

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by
Brilliant Lighting (Aust) Pty Ltd ACN 006 203 694

1. Person giving the Undertaking

1.1 This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Brilliant Lighting (Aust) Pty Ltd ACN 006 203 694 (**Brilliant Lighting**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**the Undertaking**).

2. Background

2.1 Brilliant Lighting is a wholesale supplier of fans, lighting and electrical products. It sells these products to a network of at least 1,439 retailers and distributors (**Resellers**).

2.2 In around late September 2022, Brilliant Lighting sent an email or letter to 42 Resellers. Attached to the email or letter was a price list for 116 products sold by Brilliant Lighting called *Suggested Online Prices "SOP" Oct 2022* (**the Price List**).

2.3 In its email or letter, Brilliant Lighting made statements to the effect that:

- (a) the Reseller should not, on its website, publish or display headline prices for Brilliant Lighting products below the prices stated in the Price List; and
- (b) the rights to use Brilliant Lighting's intellectual property and the rights to distribute the products set out on the Price List are based on adherence to Brilliant Lighting's suggested online pricing,

collectively referred to as the **SOP Guidance**.

2.4 From around late September 2022 to May 2023, Brilliant Lighting monitored Resellers' compliance with the SOP Guidance and corresponded with Resellers via email and phone calls in relation to their compliance with the SOP Guidance.

3. ACCC concerns

3.1 The ACCC considers that by engaging in the conduct described in paragraphs 2.2 to 2.4 above (**the SOP Conduct**), Brilliant Lighting has engaged, or is likely to have engaged, in resale price maintenance (**RPM**) within the meaning of sections 96(3) and 96(7) of the CCA and in contravention of section 48 of the CCA by:

- (a) making it known to a Reseller that it will not supply goods to the Reseller unless the Reseller agrees not to sell those goods at a price lower than a price specified by Brilliant Lighting;
- (b) inducing, or attempting to induce, a Reseller to not sell goods supplied by Brilliant Lighting at a price lower than a price specified by Brilliant Lighting; and
- (c) using a statement of price in relation to goods supplied by Brilliant Lighting that was likely to be understood by a Reseller as the price below which goods are not to be sold.

4. Admission and Resolution

4.1 As a result of the ACCC's investigation and in response to the ACCC's concerns, Brilliant Lighting:

- (a) admits that it engaged in RPM within the meaning of sections 96(3) and 96(7) of the CCA, and has contravened section 48 of the CCA;
- (b) has ceased the SOP Conduct; and
- (c) offers this Undertaking to the ACCC to resolve the ACCC's concerns.

5. Commencement of this Undertaking

5.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by Brilliant Lighting, and
- (b) this Undertaking so executed is accepted by the ACCC (**the Commencement Date**).

5.2 This Undertaking has effect for 3 years from the Commencement Date.

5.3 From the Commencement Date, Brilliant Lighting undertakes to assume the obligations set out in paragraph 6 below for the purposes of section 87B of the CCA.

6. Undertaking

SOP Conduct

6.1 Brilliant Lighting undertakes that it will not:

- (a) make it known to a Reseller that it will not supply goods to the Reseller unless the Reseller agrees not to sell those goods at a price lower than a price specified by Brilliant Lighting;

- (b) induce, or attempt to induce, a Reseller to not sell goods supplied by Brilliant Lighting at a price lower than a price specified by Brilliant Lighting; and
- (c) use a statement of price in relation to goods supplied by Brilliant Lighting that was likely to be understood by a Reseller as the price below which goods are not to be sold.

SOP Guidance

6.2 Brilliant Lighting undertakes that, with respect to the Resellers listed in **Annexure A**, it will not:

- (a) enforce the SOP Guidance on a Reseller;
- (b) revoke a Reseller's rights to use Brilliant Lighting's intellectual property on the basis that the Reseller had not complied with the SOP Guidance; and
- (c) revoke a Reseller's rights to sell Brilliant Lighting products on the basis that the Reseller had not complied with the SOP Guidance.

6.3 Paragraphs 6.1 and 6.2 do not apply to any conduct in respect of which there is a notice in force under section 93 of the CCA.

