

## **COMPETITION AND CONSUMER ACT 2010**

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

by

InvoCare Limited

ACN 096 437 393

and

InvoCare Australia Pty Limited

ACN 060 060 031

### **Persons giving this undertaking**

- (1) This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by InvoCare Limited (ACN 096 437 393) and InvoCare Australia Pty Limited (ACN 060 060 031) (**InvoCare Australia**) (together, **InvoCare**) both of Level 4, 153 Walker Street, North Sydney, in the State of New South Wales for the purposes of section 87B of the *Competition and Consumer Act 2010* (the **Act**) (**Undertaking**).

### **Background**

- (2) InvoCare Australia is incorporated in South Australia and is a wholly owned subsidiary of InvoCare Limited. It is responsible for the day to day operation of InvoCare Limited's cemetery and crematoria operations in Australia, including the operation of Pinegrove Memorial Park (**Pinegrove**) and Castlebrook Memorial Park (**Castlebrook**) in New South Wales.
- (3) InvoCare sells to consumers the right to interment (burial of bodily remains) and inurnment (burial of cremated remains) at a burial site in advance of the need for the site. Where they wish to do so, consumers may purchase multiple burial sites.
- (4) InvoCare assumes for accounting purposes that the average period between the pre-purchase of a burial site and the date of its utilisation is 15 years.
- (5) Prior to November 2010, InvoCare sold most of its burial sites to consumers pursuant to contracts which did not contain any obligation for a consumer to:
  - (a) purchase a monument, headstone or plaque (a **memorial**) at the time of using the burial site; or
  - (b) purchase a memorial exclusively from InvoCare(**Unbundled Contract**).

For the removal of doubt, most Unbundled Contracts included a provision that the approval of InvoCare Australia was required for a memorial.

- (6) In or around January 2011, InvoCare introduced a new form of contract (**2011 Contract**) for the sale of a burial site which contained the following conditions:

*13. The [burial] Site can only be used for the interment, inurnment or entombment of the Nominated User if a Memorial is also purchased from InvoCare for installation at the Site. If the Site is purchased without a*

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*Memorial, the right to use the Site is conditional upon a Memorial for the Site being subsequently purchased from InvoCare for installation at the Site. If a Memorial for the Site is not purchased from InvoCare within 60 days after the death of the Nominated User, InvoCare has the right to terminate this Agreement by notice in writing to the Purchaser and, if it does so, all rights to use the unused Site will cease. In such a case, the Purchaser must pay, and InvoCare is entitled to retain, all direct loss it has incurred up to the date of termination. Subject to this requirement, this Agreement may relate to the purchase of any one or more of a Site, a Memorial and/or Ornamentation.*

*16. Memorials and Ornamentation can only be placed on a Site if they are purchased from InvoCare and approved by InvoCare for installation at the Site, such approval not being in any way restricted by any existing Memorial or Ornamentation forming part of the Facilities.*

### **Relevant provisions**

- (7) Section 18 of the Australian Consumer Law (ACL) contained at Schedule 2 of the Act 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.
- (8) Section 29(1)(l) 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 concerning the need for any goods or services.

### **Conduct of concern**

- (9) In late 2013 and early 2014 the ACCC received complaints from consumers who had purchased a burial site from InvoCare at its Pinegrove or Castlebrook Memorial Parks pursuant to an Unbundled Contract that InvoCare had made representations to them to the effect that:
  - (a) they were required to purchase a memorial at the time of using a burial site for a family member; and/or
  - (b) they were required to purchase a memorial exclusively from InvoCarewhen the Unbundled Contract did not require either of these matters.
- (10) The ACCC considers that by making the representations referred to in paragraph 9 above, InvoCare:
  - (a) engaged in conduct, in trade or commerce, which was likely to mislead or deceive in contravention of section 18 of the ACL; and
  - (b) was likely to have made false or misleading representations about the need for memorials in contravention of section 29(1)(l) of the ACL.
- (11) In response to the ACCC's concerns and in order to ensure that there could be no recurrence of the conduct set out in paragraph 9, InvoCare:
  - (a) undertook internal investigations to identify affected consumers and advised the ACCC of the names of these consumers;

- (b) contacted these consumers and sought to address their specific concerns by way of either an ex-gratia payment, refund, discount or by allowing the consumer to source a memorial from a third party supplier;
  - (c) revised its ACL compliance policies; and
  - (d) undertook compliance training for its staff.
- (12) In the course of its investigation, the ACCC also considered whether the obligations in the 2011 Contract might in themselves raise concerns. In order to allay any such concerns, InvoCare created a new form of contract for the sale of burial sites which did not include an obligation for a consumer to purchase a memorial and did not include an obligation for a consumer to purchase a bronze plaque memorial exclusively from InvoCare (New Contract). The relevant conditions of the New Contract state:

