the manufacturer.

Commencement of Undertaking

- (11) This Undertaking comes into effect when:
 - (i) the Undertaking is executed by Privity; and

- (ii) the ACCC accepts the Undertaking so executed.
- (12) Upon the commencement of this Undertaking, Privity undertakes to assume the obligations set out in paragraphs 13 - 14 below.

Undertakings

- (13) Privity undertakes for the purposes of section 87B of the TPA and section 87B of the CCA, that for a period of three (3) years from the commencement of this Undertaking, Privity (whether by itself, its servants, its agents or otherwise):
- (i) will not in trade or commerce make false or misleading representations about the contents or ingredients of products that it sells or supplies; and
 - (ii) will ensure all brochures or other marketing material supplied by it complies with the CCA and the *Australian Consumer Law* contained in schedule 2 of the CCA (**the ACL**), in particular ACL sections 18 (formerly section 52 of the TPA) and 29(1)(a) (formerly 53(a) of the TPA).

Trade Practices Compliance Program

- (14) Privity undertakes for the purposes of section 87B of the TPA and section 87B of the CCA to, at its own expense:
- (i) within three (3) months of the commencement of this Undertaking, implement a trade practices compliance program (**the Compliance Program**) in accordance with the requirements set out in Attachment A for the relevant employees and other persons involved in the Privity business, being a program designed to:
 - i. minimise Privity's risk of breaches of the ACL:
 - 1. Part 2-1 (Misleading or deceptive conduct); and
 - 2. Part 3-1, Division 1 (False or misleading representations etc.).
 - (ii) maintain and continue to implement the Compliance Program for a period of three (3) years from the commencement of this Undertaking; and
 - (iii) within 14 days of a written request from the ACCC, provide to the ACCC a copy of any documents or material required by the ACCC, which demonstrate or evidence compliance with each of the obligations set out in Attachment A.

Acknowledgments

- (15) Privity acknowledges that:

- (i) 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 (www.accc.gov.au);
- (ii) the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications; and
- (iii) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed by

Privity Pty Ltd trading as Haircare Australia (ACN: 007 887 729) and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.

.....
 Secretary/Director

.....
 Director

This 9th day of August 2011

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO:

- a. SECTION 87B OF THE TRADE PRACTICES ACT 1974 AS APPLIED BY ITEM 6 OF SCHEDULE 7 OF THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) ACT (NO.2) 2010, FOR CONDUCT PRIOR TO 1 JANUARY 2011; AND
- b. SECTION 87B OF THE COMPETITION AND CONSUMER ACT 2010.

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Rodney Graham Sims

Chairman

This 23rd day of August 2011

Attachment A

TRADE PRACTICES COMPLIANCE PROGRAM

Privity Pty Ltd trading as Haircare Australia ACN 007 887 729 (**Privity**) will establish a Trade Practices Compliance Program (**Compliance Program**) that complies with each of the following requirements:

1. Appointments

- 1.1. Within one (1) month of the date of the Undertaking coming into effect Privity 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. Privity will ensure that, within one (1) month of the Undertaking coming into effect, the Compliance Officer attends practical training focusing on the *Australian Consumer Law* (**the ACL**) as contained in Schedule 2 to the *Competition and Consumer Act 2010* (**the CCA**) in particular:
 - 2.1.1. Part 2-1 (Misleading or deceptive conduct); and
 - 2.1.2. Part 3-1, Division 1 (False or misleading representations etc.).

(the Relevant Provisions).
- 2.2. Privity shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
- 2.3. Privity, within 14 days of completion of the 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. Privity will cause all employees, agents or representatives of Privity whose duties could result in them being concerned with conduct that may contravene the Relevant Provisions 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 trade practices law, that focuses on the ACL.

4. Complaints handling

- 4.1. Privity will within two (2) months of the Undertaking coming into effect develop procedures for recording, storing and responding to trade practices complaints.