

## **TRADE PRACTICES ACT 1974**

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

by

Kalbarri Holdings Pty Ltd  
ACN 009 327 486

### **Persons giving this undertaking**

- 1) This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Kalbarri Holdings Pty Ltd ACN 009 327 486 (**Kalbarri Holdings**), c/- Francis A Jones & Associates Pty Ltd, 154 High Street, Fremantle, Western Australia, 6160 for the purposes of section 87B of the *Trade Practices Act 1974* (**TPA**).

### **Background**

- 2) Kalbarri Holdings trading as Greenfields Liquor Store is a liquor retailer (**Greenfields Liquor Store**). It supplies packaged liquor to consumers from its premises at Shop 2, 53 Murdoch Drive, Greenfields, Mandurah, Western Australia.
- 3) In response to a perceived drop in customer demand in 2009, representatives of Greenfields Liquor Store and nine other liquor retailers operating in the Perth metropolitan area including Mandurah (**Liquor Retailers**), met and agreed to jointly advertise packaged liquor at specified prices in The West Australian newspaper (**The West Australian**).
- 4) Between December 2009 and February 2010 five advertisements were published in The West Australian in which the Liquor Retailers offered to supply packaged liquor at specified prices.
- 5) All of the Liquor Retailers, including Greenfields Liquor Store, advertised in the first two advertisements and eight of the Liquor Retailers, including Greenfields Liquor Store, advertised in the remaining three advertisements.
- 6) The TPA provides that a corporation is prohibited from making, or giving effect to, a contract, arrangement of understanding containing a cartel provision in circumstances where:
  - a) the provision has the purpose or effect of fixing, controlling or maintaining the price for the supply of goods or services by any or all of the parties to the contract, arrangement or understanding; and
  - b) at least two of the parties to the contract, arrangement or understanding are in competition with each other.
- 7) An exemption to the provision broadly applies where corporations collectively acquire goods or services and jointly advertise those goods or services at agreed prices. The exemption is set out at section 44ZZRV of the TPA.

- 8) The exemption did not apply in this instance because most of the packaged liquor jointly advertised at specified prices in The West Australian by the Liquor Retailers was not collectively acquired.
- 9) The ACCC considers that by:
  - a) the Liquor Retailers entering into an arrangement to jointly advertise packaged liquor at specified prices Greenfields Liquor Store entered into an arrangement that contained a cartel provision, in contravention of section 44ZZRJ of the TPA; and
  - b) authorising the publication of the advertisements referred to in paragraph 4 above Greenfields Liquor Store gave effect to the cartel provision in contravention of section 44ZZRK of the TPA.
- 10) Greenfields Liquor Store admits that by engaging in the conduct specified at paragraphs 3 and 4 above it contravened sections 44ZZRJ and 44ZZRK of the TPA, and has offered this undertaking to the ACCC for the purpose of section 87B of the TPA.

### **Commencement of undertaking**

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

### **Undertaking**

- 13) Kalbarri Holdings undertakes for the purposes of section 87B of the TPA:
  - (i) that for a period of 3 years, it will not:
    - i) enter into a contract, arrangement or understanding with another party or parties regarding the joint advertising of liquor at specified prices; or
    - ii) cause to be published joint advertisements advertising liquor at specified prices;  
  
unless all of the advertised liquor has been collectively acquired by the parties to the contract, arrangement or understanding within the meaning of the TPA;
  - (ii) that it will, at its own expense, establish and implement a Trade Practices Compliance Program in accordance with the requirements set out in **Annexure A**, within 3 months of the date of this undertaking coming into effect, being a program designed to minimise Kalbarri Holdings' risk of future breaches of Division 1 of Part IV of the TPA and to ensure its awareness of its responsibilities and obligations in relation to the requirements of that Division;
  - (iii) to maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this undertaking coming into effect; and

- (iv) to provide, at its own expense, a copy of any documents required by the ACCC in accordance with **Annexure A**.

**Acknowledgments**

- 14) Kalbarri Holdings 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.

**Executed by**

Kalbarri Holdings Pty Ltd (ACN 009 327 486) and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.

  
.....  
Secretary/Director

This TENTH day of NOVEMBER 2010

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974.

  
.....  
Graeme Julian Samuel  
Chairman

This 21<sup>st</sup> day of December 2010

## Annexure A

### TRADE PRACTICES COMPLIANCE PROGRAM

Kalbarri Holdings 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 the undertaking coming into effect Kalbarri Holdings will appoint a Director or a Senior Manager of its business to be responsible for the development, implementation and maintenance of the Compliance Program (**Compliance Officer**).

#### 2. **Training**

- 2.1. Within 3 months of this undertaking coming into effect, and thereafter at least once a year for the period of the undertaking, all officers and employees of Kalbarri Holdings who are engaged in senior executive, marketing or sales functions will attend practical trade practices training focusing on sections 44RF, 44RG, 44ZZRJ and 44ZZRK of the *Trade Practice Act 1974*.
  - 2.2. Kalbarri Holdings will ensure that the training referred to in paragraph 2.1 above is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
  - 2.3. Kalbarri Holdings will provide a written statement or certificate from the trade practices professional who conducts the training referred to in paragraph 2.1 above to the ACCC within 14 days of completion of the training verifying that such training has occurred.
3. If requested by the ACCC, Kalbarri Holdings will provide, at its expense, copies of any other documents or information in respect of matters which are the subject of the Compliance Program.