*9. Memorials and Ornamentation – If you want a Memorial or Ornamentation, to the extent permitted by law and to maintain the beauty of the Park, unless it is a bronze plaque, it can only be installed or placed on the Site if it is purchased from us. Only we may install or construct Memorials or Ornamentation.*

*10. Third party bronze plaques – On request, we will install bronze plaques not purchased from us but they must be pre-approved by us in writing, acting in good faith, and accord with our specifications. We will charge a placement fee in accordance with the customer price list current at the time of the installation. The placement fee will take into account matters including the time and expense required to approve the plaque, install it and the obligations assumed by us to take care of the Park.*

- (13) InvoCare acknowledges that by its conduct set out in paragraph 9 it was likely to have contravened sections 18 and 29(1)(l) of the ACL.
- (14) InvoCare has agreed to resolve the ACCC's concerns by:
- (a) the payment by InvoCare Limited of an infringement notice under section 134A of the Act for the alleged contravention of section 29(1)(l) of the ACL in the amount of \$102,000, and
  - (b) the provision of this Undertaking.

#### **Commencement of Undertaking**

- (15) This Undertaking comes into effect when:
- (a) the Undertaking is executed by InvoCare Australia and InvoCare Limited; and
  - (b) the ACCC accepts the Undertaking so executed.
- (16) Upon the commencement of this Undertaking, InvoCare undertakes to assume the obligations set out in paragraphs 17 to 18 below.

#### **Undertakings**

- (17) InvoCare undertakes that, for a period of three years commencing on the date of this Undertaking coming into effect:
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- (a) it will not, whether by itself, its officers, employees, contractors, representative or agents make any representation to a consumer in relation to a burial site purchased pursuant to an Unbundled Contract that they are:
  - i. bound by conditions 13 and 16 of the 2011 Contract in so far as they relate to memorials;
  - ii. required to purchase a memorial at the time of using a burial site; or
  - iii. subject to terms inconsistent with the relevant Unbundled Contract;
- (b) it will not require a person who has purchased a burial site pursuant to an Unbundled Contract to purchase a memorial or to purchase a memorial on terms inconsistent with the relevant Unbundled Contract;
- (c) it will not enforce conditions 13 and 16 of the 2011 Contract upon any person who has purchased a burial site pursuant to a 2011 Contract, and who has not yet purchased a memorial for that burial site, provided that person has accepted conditions substantially equivalent to clauses 9 and 10 of the New Contract;
- (d) any form of contract it offers to a consumer in respect of the sale of a burial site will conform to the New Contract in so far as the New Contract does not contain any provision or obligation for a consumer to either:
  - i. purchase a memorial; or
  - ii. purchase a bronze plaque exclusively from InvoCare;

For the removal of doubt, nothing in sub-paragraphs (b), (c) and (d) of this paragraph 17 prevents InvoCare enforcing its contractual rights to obtain payment for a memorial if a person has (after compliance by InvoCare with this paragraph 17) agreed to purchase that memorial from InvoCare.

- (e) InvoCare Australia's Chief Operating Officer (or if that exact position ceases to exist, someone in a position of comparable seniority) will be available as the contact person for any consumer who has purchased a burial site at Pinegrove or Castlebrook under an Unbundled Contract and who has a complaint that InvoCare has engaged in behaviour which would breach paragraphs 17(a), (b) or (c) of this Undertaking; and
- (f) it will consider any consumer complaints referred to in sub-paragraph (e) above and promptly resolve them in good faith.

### **Consumer Law Compliance Program**

- (18) InvoCare Australia undertakes for the purpose of section 87B of the Act to, at its own expense:
  - (a) update its consumer law compliance program in accordance with the requirements set out in Attachment A, being a program designed to minimise InvoCare's risk of future contraventions of the ACL (**Updated Compliance Program**).

- (b) maintain and continue to implement the Updated Compliance Program for a period of three years from the date of this Undertaking coming into effect; and
- (c) provide a copy of any documents required by the ACCC in accordance with Attachment A.

**Acknowledgments**

(19) InvoCare 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 may, 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**

InvoCare Limited (ACN 096 437 393) pursuant to section 127(1) of the *Corporations Act 2001* by:

  
 .....  
 Signature of director

ANDREW ROBIN SMITH  
 .....  
 Name of director

11 NOVEMBER 2014  
 .....  
 Date

  
 .....  
 Signature of a director/company secretary

PHILLIP JOHN FRIERY  
 .....  
 Name of a director/company secretary

11 November 2014  
 .....  
 Date

InvoCare Australia Pty Limited (ACN 060 060 031) pursuant to section 127(1) of the *Corporations Act 2001* by:

