

## **Undertaking to the Australian Competition and Consumer Commission**

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Dusk Australasia Pty ABN 45 090 850 383

### **1. Person giving the Undertaking**

1.1 This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Dusk Australasia Pty ABN 45 090 850 383 (**Dusk**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

### **2. Background**

2.1 Consumer goods supplied to consumers in Australia, in trade or commerce, that contain a button battery must comply with the *Consumer Goods (Products Containing Button/Coin Batteries) Safety Standard 2020* (**Safety Standard**) and *Consumer Goods (Button/Coin Batteries) Information Standard 2020* (**Information Standard**).

2.2 Sections 8 and 9 of the Safety Standard require that:

- (a) if consumer goods contain a button battery, the button battery must not release during reasonably foreseeable use or misuse conditions;
- (b) if consumer goods contain a button battery that is intended to be replaceable by a consumer, the compartment in which the battery is held must be designed to ensure the compartment is resistant to being opened by young children; and
- (c) the above requirements are met if, and only if, the consumer goods are tested for compliance against the relevant provisions of an applicable industry standard before supply to a consumer.

2.3 Section 8 of the Information Standard requires that, if a consumer good contains a button battery and is packaged:

- (a) the front panel of the packaging must be marked with an internationally recognised safety alert symbol that is clearly visible, prominent and legible; and
- (b) if the consumer good is not accompanied by instructions, a warning about the button battery, covering the matters specified by section 8(7) of the Information Standard, must be attached to or included with the relevant good.

2.4 Dusk is a wholly owned subsidiary of Dusk Group Limited, an ASX listed corporation. Dusk is an in-store and online retailer which sells candles, homewares and fragrance products to consumers in Australia. Dusk has 131 retail stores nationwide.

### **3. Australian Consumer Law**

3.1 The Australian Consumer Law (**ACL**) is contained in Schedule 2 to the CCA.

3.2 Section 106(1) of the ACL prohibits a person from supplying, in trade or commerce, consumer goods, being goods that are intended to be used, or

are of a kind likely to be used, for personal, domestic or household use or consumption, if a safety standard for those goods is in force under the ACL and those goods do not comply with that safety standard.

- 3.3 Section 136(1) of the ACL prohibits a person from supplying, in trade or commerce, goods of a particular kind if an information standard for goods of that kind is in force and the person has not complied with that information standard.

#### 4. Conduct of concern

- 4.1 Between 30 August and 27 October 2022 (the **Relevant Period**), Dusk, in trade or commerce, supplied 7,720 units of 4 Halloween-themed LED products containing button batteries to consumers:
- Enchanted Pumpkin Stack;
  - Morticia;
  - Sookie Skull; and
  - Salem and Freddy,
- (collectively, the **Products**).

##### *Supply of consumer goods that did not comply with the Safety Standard*

- 4.2 The Products contained button batteries that were intended to be replaceable by consumers.
- 4.3 The Safety Standard applied to the Products and was in force during the Relevant Period.
- 4.4 The ACCC considers that the Products:
- (a) did not comply with section 8 of the Safety Standard because representative samples of the Product were not tested for compliance against the relevant provisions of an applicable industry standard in sub-section 12(1) or section 16 of the Safety Standard before supply to a consumer; and
  - (b) did not comply with section 9 of the Safety Standard because representative samples of the Product were not tested for compliance against the relevant provisions of an applicable industry standard in sub-section 13(1), sub-section 14(1), subsection 15(1) or section 17 of the Safety Standard before supply to a consumer.
- 4.5 By reason of the above, the ACCC considers that Dusk contravened section 106(1) of the Australian Consumer Law (**ACL**) on each occasion that it supplied a Product to a consumer.

##### *Supply of consumer goods that did not comply with the Information Standard*

- 4.6 The Information Standard applied to the Products and was in force during the Relevant Period.
- 4.7 The Products were packaged and were not accompanied by instructions.

- 4.8 The ACCC considers that the Products did not comply with section 8 of the Information Standard because:
- (a) the Products' packaging was not marked with an internationally recognised warning symbol on the front panel that was clearly visible, prominent and legible; and
  - (b) a warning about the button battery that included the substance of all of the matters outlined in sub-section 8(7) was not attached to, or included with, the Products.
- 4.9 By reason of the above, the ACCC considers that Dusk contravened section 136(1) of the ACL on each occasion that it supplied a Product to a consumer.

