

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

Lenan Corporation Pty Ltd

ACN 054 854 027

Persons giving this undertaking

- (1) This Undertaking is given to the Australian Competition and Consumer Commission (the ACCC) by Lenan Corporation Pty Ltd ACN 054 854 027 (Lenan) of Unit 9, 57 Mortimer Road, Acacia Ridge, in the state of Queensland for the purposes of section 87B of the *Competition and Consumer Act 2010* (the CCA).

Background

- (2) Lenan is a wholesale distribution company which sells hair and beauty products and pharmacy sundries to pharmacies, supermarkets and other retailers Australia-wide. Lenan supplies more than 3,000 products and is the Australian distributor of the “Organix Ever Straight Brazilian Keratin Therapy” (ESBKT) range of hair straightening and maintenance products.
- (3) Lenan’s head office and primary distribution centre is located in Acacia Ridge, Queensland.

Conduct

- (4) From 11 March 2011 Lenan commenced distribution of the ESBKT range throughout Australia to retailers such as Coles, Woolworths, Chemist Warehouse, Priceline and approximately 300 independent pharmacies.
- (5) Between March and August 2011 Lenan promoted the ESKBT range as being “formaldehyde free”, “certified formaldehyde free”, “sulphate free” and “sodium free”. These representations appeared on Lenan’s corporate website (www.lenan.com.au), the Organix brand’s promotional website (www.organixhair.com.au), print advertisements in various publications, in-store promotional posters and product packaging for the ESBKT range.
- (6) During April 2011 analytical testing by an independent testing authority detected levels of free formaldehyde, sulphate and sodium in the following ESBKT products:
 - a. Organix ESBKT shampoo: (340 mg/kg [0.034%] free formaldehyde, 11,000 mg/kg sulphate and 5,600 mg/kg sodium);
 - b. Organix ESBKT 30 day smoothing treatment: (200 mg/kg [0.02%] free formaldehyde, 2,700 mg/kg sulphate and 2,800 mg/kg sodium); and
 - c. Organix ESBKT flat iron spray: (390 mg/kg [0.039%] free formaldehyde and 110 mg/kg sulphate).

- (7) The ACCC is concerned that consumers who relied upon Lenan's representations were misled into purchasing products from the Organix ESBKT range on the basis that the products were free from formaldehyde, sulphates and sodium, when this was not the case.
- (8) The ACCC considers that by making the "formaldehyde free", "certified formaldehyde free", "sulphate free" and "sodium free" representations, Lenan:
 - a. engaged in conduct, in trade or commerce, that was misleading or deceptive, in contravention of section 18 of the *Australian Consumer Law* (ACL), contained in Schedule 2 to the CCA; and
 - b. made false or misleading representations concerning the composition of the goods, in connection with the supply of goods, in contravention of section 29(1)(a) of the ACL.

Admission

- (9) Lenan admits that the conduct described at paragraphs 4 and 5 contravened the ACL.
- (10) Since being made aware of the ACCC's concerns, Lenan has ceased the conduct by carrying out the following actions:
 - a. removing the representations of concern from Lenan's corporate website and the Organix brand's promotional website;
 - b. overlabelling all existing stock of the Organix ESBKT range in retail stores with corrective labels containing no representations about formaldehyde, sulphate or sodium content;
 - c. overlabelling all inventory stock of the Organix ESBKT range with corrective labels containing no representations about formaldehyde, sulphate or sodium content; and
 - d. suspending all advertising of the Organix ESBKT range during the overlabelling process.
- (11) Lenan states, and the ACCC accepts, that it promoted the Organix ESBKT range in reliance upon representations made by the products' US-based manufacturer.

Commencement of Undertaking

- (11) This Undertaking comes into effect when:
 - a. the Undertaking is executed by Lenan; and
 - b. the ACCC accepts the Undertaking so executed.
- (12) Upon the commencement of this Undertaking, Lenan undertakes to assume the obligations set out in paragraphs 13 - 19 below.

Undertakings

- (13) Lenan undertakes that for a period of three (3) years from the commencement of this Undertaking, Lenan (whether by itself, its servants, its agents or otherwise):
- a. will not in trade or commerce make false or misleading representations about the contents or ingredients of products that it sells or supplies; and
 - b. will ensure all product labelling, brochures or other marketing materials supplied by it complies with the ACL, and in particular with sections 18 and 29(1)(a) contained in schedule 2 of the CCA.

