

## 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* (Cth)

By

**Bob Jane Corporation Pty Ltd**

ACN 005 870 431

### 1. PERSON GIVING THIS UNDERTAKING

1.1. This Undertaking (**Undertaking**) is given to the Australian Competition and Consumer Commission (**ACCC**) by Bob Jane Corporation Pty Ltd (ACN 005 870 431) (**BJC**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (**Act**).

### 2. BACKGROUND

- 2.1. BJC is incorporated under the *Corporations Act 2001* (Cth) and is registered in Victoria.
- 2.2. BJC currently operates a network of 86 franchise stores and 49 company owned stores throughout Australia that primarily supply vehicle tyres, wheels, batteries and associated services.
- 2.3. Most BJC T-Mart franchisees in Australia operate their franchises in accordance with a “standard” form of BJC T-Mart franchise agreement that was introduced across the system during 2001/2002. The “standard” franchise agreement is for an indefinite term with automatically renewing five (5) year terms. Accordingly, the perpetual “standard” agreement does not expire by the effluxion of time.
- 2.4. In or about 2004/2005, BJC elected to offer some new franchisees to the BJC T-Mart franchise system an alternative franchise agreement in substantially similar terms to the “standard” agreement. Primarily, the varied agreement was for a fixed term (usually 10 years) rather than a perpetual term.
- 2.5. During 2015/2016, three (3) of the BJC T-Mart franchisees on fixed term agreements of 10 years reached the expiry of their franchise agreements by the effluxion of time. BJC as franchisor had discussions with each of the franchisees whose agreements were due to expire. BJC and each franchisee agreed to extend the term of the relevant franchise agreement and for each franchisee to continue to operate their franchise on an “overholding” basis month to month.

2.6. In 2017, the ACCC raised concerns with BJC about its conduct, including that BJC failed to comply with the Franchising Code of Conduct (**the Code**) and consequently section 51ACB of the Act. The ACCC's investigation was resolved administratively, noting that BJC had taken steps towards remedying the conduct and had put procedures in place to ensure its ongoing compliance with the Code. In the meantime, the franchisees in question continue to operate their franchises on an 'over-holding' basis month to month.

2.7. In 2019, the ACCC raised concerns with BJC after, in the ACCC's view, BJC did not appropriately remedy the conduct subject of the 2017 investigation, and identified additional concerns about ongoing similar conduct by BJC in respect of four other franchisees whose fixed term franchise agreements expired during 2018 and 2019.

2.8. In particular, the ACCC considers that:

- (a) BJC failed to notify each of the franchisees in writing of its intention whether to renew or extend the franchise agreement at least six (6) months before the end of the term of the agreement, as required by clause 18 of the Code;
- (b) BJC failed to provide each of the franchisees with a copy of the franchise agreement in the form to be executed, a copy of the Code and the disclosure document at least fourteen (14) days before the proposed extension of the franchise agreement, as required by clause 9(2) of the Code; and
- (c) BJC extended the term of the existing franchise agreements without having received a written statement from each of the franchisees that they had received, read and had a reasonable opportunity to understand the disclosure document and the Code, as required by clause 10(1) of the Code.

2.9. The ACCC considers that each of the franchisees who are continuing to operate their franchises on a month to month over-holding arrangement have been adversely affected by BJC's non-compliance with the Code by denying those franchisees the benefits and protections to which they would otherwise be entitled under the mandatory requirements of clauses 9, 10 and 18 of the Code, which cannot be varied by agreement between the parties.

2.10. In response to the ACCC's concerns, BJC:

- (a) acknowledges that its conduct was likely to have contravened clauses 9, 10 and 18 of the Code and, consequently, section 51ACB of the Act which prohibits contraventions of applicable industry codes; and
- (b) has offered this Undertaking to the ACCC.

### 3. COMMENCEMENT AND TERM OF THIS UNDERTAKING

3.1. This Undertaking comes into effect when:

1. this Undertaking is executed by BJC; and
2. the ACCC accepts this Undertaking so executed.