## 5. Admissions and resolution

- 5.1 In response to the ACCC's investigation and concerns, Dusk:
- (a) ceased supplying the Products through Dusk stores and via Dusk's website; and
  - (b) initiated a voluntary recall of the Products.
- 5.2 Dusk admitted that:
- (a) the Products it supplied failed to comply with sections 8 and 9 of the Safety Standard and section 8 of the Information Standard;
  - (b) by supplying the Products, Dusk is likely to have contravened s 106(1) and s 136(1) of the ACL.
- 5.3 Dusk provided this Undertaking to the ACCC as a part resolution to this matter. Dusk also paid 8 Infringement Notices, with a penalty of \$13,320 each (amounting to \$106,560 in total) issued by the ACCC under section 134A of the CCA for 4 (separate) instances of alleged contraventions of s106(1) of the ACL and 4 (separate) instances of alleged contraventions of s136(1) of the ACL.

## 6. Commencement of this Undertaking

- 6.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Dusk, and
  - (b) this Undertaking so executed is accepted by the ACCC (**Commencement Date**).
- 6.2 This Undertaking has effect for 3 years from the Commencement Date (**Term**).
- 6.3 Upon the commencement of this Undertaking, Dusk undertakes to assume the obligations set out in Section 7 of this Undertaking below for the purposes of section 87B of the CCA.

## 7. Undertaking

- 7.1 Dusk undertakes that it will not, in trade or commerce:
- (a) supply or offer to supply consumer goods containing, or designed to store or contain button batteries, if those goods do not comply with the Safety Standard; and

- (b) supply or offer to supply consumer goods containing, or designed to store or contain button batteries, if those goods do not comply with the Information Standard.

7.2 Dusk undertakes that it will

- (a) establish and implement a Competition and Consumer Compliance Program (**Compliance Program**) in accordance with the requirements set out in “Annexure A”, being a program designed to minimise Dusk’s risk of future breaches of the ACL, in particular sections 106 and 136 of the ACL.
- (b) maintain and continue to implement the Compliance Program for a period of 3 years from the Commencement Date, and
- (c) provide, at its own expense, a copy of any documents required by the ACCC in accordance with this Undertaking, including Annexure A.

## 8. ACCC Enquiries

8.1 For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with Dusk, and Dusk will respond to such enquiries at its own expense within a reasonable time.



## 9. Acknowledgements

9.1 Dusk 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 including in news media statements and in ACCC publications;
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and
- (d) a summary of the ACCC Compliance Program review reports referred to in Annexure A of this Undertaking may be held with this Undertaking in the public register.

**Executed as an Undertaking**

Executed by Dusk Australasia Pty ABN 45 090 850 383 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a <del>director</del> /company secretary (delete as appropriate, or entire column if sole director company)
Peter King	Kate Sundquist
Name of director (print)	Name of <del>director</del> /company secretary (print)
14/4/2023	14/4/2023
Date	Date

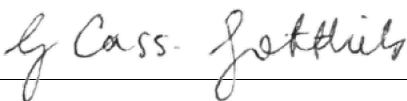
Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

27 April 2023

Date

and signed on behalf of the Commission:

Chair



Date

27 April 2023

## Annexure A

### AUSTRALIAN CONSUMER LAW COMPLIANCE PROGRAM

Dusk Australasia Pty Ltd (**Dusk**) will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

#### Appointments

1. Within 1 month of the Undertaking coming into effect (**Commencement Date**), Dusk will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).
2. Within 2 months of the Commencement Date, Dusk will appoint a suitably qualified, internal or external, compliance professional with expertise in competition and consumer law (**Compliance Advisor**).
3. Dusk will instruct the Compliance Advisor to conduct a competition and consumer law risk assessment within 4 months of being appointed as the Compliance Advisor (**Risk Assessment**).
4. Dusk 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 Dusk is at risk of breaching sections 106 and 136 of the Australian Consumer Law (**ACL**), being schedule 2 to the *Competition and Consumer Act 2010 (Cth)* (**CCA**);
  - 4.2 assesses the likelihood of these risks occurring;
  - 4.3 identifies where there may be gaps in Dusk's existing procedures for managing these risks; and
  - 4.4 provides recommendations for any action to be taken by Dusk having regard to the above assessment.

#### Compliance Policy

5. Dusk will, within 2 months of the Commencement Date, issue a policy statement outlining Dusk's commitment to compliance with the CCA (**Compliance Policy**).
6. Dusk will ensure the Compliance Policy:
  - 6.1 contains a statement of commitment to compliance with the CCA;
  - 6.2 contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and
  - 6.3 contains a clear statement that Dusk will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings in respect of that contravention.