Online Corrective Notices

- (14) Lenan undertakes to, within 7 days from the commencement of this Undertaking, place Online Corrective Notices in the form of **Attachment A** of this Undertaking, on both Lenan's website (www.lenan.com.au) and the Organix website (www.organixhair.com.au).
- (15) Lenan undertakes to ensure that the Online Corrective Notices and links from the Lenan and Organix websites are displayed in accordance with paragraph 14 above for a period of not less than 30 days; and
- (16) Lenan undertakes to ensure that the Online Corrective Notices are substantially the same as the Corrective Notice in Attachment A with the following specifications:
- a. is accessible through a prominent one-click link displayed in the top third of the home page of the Lenan and Organix websites entitled "CORRECTIVE NOTICE FOR MISLEADING ADVERTISING", with the following specifications:
 - i. the words "CORRECTIVE NOTICE FOR MISLEADING ADVERTISING" to be in uppercase not less than 18 point, Sans Serif, bold, black typeface on a white background, centred and in a bordered box;
 - ii. the words 'Click here for further information' to be no less than 14 point, times new roman black typeface on a white background, centred below the text at (i) above and in the same bordered box;
 - iii. the bordered box is not less than 255 pixels wide by 60 pixels high; and
 - iv. the bordered box and its contents, including white space, is to operate in the form of a one-click hyper-link to the Website Notice.
 - b. the Online Corrective Notices will be no less than 540 pixels wide by 500 pixels high;

- c. the Online Corrective Notices will have a top banner of at least 25 point sans serif white typeface, centred and in a black box of height not less than 40 pixels;
- d. the headline typeface will be bold, sans serif, not less than 30 point size, centred, in lower case;
- e. the Lenan logo will be in colour, centred below the headline and be no less than 20mm in height;
- f. the Online Corrective Notices will have body text of at least 12 point times new roman, black typeface on a white background;
- g. the border will be 100 per cent black and have a minimum width of 3 pixels;
- h. the ACCC and Commonwealth logos will be in colour, centred below the body copy and be no less than 20mm in height;
- i. the baseline text will be at least 10 point times new roman black typeface and centred beneath the ACCC and Commonwealth logos;
- j. the Online Corrective Notices will be displayed on a stand-alone webpage which is coded in standard 'HTML' format; and
- k. the Online Corrective Notices will not be displayed as a 'pop-up' or 'pop-under' window.

Corrective Advertisements

- (17) Lenan undertakes to cause corrective advertisements to be published in the terms of the consumer notice set out in **Attachment A** of this Undertaking, in each publication named in **Attachment B** of this Undertaking. Lenan undertakes to use its best endeavours to cause the corrective advertisements to be published in each publication within 30 days from the commencement of this Undertaking, but in any event by no later than by 31 January 2012.
- (18) Lenan undertakes to use its best endeavours to ensure that each corrective advertisement referred to in paragraph 17:
 - a. appears in the first half of the publications named in **Attachment B** of this Undertaking;
 - b. is in every respect substantially the same as the consumer notice contained in **Attachment A**, with the following specifications:
 - ii) at least half a page in size;
 - iii) has a banner placed at the top set in uppercase with a minimum 14 point, sans serif typeface, centred and reversed in black box with a minimum depth of 8mm;
 - iv) the headline typeface is bold, sans serif, not less than 34 point size, centred, in lower case;
 - v) the Lenan logo is centred below the headline and not less than 20mm in height;

- vi) the border is 100 per cent black, with a minimum width of 2 points;
 - vii) the ACCC and Commonwealth logos are centred below the body copy and not less than 20mm in height; and
 - viii) the baseline text is not less than 8 point times new roman typeface and centred beneath the ACCC and Commonwealth logos; and
- (19) Lenan undertakes to, within 14 days of the publication of each corrective advertisement referred to in paragraphs 17 and 18, provide to the ACCC copies of each corrective advertisement as published.

Consumer Refund/Exchange Program

- (20) Lenan undertakes to provide, for a period of 30 days from the date when the final corrective advertisement referred to in paragraphs 17 and 18 is published:
- a. a suitable replacement product; or
 - b. a refund of the applicable purchase price,
- to affected consumers, being those who purchased products from the ESBKT range, where dissatisfaction arises from Lenan's misrepresentations about product composition.
- (21) Lenan undertakes to, within 14 days from the end of the 30 day period referred to in paragraph 20, provide the ACCC with a report giving details of the total replacement products/refunds sought and the number and value of replacement products/refunds processed.

Trade Practices Compliance Program

- (22) Lenan undertakes for the purposes of section 87B of the CCA to, at its own expense:
- a. 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 C** for the relevant employees and other persons involved in Lenan's business, being a program designed to:
 - i. minimise Lenan'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).
 - b. maintain and continue to implement the Compliance Program for a period of three (3) years from the commencement of this Undertaking; and
 - c. 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 C**.

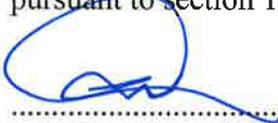
Acknowledgments

(23) Lenan acknowledges that:

- a. the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of undertakings on its website (www.accc.gov.au);
- 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.

Executed by

Lenan Corporation Pty Ltd ACN: 054 854 027 and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.



.....
Secretary/Director

.....
Director

This 22nd day of November 2011

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



.....
Rodney Graham Sims

Chairman

This 30 day of November 2011

Attachment A

A correction from Lenan Corporation Pty Ltd Organix Ever Straight Brazilian Keratin Therapy



Between March and August 2011 Lenan created and published a range of advertisements containing statements that its Organix Ever Straight Brazilian Keratin Therapy range of products was “formaldehyde free”, “certified formaldehyde free”, “sulphate free” and “sodium free” when this was not the case.

