

COMPETITION AND CONSUMER ACT 2010

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

by

Bromic Pty Ltd

ACN 001 648 979

1. Person giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Bromic Pty Ltd (**Bromic**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (the **CCA**).

2. Background

The parties

- 2.1 Bromic, trading under the business name 'Bromic Heating' (**Bromic Heating**) is a supplier of outdoor heating goods, including via a network of 29 authorised distributors located in the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria and Western Australia (**Bromic Retailers**).
- 2.2 The ACCC is the independent statutory authority which is responsible, among other roles, for the enforcement of the CCA.

3. Conduct of concern

- 3.1 In January 2018, Bromic introduced a minimum advertised pricing policy (**MAP Policy**) for goods supplied by it to Bromic Retailers. The MAP Policy required that Bromic Retailers not advertise specified Bromic Heating goods at prices less than prices specified by Bromic in a price list schedule (**List Prices**). The MAP Policy applied to advertising in any media, including websites, but did not apply to in-store advertising.
- 3.2 Under the MAP Policy, any intentional and/or repeated failure by a Bromic Retailer to abide by the MAP Policy exposed the Bromic Retailer to potential sanctions under a three strikes policy, which included indefinite termination of the Bromic Retailer's dealership or distributorship.
- 3.3 Bromic communicated the introduction of MAP Policy and new List Prices to Bromic Retailers from late January 2018 and the MAP Policy took effect from 12 February 2018.
- 3.4 Bromic ceased referring to the MAP Policy or seeking to enforce the MAP Policy after April 2018. However, Bromic failed to communicate this to Bromic Retailers who may have continued to believe that the MAP Policy was still in effect.

4. Contraventions of the CCA

- 4.1 The ACCC considers that, by engaging in the conduct described above in paragraphs 3.1 to 3.4, Bromic has engaged in resale price maintenance in contravention of section 48 of the CCA (which is read with the definitions of and explanatory provisions of Part VIII of the CCA).
- 4.2 Specifically, the ACCC considers that:
 - a) by circulating the MAP Policy, Bromic induced, or attempted to induce, Bromic Retailers, not to advertise relevant goods at a price less than a specified List Price, such conduct being a contravention of section 48, when read with sections 96(3)(b) and 96(7) of the CCA; and
 - b) by circulating the List Prices with the MAP Policy, Bromic Retailers, would have understood the List Prices as a statement of price below which relevant goods were not to be advertised, such conduct being a contravention of section 48, when read with sections 96(3)(f) and 96(7) of the CCA.

5. Admission

5.1 Bromic admits that its conduct outlined in paragraphs 3.1 to 3.4 above has contravened section 48 of the CCA.

6. Commencement of this Undertaking

6.1 This Undertaking comes into effect when:

- a) this Undertaking is executed by Bromic; and
- b) this Undertaking so executed is accepted by the ACCC (the **commencement date**).

6.2 Upon the commencement date, Bromic undertakes to assume the obligations set out in paragraphs 7.1 to 7.8 for the purposes of section 87B of the CCA.

6.3 This Undertaking ceases to have effect after a period of three (3) years from the commencement date.

7. Undertakings

Letter to Bromic Retailers

7.1 Bromic undertakes that within a month of the Undertaking commencing, to provide written advice to all Bromic Retailers that:

- a) the MAP Policy is not operative and Bromic recognises that the MAP Policy contravened the resale price maintenance provisions of the CCA. Further, that Bromic has provided a court enforceable undertaking to the ACCC that reflects this;
- b) they are free to advertise Bromic Heating products at prices less than Bromic's recommended retail prices;
- c) the prices Bromic lists for its goods are recommended prices only and there is no obligation to comply with that recommendation; and
- d) they are therefore free to advertise any Bromic Heating goods at any price.

7.2 The written advice to all retailers will be in the form prescribed in Annexure A to this Undertaking.

7.3 Bromic will advise the ACCC within 7 days of sending this written advice to all Bromic Retailers.

Education and Training

7.4 Bromic undertakes for a period of three (3) years that Bromic will advise all new Bromic Retailers in writing of the matters referred to in sub-paragraphs 7.1 b) to d) of this Undertaking within one (1) month of Bromic commencing to supply those parties with Bromic Heating products.

7.5 Bromic undertakes to cause all Bromic's officers, sales representatives, sales and any other employees that operate a retailer facing role (**Bromic Personnel**) to receive practical legal training in the requirements of the CCA, including resale price maintenance.

7.6 The training will be administered by a suitably qualified legal practitioner and completed by Bromic Personnel at least once a year for a period of three (3) years. The first training will take place within six months of the Undertaking commencing.

7.7 By 28 March 2020, Bromic will advise the ACCC of its compliance with 7.5 and 7.6 in relation to the first training, including by providing a list of Bromic Personnel that attended the training.

Reporting to the ACCC

7.8 The ACCC may make reasonable inquiries of Bromic about its compliance with this Undertaking, and Bromic must provide documents and/or information sought within a reasonable period of time.

8. Acknowledgements

8.1 Bromic 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 this 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 as an undertaking

Executed by Bromic Pty Ltd ACN 001 648 979 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director/company secretary
SCOTT SMITH	Michael Flynn
Name of director (print)	Name of director/company secretary (print)
12 TH SEPTEMBER 2019	12 TH September 2019
Date	Date

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

Date

and signed on behalf of the Commission:


Chair

Date 16/10/19

Attachment A –

[ON BROMIC HEATING LETTERHEAD]

[Insert Date]

[Insert Address of Reseller]

Dear [Insert Name]

Confirmation of Withdrawal of MAP Policy

We write to confirm that the Bromic Heating Minimum Advertised Pricing Policy (**MAP Policy**) has been withdrawn by Bromic Heating.

In late January 2018, we circulated the **attached** document which was stated to have effect from 12 February 2018. As noted in our email to you in late January 2018, the Policy was introduced to bring our arrangements with resellers in Australia into line with arrangements Bromic Heating has with its resellers in Europe and North America.

However we realised in April 2018 that although the MAP Policy could be utilised in other countries, it contravened the provisions of the *Competition & Consumer Act 2010* (Cth) which prohibit the practice of resale price maintenance.

We now write to confirm formally that the MAP Policy is not operative and is of no effect. You, and other resellers of Bromic Heating products, are free to advertise Bromic Heating products at prices less than our recommended retail price for those products (this includes the prices indicated in the List Price Schedule that accompanied the MAP Policy). We confirm that the prices that we list for our products are recommended prices only and there is no obligation to comply with that recommendation. You are therefore free to advertise Bromic Heating products at any price. We have provided a court enforceable undertaking to the Australian Competition and Consumer Commission reflecting the above (copy attached).

We trust that this clarifies this matter and apologise for not formally communicating this position earlier.

Please contact me if you have any queries regarding what is set out above.

Yours faithfully

[Insert Bromic Heating Signoff]