#### Complaints Handling System

7. Dusk will ensure the Compliance Program includes a competition and consumer law complaints handling system capable of identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

#### Staff Training and Induction

8. Dusk will ensure that the Compliance Program includes a requirement for regular (at least once a year) training for all employees of Dusk whose duties could result in them being concerned with conduct that may contravene sections 106 and 136 of the ACL.

9. Dusk will ensure that the staff training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
10. Dusk will ensure that the Compliance Program includes a requirement that awareness of competition and consumer compliance issues forms part of the induction of all new directors, officers and employees whose duties could result in them being concerned with conduct that may contravene sections 106 and 136 of the ACL.

### **Product Safety**

11. Dusk will:
  - 11.1 maintain up-to-date copies, at its business premises, of all mandatory safety standards and information standards made or declared under the ACL that relate to products Dusk supplies (**Standards**);
  - 11.2 ensure that products supplied that are subject to one or more Standards comply with the relevant Standard; and
  - 11.3 develop, implement and maintain recall procedures that enable products supplied by Dusk that do not comply with the Standards to be efficiently and effectively withdrawn from the market and returned to Dusk.

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

12. Dusk will ensure that the Compliance Officer reports to the Board and/or senior management every 6 months on the continuing effectiveness of the Compliance Program.

### **Compliance Review**

13. Dusk will, at its own expense, cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:
  - 13.1 **Scope of Review** – the Review should be broad and rigorous enough to provide Dusk and the ACCC with:
    - 13.1.1 a verification that Dusk has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1-12 above; and
    - 13.1.2 the Compliance Reports detailed at paragraph 14 below.
  - 13.2 **Independent Reviewer** – Dusk will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (the **Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
    - 13.2.1 did not design or implement the Compliance Program;
    - 13.2.2 is not a present or past staff member or director of Dusk;
    - 13.2.3 has not acted and does not act for, and does not consult and has not consulted to, Dusk in any competition and consumer law matters, other than performing Reviews under this Undertaking; and
    - 13.2.4 has no significant shareholding or other interests in Dusk.
  - 13.3 **Evidence** – Dusk 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 Dusk's possession or control, including without limitation:
    - 13.3.1 the ability to make enquiries of any officers, employees, representatives, and agents of Dusk;
    - 13.3.2 documents relating to the Risk Assessment, including the Risk Assessment Report;

- 13.3.3 documents relating to Dusk's Compliance Program, including documents relevant to Dusk's Compliance Policy, Complaints Handling System, Staff Training and Induction; and
- 13.3.4 any reports made by the Compliance Officer to the Board or senior management regarding Dusk's Compliance Program.
- 13.4 Dusk will ensure that a Review is completed within one year of the Commencement Date, and that a subsequent Review is completed annually for 3 years.

### **Compliance Reports**

- 14. Dusk will use its best endeavours to ensure that within 30 days of a Review, the Reviewer includes the following findings of the Review in a report to the Compliance Officer of Dusk (**Compliance Report**):
  - 14.1 whether the Compliance Program of Dusk includes all the elements detailed in paragraphs 1-12 above and if not, what elements need to be included or further developed;
  - 14.2 whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;
  - 14.3 whether the Staff Training and Induction is effective, and if not, what aspects need to be further developed;
  - 14.4 whether Dusk's Complaints Handling System is effective, and if not, what aspects need to be further developed;
  - 14.5 whether there are any material deficiencies in Dusk's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure<sup>1</sup>.

### **Dusk's response to Compliance Reports**

- 15. Dusk will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
  - 15.1 provides the Compliance Report to the Board or relevant governing body;
  - 15.2 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 Dusk can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure;
- 16. Dusk 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**

- 17. Where a Material Failure has been identified by the Reviewer in the Compliance Report, Dusk will:

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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, for example, if a Complaints Handling System did not provide a mechanism for responding to complaints; 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.



- 17.1 provide a copy of the Compliance Report to the ACCC within 7 days of the Board or relevant governing body receiving the Compliance Report; and
- 17.2 inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
- 17.3 otherwise outline the steps Dusk proposes to take to implement the recommendations and inform the ACCC once those steps have been implemented.

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

- 18. Dusk will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than 5 years.
- 19. If requested by the ACCC during the period of 5 years following the Commencement Date Dusk will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 19.1 the Compliance Policy;
  - 19.2 the Risk Assessment Report;
  - 19.3 an outline of the Complaints Handling System;
  - 19.4 Staff Training and Induction materials;
  - 19.5 all Compliance Reports that have been completed at the time of the request;
  - 19.6 copies of the reports to the Board and/or senior management referred to in paragraph 12 and paragraph 15.

#### **ACCC Recommendations**

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