Corrective notices

6.4 Brilliant Lighting undertakes that it will, within 7 calendar days of the Commencement Date, email the corrective notice set out in **Annexure B** to all Resellers listed in Annexure A.

Compliance program

6.5 Brilliant Lighting undertakes to, at its own expense:

- (a) establish and implement a Competition and Consumer Compliance Program (**Compliance Program**) in accordance with the requirements set out in **Annexure C**, being a program designed to minimise Brilliant Lighting's risk of future breaches of the CCA and to ensure its awareness of its responsibilities and obligations in relation to the requirements of the CCA;
- (b) maintain and continue to implement the Compliance Program for a period of 3 years from the Commencement Date; and
- (c) provide a copy of any documents required by the ACCC, if requested, in accordance with this Undertaking, including Annexure C.

7. Acknowledgements

7.1 Brilliant Lighting 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; 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 Brilliant Lighting (Aust) Pty Ltd ACN 006 203 694 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director /company secretary
Norman Levin	LEONIL A FERRERAS
Name of director (print)	Name of director /company secretary (print)
Date 17/10/2023	Date 17/10/2023

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

20 October 2023

Date

and signed on behalf of the Commission:

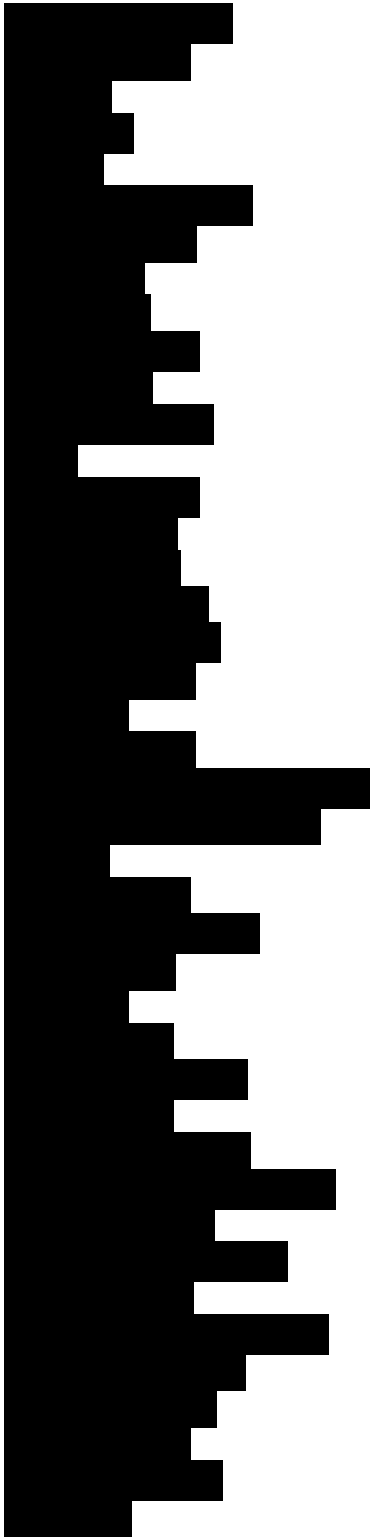


Acting Chair

20 October 2023

Date

Annexure A



Annexure B

Reseller Corrective Notice

We're contacting you as an online retailer or distributor of Brilliant Lighting products.

We want to let you know about things that we have done that are prohibited under Australia's competition laws.

Between September 2022 and May 2023, we sent you an email or letter in relation to Brilliant Lighting's 'Suggested Online Pricing' or 'SOP' guidance. Attached to the email or letter was a price list titled '*Suggested Online Prices "SOP" Oct 2022*' for 116 products supplied by Brilliant Lighting

In that email or letter, we informed you that:

- you may not, on your website, publish or display headline prices for Brilliant Lighting products below the prices stated in a price list provided by Brilliant Lighting; and
- the rights to use Brilliant Lighting's intellectual property and the rights to distribute the products set out on the price list, are based on adherence to Brilliant Lighting's suggested online pricing.