  
 .....  
 Signature of director

ANDREW ROBIN SMITH  
 .....  
 Name of director

11 NOVEMBER 2014  
 .....  
 Date

  
 .....  
 Signature of a director/company secretary

PHILLIP JOHN FRIERY  
 .....  
 Name of a director/company secretary

11 November 2014  
 .....  
 Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010*



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Rodney Graham Sims  
Chairman

This 14<sup>th</sup> day of November 2014

## Annexure A

### COMPETITION AND CONSUMER COMPLIANCE PROGRAM

#### LEVEL 4

InvoCare Australia Pty Limited (**InvoCare Australia**) will establish and maintain for a three year period (**Period**) an updated consumer law compliance program in respect of its cemetery and crematoria operations (**Updated Compliance Program**) that complies with each of the following requirements:

#### Appointments

1. Within one month of the Undertaking coming into effect, InvoCare Australia will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as a Compliance Officer with responsibility for ensuring the Updated Compliance Program is effectively designed, implemented and maintained (**the Compliance Officer**).
2. Within 2 months of the Undertaking coming into effect, InvoCare Australia will appoint a suitably qualified, internal or external, compliance professional with expertise in consumer law (**the Compliance Advisor**).
3. InvoCare Australia will instruct the Compliance Advisor to review InvoCare Australia's existing compliance program, as it applies to its cemetery and crematoria operations, within 2 months of being appointed as the Compliance Advisor (**Risk Assessment**).
4. InvoCare Australia will use its best endeavours to ensure that the Risk Assessment covers the following matters, to be recorded in a written report (**Risk Assessment Report**):
  - 4.1. identifies the areas where InvoCare Australia is at risk of breaching sections 18 and 29(1)(l) of the Australian Consumer Law (**ACL**) contained at Schedule 2 of the *Competition and Consumer Act 2010* (**CCA**);
  - 4.2. assesses the likelihood of these risks occurring;
  - 4.3. identifies where there may be gaps in InvoCare Australia's existing procedures for managing these risks; and
  - 4.4. provides recommendations for any action to be taken by InvoCare Australia having regard to the above assessment.

#### Compliance Policy

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5. InvoCare Australia will, within 90 days of the Undertaking coming into effect, issue an updated policy statement, applicable to its cemetery and crematoria operations, outlining InvoCare Australia's commitment to compliance with the CCA (**the Updated Compliance Policy**).
6. InvoCare Australia will ensure that the Updated Compliance Policy:
  - 6.1. contains a statement of commitment to compliance with the ACL;
  - 6.2. contains an outline of how commitment to ACL compliance will be realised within InvoCare Australia;
  - 6.3. contains a requirement for all staff to report any Updated Compliance Program related issues and ACL compliance concerns to the Compliance Officer;
  - 6.4. contains a guarantee that whistleblowers with consumer law compliance concerns will not be prosecuted or disadvantaged in any way and that their reports will be kept confidential and secure; and
  - 6.5. contains a clear statement that InvoCare Australia will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them against a liability to pay a pecuniary penalty for breach of the ACL or against legal costs incurred in any court proceedings in which they are found to have such a liability.

### **Complaints Handling System**

7. InvoCare Australia will, within 4 months of the Undertaking coming into effect, ensure that the Updated Compliance Program includes an updated system for handling consumer law complaints arising out of its cemetery and crematoria operations (**Updated Complaints Handling System**).
8. InvoCare Australia will use its best endeavours to ensure this system is consistent with AS/ISO 10002:2006 *Customer satisfaction - Guidelines for complaints handling in organizations*, tailored as required to InvoCare's circumstances.
9. InvoCare Australia will ensure that staff and customers of its cemetery and crematoria operations are made aware of the Updated Complaints Handling System.

### **Whistleblower Protection**

10. InvoCare will ensure that the Updated Compliance Program includes whistleblower protection mechanisms to protect those coming forward with consumer law complaints in relation to its cemetery and crematoria operations.

11. InvoCare Australia will use its best endeavours to ensure that these mechanisms are consistent with AS 8004:2003 *Whistleblower protection programs for entities*, tailored as required to InvoCare Australia's circumstances.

### **Staff Training**

12. InvoCare Australia will ensure that the Updated Compliance Program provides for regular training for all directors, officers, employees, representatives and agents of InvoCare Australia, whose duties could result in them being concerned with conduct relating to its cemetery and crematoria operations that may contravene sections 18 and 29(1)(l) of the ACL.
13. InvoCare Australia must ensure that the training is first conducted within 1 year of the Undertaking coming into effect, and thereafter at least once a year throughout the Period.
14. InvoCare Australia must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in consumer law.
15. InvoCare Australia will ensure that the Updated Compliance Program includes a requirement that awareness of consumer compliance issues forms part of the induction of all new directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct relating to its cemetery and crematoria operations that may contravene sections 18 and 29(1)(l) of the ACL.

### **Reports to Board/Senior Management**

16. InvoCare Australia will ensure that the Compliance Officer reports to the Board and/or senior management every six months on the continuing effectiveness of the Updated Compliance Program.