The Australian Competition and Consumer Commission (the ACCC) considers that these advertisements were likely to mislead consumers about the composition of the Organix Ever Straight Brazilian Keratin Therapy range. Lenan acknowledges the ACCC’s concerns and admits that its statements contravened the *Competition and Consumer Act 2010* (the CCA). Lenan states that it promoted the Organix Ever Straight Brazilian Keratin Therapy range in reliance upon representations made by the products’ US-based manufacturer. The matter has now been resolved by the ACCC accepting a court enforceable undertaking from Lenan, which can be viewed at www.accc.gov.au.

Pursuant to the undertaking, until [enter applicable date as per paragraphs 17 and 20 of the Undertaking] Lenan will be offering consumers affected by Lenan’s conduct either a refund of the purchase price paid for Organix Ever Straight Brazilian Keratin Therapy products, or a replacement product with corrected labelling. Consumers who believe they have been misled by Lenan’s statements should contact Lenan’s Customer Service team during business hours on 1800 052 844, or by email at enquiries@lenan.com.au.

Pursuant to the undertaking Lenan will also implement and maintain a trade practices compliance program to ensure future compliance with its obligations under the Act.

Lenan would like to apologise for any confusion and inconvenience caused to its customers.



**Australian
Competition &
Consumer
Commission**

This Corrective Notice has been paid for by Lenan Corporation Pty Ltd

Attachment B

Publications in which Lenan will publish corrective advertising in accordance with paragraphs 17 to 20 of this Undertaking:

Cleo

Cosmopolitan

In Style

NW

Shop til You Drop

Soap World

TV Soap

Woman's Day

Attachment C

TRADE PRACTICES COMPLIANCE PROGRAM

Lenan Corporation Pty Ltd ACN 054 854 027 (Lenan) 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 Lenan 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. Lenan will ensure that, within one (1) month of the Undertaking coming into effect, the Compliance Officer attends practical training focusing on sections 18 and 29 of Parts 2 and 3 of the Australian Consumer Law (ACL) contained in schedule 2 of the *Competition and Consumer Act 2010 (CCA)*;
- 2.2. Lenan shall ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law;
- 2.3. Lenan, 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. Lenan will cause all employees of Lenan involved in the production, design or approval of marketing materials, whose duties could result in them being concerned with conduct that may contravene sections 18 and 29 of the ACL, 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 sections 18 and 29 of parts 2 and 3 of the ACL.

4. **Complaints handling**

- 4.1. Lenan will develop procedures for recording, storing and responding to trade practice complaints within two (2) months of the Undertaking coming into effect.
- 4.2. Lenan will provide the ACCC with an outline of the complaint handling system within two (2) months of the Undertaking coming into effect.
5. Lenan will ensure that the Compliance Officer reports to their director(s) or governing body every 12 months on the continuing effectiveness of the Compliance Program.
6. **Review** – Lenan 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:
 - 6.1. **Scope of the Review** – Lenan shall ensure that the Review is broad and rigorous enough to:
 - 6.1.1. provide Lenan and the ACCC with supportable verification that Lenan has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of Lenan;
 - 6.1.2. provide the Review Report and opinions detailed at point 6 below.
 - 6.2. **Independence of Reviewer** – Lenan 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:
 - 6.2.1. did not design or implement the Compliance Program;
 - 6.2.2. is not a present or past staff member or director of Lenan;
 - 6.2.3. has not acted and does not act for Lenan in any trade practices related matters;

- 6.2.4. has not and does not act for or consult to Lenan or provide other services on trade practices related matters other than Compliance Program reviewing; and
 - 6.2.5. has no significant shareholding or other interests in Lenan.
- 6.3. **Evidence** - Lenan 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 Lenan's possession or control, including without limitation:
- 6.3.1. enquiries of any employees, representatives, agents and stakeholders of Lenan; and
 - 6.3.2. documents created by Lenan's consultants, legal practitioners and accountants for use in Lenan's Compliance Program.
- 6.4. Lenan shall ensure that the first Review is completed within one (1) year and one (1) month of this Undertaking coming into effect, that the second Review is completed within one (1) year thereafter and that the final review is completed one (1) month before the expiration of this Undertaking.

7. Reporting

- 7.1. Lenan 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:
- 7.1.1. details of the evidence gathered and examined during the Review;
 - 7.1.2. the name and relevant experience of the person appointed as Lenan's Compliance Officer;
 - 7.1.3. the Reviewer's opinion on whether Lenan has in place effective staff training and complaints handling programs that comply with the requirements of the Undertaking; and

- 7.1.4. actions recommended by the Reviewer to ensure the continuing effectiveness of Lenan's Compliance Program.
- 7.2. Lenan shall ensure that each Compliance Program Review Report is completed and provided to Lenan within one (1) month of completion of the Review.
- 7.3. Lenan will cause the Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.
- 7.4. Lenan 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 Lenan maintains and continues to develop the Compliance Program elements in accordance with the requirements of this Undertaking.

8. Additional Requirements

- 8.1. If requested by the ACCC, Lenan shall, at its own expense, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.
- 8.2. In the event the ACCC has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Lenan 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.