3.2. This Undertaking has effect for three (3) years after the Commencement Date (**the Term**).

3.3. Upon the commencement of this Undertaking BJC undertakes to assume the obligations set out in section 4 below for the purposes of section 87B of the Act.

### 4. UNDERTAKINGS

#### Agreements with BJC franchisees and prospective franchisees

4.1. BJC undertakes that it will not terminate any franchise agreement that is operating on an over-holding basis as at the Commencement Date without providing the relevant franchisee with a minimum six (6) months' written notice.

4.2. BJC undertakes that it will give six (6) months' written notification to franchisees as to whether it intends to renew or extend their franchise agreements under clause 18 of the Code.

4.3. BJC undertakes that, for those franchise agreements that BJC intends to extend or renew, BJC will provide the franchisees with a copy of the Code, the disclosure document and the proposed franchise agreement, in the form in which it is to be executed, at least fourteen (14) days before the renewal or extension of the franchise agreement, as required under clause 9 of the Code.

4.4. BJC undertakes that it will not enter into, renew or transfer, or extend the term or scope of a franchise agreement without first receiving a written statement from the franchisee, or prospective franchisee, that they have received, read and had a reasonable opportunity to understand the disclosure document and the Code, as required under clause 10 of the Code.

#### Compliance Program

4.5. Within four (4) months of the Commencement Date, BJC undertakes that it will establish and implement a compliance program, in accordance with the requirements set out in Annexure A of this Undertaking, being a program designed to minimise BJC's risk of future breaches of the Code and to ensure its awareness of the responsibilities and obligations in relation to the requirements of the Code (**Compliance Program**).

4.6. BJC undertakes to:

- (a) maintain and continue to implement the Compliance Program for a period of at least three (3) years from the Commencement Date; and
- (b) provide, at its own expense, a copy of any documents required by the ACCC in accordance with Annexure A.

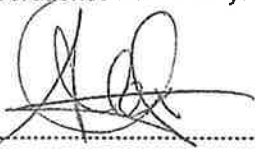
## **5. ACKNOWLEDGMENTS**


5.1. BJC 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 this Undertaking given by BJC including by issuing a media release at the time this Undertaking is entered into, 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 as an Undertaking**

Executed by Bob Jane Corporation Pty Ltd ACN 005 870 431 pursuant to section 127(1) of the Corporations Act 2001 by:

  
.....  
Signature of Director

  
.....  
Signature of a Director / Company Secretary

ALEX CHUNG.  
.....  
Name of Director (print)

Veronica Rafter  
.....  
Name of Director / Company Secretary (print)


24 APRIL 2020  
.....  
Date

24 April 2020  
.....  
Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 (Cth) on:

29 April 2020  
.....  
Date

and signed on behalf of the Australian Competition and Consumer Commission by:

  
.....  
Chair

29 April 2020  
.....  
Date

## ANNEXURE A

### FRANCHISING CODE OF CONDUCT COMPLIANCE PROGRAM

BJC will establish a Franchising Code of Conduct Compliance Program (**Compliance Program**) that complies with each of the following requirements:

#### **Appointments**

1. Within three (3) months of the Undertaking coming into effect, BJC will appoint a director or senior manager of the business to be responsible for the development, implementation and maintenance of the Compliance Program (**the Compliance Officer**).

#### **Compliance Policy**

2. BJC will, within three (3) months of the Undertaking coming into effect, issue a policy statement outlining BJC's commitment to compliance with the Franchising Code of Conduct (**the Code**) (**the Compliance Policy**).
3. BJC will ensure that the Compliance Policy:
  - 3.1. contains a statement of commitment to compliance with the Code;
  - 3.2. contains an outline of how commitment to compliance with the Code will be realised within BJC;
  - 3.3. contains a requirement for all staff to report any Compliance Program related issues and Code compliance concerns to the Compliance Officer; and
  - 3.4. contains a clear statement that Bob Jane will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Code and will not indemnify them in the event of any court proceedings in respect of that contravention.