Regardless of intention, these actions are a form of resale price maintenance, which is prohibited under Australia's *Competition and Consumer Act 2010*. This is because it is illegal for suppliers to impose minimum prices for the resale of their goods or services.

Resale price maintenance is illegal because it stops retailers from competing on price and increases what customers pay.

The Australian Competition and Consumer Commission, known as the ACCC, investigated our business for doing these things. The ACCC has recently accepted our court enforceable undertaking where we agreed to not set minimum retail prices again.

We want to notify you that:

- the 'SOP' guidance is not an operative policy of Brilliant Lighting and is of no effect;
- you're free to set your own prices for goods supplied to you by Brilliant Lighting; and
- any prices contained within our communications are recommended prices only – you are not obligated to comply with our recommendation.

For more information about setting minimum resale prices and competition law, see:

<https://www.accc.gov.au/business/competition-and-exemptions/minimum-resale-prices>

Should you have any queries regarding the above, please contact Brilliant Lighting.

Annexure C

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

Brilliant Lighting (Aust) Pty Ltd (**Brilliant Lighting**) 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 under s 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provided by Brilliant Lighting to the ACCC (**Undertaking**) coming into effect (**Commencement Date**), Brilliant Lighting 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 1 month of the Commencement Date, Brilliant Lighting will appoint a suitably qualified, internal or external, compliance professional with expertise in competition and consumer law (**Compliance Advisor**).

Risk Assessment

3. Brilliant Lighting will instruct the Compliance Advisor to conduct a competition law risk assessment within 1 month of being appointed as the Compliance Advisor (**Risk Assessment**) and to provide a written report outlining their findings (**Risk Assessment Report**) to Brilliant Lighting within 1 month of conducting the Risk Assessment.
4. Brilliant Lighting will use its best endeavours to ensure that the Risk Assessment Report:
 - 4.1. identifies the areas where Brilliant Lighting is at risk of breaching the CCA, taking into account but not limited to areas which are the subject of the ACCC's concerns and which are set out in the Undertaking;
 - 4.2. assesses the likelihood of these risks occurring;
 - 4.3. identifies where there may be gaps in Brilliant Lighting's existing procedures for managing these risks; and
 - 4.4. provides recommendations for any action to be taken by Brilliant Lighting based on the Risk Assessment.

Compliance Policy

5. Brilliant Lighting will, within 14 days of the Commencement Date, issue a policy statement outlining Brilliant Lighting's commitment to compliance with the CCA (**Compliance Policy**).
6. Brilliant Lighting will ensure the Compliance Policy:

- 6.1. contains a statement of commitment to compliance with the CCA;
- 6.2. contains an outline of how commitment to CCA compliance will be realised within Brilliant Lighting;
- 6.3. contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and
- 6.4. contains a clear statement that Brilliant Lighting 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. Within 2 months of the Commencement Date, Brilliant Lighting will develop and implement procedures for identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).
8. Brilliant Lighting will use its best endeavours to ensure the Complaints Handling System is consistent with the Australian/New Zealand Standard **AS/NZS 10002:2022 Guidelines for complaint management in organizations**, as in force or existing at the Commencement Date, tailored as required to Brilliant Lighting's circumstances.
9. Brilliant Lighting will ensure that staff and customers are made aware of the Complaints Handling System.

Staff Training and Induction

10. Brilliant Lighting will ensure that the Compliance Program includes a requirement for CCA compliance training at least once a year (**Staff Training**) for all:
 - 10.1. officers, employees, representatives and agents of Brilliant Lighting, whose duties could result in them being concerned with conduct that may contravene the CCA; and
 - 10.2. executive and non-executive directors of Brilliant Lighting.
11. Brilliant Lighting will ensure that the Compliance Program includes a requirement that awareness of Brilliant Lighting's obligations under the CCA forms part of the induction (**Induction**) of all new:
 - 11.1. officers, employees, representatives and agents of Brilliant Lighting whose duties could result in them being concerned with conduct that may contravene the CCA; and
 - 11.2. executive or non-executive directors of Brilliant Lighting.