### **Compliance Review**

17. InvoCare Australia will, at its own expense, cause an annual review of the application of the Updated Compliance Program (**the Review**) at InvoCare Australia's Pinegrove Memorial Park and Castlebrook Memorial Park to be carried out in accordance with each of the following requirements:

17.1. **Scope of Review**– the Review should be broad and rigorous enough to provide InvoCare Australia and the ACCC with:

17.1.1. a verification that InvoCare Australia has in place a Updated Compliance Program that complies with each of the requirements detailed in paragraphs 1 – 15 above; and

17.1.2. the Compliance Report detailed at paragraph 18 below.

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17.2. **Independent Reviewer** – InvoCare Australia will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in consumer law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:

17.2.1. did not design or implement the Compliance Program;

17.2.2. is not a present or past staff member or director of InvoCare Australia or InvoCare Limited;

17.2.3. does not act for or consult to and, within the past 3 years, has not acted for or consulted to, InvoCare Australia or InvoCare Limited in any consumer law related matters, other than performing Reviews under this Undertaking; and

17.2.4. has no significant shareholding or other interests in InvoCare Australia or InvoCare Limited.

17.3. **Evidence** – InvoCare Australia will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in InvoCare Australia’s possession or control, including without limitation:

17.3.1. the ability to make enquiries of any officers, employees, representatives and agents of InvoCare Australia;

17.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;

17.3.3. documents relating to InvoCare Australia’s Updated Compliance Program, including documents relevant to InvoCare’s Updated Compliance Policy, Updated Complaints Handling System, Staff Training and induction program; and

17.3.4. any reports made by the Compliance Officer to the Board or senior management regarding InvoCare Australia’s Updated Compliance Program.

17.4. InvoCare Australia will ensure that a Review is completed within one year of this Undertaking coming into effect, and that a subsequent Review is completed within each year thereafter throughout the Period.

### **Compliance Report**

18. InvoCare Australia will use its best endeavours to ensure that within 30 days of the completion of a Review, the Reviewer includes the following findings of the Review in a report provided to InvoCare Australia, (**the Compliance Report**):

- 18.1. whether the Updated Compliance Program of InvoCare Australia includes all the elements detailed in paragraphs 1 – 15 above, and if not, what elements need to be included or further developed;
- 18.2. whether the Updated Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;
- 18.3. whether the Staff Training and induction, as referred to in paragraphs 12 - 15 above, is effective and if not, what aspects need to be further developed;
- 18.4. whether InvoCare Australia's Updated Complaints Handling System is effective and if not, what aspects need to be further developed;
- 18.5. whether InvoCare Australia is able to provide confidentiality and security to consumer law whistleblowers, and whether staff are aware of the whistleblower protection mechanisms;
- 18.6. whether there are any material deficiencies in InvoCare Australia's Updated Compliance Program, or whether there are or have been any instances of material non-compliance with the Updated Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s if not already satisfactorily rectified by InvoCare Australia.

#### **InvoCare Australia's response to Compliance Report**

19. InvoCare Australia will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
  - 19.1. provides the Compliance Report to the Board or senior management;
  - 19.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the Board or senior management identifying how InvoCare Australia can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
20. InvoCare Australia will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

#### **Reporting Material Failures to the ACCC**

21. Where a Material Failure has been identified by the Reviewer in the Compliance Report, InvoCare Australia will:
    - 21.1. provide a copy of that Compliance Report to the ACCC within 30 days of the Board or relevant governing body receiving the Compliance Report; and
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- 21.2. inform the ACCC of any steps that have been taken to rectify the Material Failure or to implement the recommendations made by the Reviewer in the Compliance Report; or
- 21.3. otherwise outline the steps InvoCare Australia proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

### **Provision of Updated Compliance Program documents to the ACCC**

22. InvoCare Australia will maintain a record of and store all documents relating to and constituting the Updated Compliance Program for a period not less than 12 months after the expiration of the Period.
23. If requested by the ACCC during the Period or within 12 months following its expiration, InvoCare Australia will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Updated Compliance Program, including:
  - 23.1. the Updated Compliance Policy;
  - 23.2. the Risk Assessment Report;
  - 23.3. an outline of the Updated Complaints Handling System;
  - 23.4. Staff Training materials and induction materials ( as referred to in paragraphs 12 -15 above);
  - 23.5. all Compliance Reports that have been completed at the time of the request;
  - 23.6. copies of the reports to the Board and/or senior management referred to in paragraph 16and paragraph 19.

### **ACCC Recommendations**

24. InvoCare Australia will implement promptly and with due diligence any recommendations that the ACCC may make that are reasonably necessary to ensure that InvoCare Australia maintains and continues to implement the Updated Compliance Program in accordance with the requirements of this Undertaking.