#### **Staff Training**

4. BJC will ensure that the Compliance Program provides for regular (at least once a year) training for all directors, officers, employees, representatives and agents of BJC, whose duties could result in them being concerned with conduct that may contravene the Code.
5. BJC must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in the Code.
6. BJC will ensure that the Compliance Program includes a requirement that awareness of Code 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 that may contravene the Code.

### **Complaints Handling System**

7. Within four (4) months of this Undertaking coming into effect BJC will review and/or implement an internal complaint handling procedure for recording, storing and responding to complaints from franchisees that complies with Part 4, Division 2 of the Code (**Complaints Handling System**).

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

8. BJC will ensure that the Compliance Officer reports to the board and/or senior management every six (6) months on the continuing effectiveness of the Compliance Program.

### **Compliance Review**

9. BJC will, at its own expense, cause an annual review of the Compliance Program (**the Review**) to be carried out in accordance with each of the following requirements:

- 9.1. **Scope of Review** – the Review should be broad and rigorous enough to provide BJC and the ACCC with:

- (a) a verification that BJC has in place a Compliance Program that complies with each of the requirements of the Undertaking and is suitable for the size and structure of BJC;
- (b) recommendations for any action to be taken by BJC with respect to any areas identified in BJC's existing procedures where BJC may be at risk of breaching the Code; and
- (c) the Compliance Reports detailed at paragraph 10 below.

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

- (a) did not design or implement the Compliance Program;
- (b) is not a present or past staff member or director of BJC;
- (c) has not acted and does not act for, and does not consult and has not consulted to, BJC in any Code related matters other than performing Reviews under this Undertaking; and
- (d) has no significant shareholding or other interests in BJC.

- 9.3. **Evidence** – BJC 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 BJC's possession or control, including without limitation:

- (a) the ability to make enquiries of any officers, employees, representatives and agents of BJC;

- (b) documents relating to BJC's Compliance Program, including documents relevant to BJC's Compliance Policy, Complaints Handling System, staff training and induction program; and
- (c) any reports made by the Compliance Officer to the board or senior management regarding BJC's Compliance Program.

9.4. **Timing of the Review** – BJC will ensure that a Review is completed within 11 months of this Undertaking coming into effect, and that a subsequent Review is completed within 12 months for three years so that three Reviews are carried out during the term of this Undertaking.

### **Compliance Reports**

10. BJC 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 BJC, (**the Compliance Report**):

- 10.1. whether BJC's Compliance Program includes all the elements detailed in paragraphs 1 to 8 above, and if not, what elements need to be included or further developed;
- 10.2. whether the staff training and induction is effective and if not, what aspects need to be further developed;
- 10.3. whether BJC's Complaints Handling System is effective and if not, what aspects need to be further developed; and
- 10.4. whether there are any material deficiencies in BJC's Compliance Program, or whether there are or have been any instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s<sup>1</sup>.

### **BJC response to Compliance Reports**

11. BJC will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:

- 11.1. provides the Compliance Report to the board or relevant governing body;
- 11.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the board or relevant governing body identifying how BJC can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.

12. BJC will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

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<sup>1</sup> Material Failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to:

- incorporate a requirement of the Undertaking in the design of the Compliance Program; or
- comply with a fundamental obligation in the implementation of the Compliance Program, for example, if no staff training has been conducted within the Annual Review period.



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

13. Where a Material Failure has been identified by the Reviewer in the Compliance Report, BJC will:

- 13.1. provide a copy of that Compliance Report to the ACCC within 14 days of the board or relevant governing body receiving the Compliance Report; and
- 13.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
- 13.3. otherwise outline the steps BJC proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

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

14. BJC will maintain a record of and store all documents relating to and constituting the Compliance Program for a period of not less than five years.

15. If requested by the ACCC during the period of five years following the Undertaking coming into effect, BJC will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:

- 15.1. the Compliance Policy;
- 15.2. an outline of the Complaints Handling System;
- 15.3. staff training materials and induction materials;
- 15.4. all Compliance Reports that have been completed at the time of the request; and
- 15.5. copies of the reports to the board and/or senior management referred to in paragraph 8 and paragraph 11.

### **ACCC Recommendations**

16. BJC will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that BJC maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.