12. Brilliant Lighting will ensure that the Staff Training and the CCA compliance training component of Induction is presented by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.

Reports to Brilliant Lighting's directors

13. Brilliant Lighting will ensure that the Compliance Officer reports to Brilliant Lighting's directors every 6 months on the continuing effectiveness of the Compliance Program.

Compliance Review

14. Brilliant Lighting 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:

- 14.1. **Scope of Review** – the Review should be broad and rigorous enough to provide Brilliant Lighting and the ACCC with:

- 14.1.1. verification that Brilliant Lighting has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1 to 13 of this Annexure; and

- 14.1.2. the Compliance Reports detailed at paragraph 15 of this Annexure.

- 14.2. **Reviewer** – Brilliant Lighting will ensure that each Review is carried out by a suitably qualified compliance professional with expertise in competition and consumer law (**Reviewer**). The Reviewer can be the Compliance Officer, or an employee, representative or agent of Brilliant Lighting. Brilliant Lighting may engage an independent compliance professional if an internal suitably qualified compliance professional is not available.

- 14.3. **Evidence** – Brilliant Lighting 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 Brilliant Lighting's possession or control, including without limitation:

- 14.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of Brilliant Lighting;

- 14.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;

- 14.3.3. documents relating to Brilliant Lighting's Compliance Program, including documents relevant to Brilliant Lighting's Complaints Handling System, and Staff Training and Induction; and

- 14.3.4. any reports made by the Compliance Officer to Brilliant Lighting's directors regarding Brilliant Lighting's Compliance Program.

- 14.4. Brilliant Lighting will ensure that a Review is completed within one year of the Commencement Date, and that a subsequent Review is completed annually for 2 years.

Compliance Report

15. Brilliant Lighting 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 to the Compliance Officer of Brilliant Lighting (**Compliance Report**):

- 15.1. whether the Compliance Program of Brilliant Lighting includes all the elements detailed in paragraphs 1 to 13 of this Annexure, and if not, what elements need to be included or further developed;
- 15.2. whether the Compliance Program adequately covers areas identified in the Risk Assessment, and if not, what needs to be further addressed;
- 15.3. whether the Staff Training and Induction is effective, and if not, what aspects need to be further developed;
- 15.4. whether Brilliant Lighting's Complaints Handling System is effective, and if not, what aspects need to be further developed; and
- 15.5. whether there are any material deficiencies in Brilliant Lighting's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program (**Material Failure**)¹, and if so, recommendations for rectifying the Material Failure.

Brilliant Lighting's Response to Compliance Report

16. Brilliant Lighting will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
 - 16.1. provides the Compliance Report to Brilliant Lighting's directors; and
 - 16.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to Brilliant Lighting's directors identifying how Brilliant Lighting can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.

¹ Material Failures are intended to include non-trivial failures that are ongoing or continue for a significant period of time to:

- incorporate a requirement of the Undertaking in the design of the Compliance Program, (e.g., if the 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 (e.g., if no Staff Training has been conducted within the Annual Review period).

17. Brilliant Lighting will promptly and fully implement any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

Reporting Material Failures to the ACCC

18. Where a Material Failure has been identified by the Reviewer in the Compliance Report, Brilliant Lighting will:

18.1. provide a copy of the Compliance Report to the ACCC within 30 days of Brilliant Lighting's directors receiving the Compliance Report; and

18.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or

18.3. otherwise outline the steps that Brilliant Lighting 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

19. Brilliant Lighting will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than 5 years.

20. If requested by the ACCC during the period of 5 years following the Commencement Date, Brilliant Lighting will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:

20.1. the Compliance Policy;

20.2. the Risk Assessment Report;

20.3. an outline of the Complaints Handling System;

20.4. Staff Training and Induction materials;

20.5. the Compliance Report that has been completed at the time of the request; and

20.6. copies of the reports to Brilliant Lighting's directors referred to in paragraphs 13 and 16 of this Annexure.

ACCC Recommendations

21. Brilliant Lighting will promptly and fully implement any recommendations that the ACCC considers reasonably necessary to ensure that Brilliant Lighting maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.