

# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)

by Lawn Solutions Australia Group Pty Limited (ACN 161 332 323)

## Person giving the Undertaking

1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Lawn Solutions Australia Group Pty Limited (ACN 161 332 323) (**LSA**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

## Summary

2. LSA has given this undertaking to address the ACCC's concerns that LSA engaged in conduct that may have been a concerted practice or an attempt to engage in a concerted practice with the purpose, effect, or likely effect of substantially lessening competition by suppressing or hindering price competition in the supply of instant turf in the greater Sydney region.
3. Key features of the conduct were that LSA communicated retail price information of each LSA grower and reseller to LSA's other growers and resellers, accompanied by requests or expectations that they price in line with LSA's recommended retail prices (**RRP**). LSA identified growers and/or resellers that were discounting below the RRP and put pressure on them to adhere to it. LSA also communicated, directly and indirectly, with a competing turf breeder about the prices of the competitor's products.
4. LSA acknowledges the ACCC's concerns that the conduct had the capacity to suppress or hinder price competition in the retail supply of turf, which raised concerns under section 45(1)(c) of the CCA. It has offered this Undertaking to address those concerns.

## Background

5. LSA is a private company incorporated in Australia. LSA primarily carries on a business as a turf breeder which involves developing, licensing and marketing instant turf grass products.
6. LSA has contractual relationships with unrelated companies that are in the business of growing and selling turf (**LSA Growers**), in particular (though not in every case exclusively) turf of the breeds licensed and marketed by LSA.
7. LSA also has contractual relationships with unrelated companies that are in the business of selling, among other things, turf grown by LSA Growers (**LSA Resellers**).
8. Through its relationships with LSA Growers and LSA Resellers, LSA operates as part of a network of turf specialists. LSA's network of growers and resellers supplies a substantial portion of instant turf in Australia.
9. There are other, competing, businesses in Australia operating networks of turf specialists including growers (**Rival Turf Breeders**).

10. LSA's most successful turf product is known as Sir Walter turf. LSA held an exclusive licence from the owner of the intellectual property rights to Sir Walter turf, known as Plant Breeder rights, until they expired in 2018. Since 2018, it has been the case that any turf grower or reseller may market and sell the Sir Walter turf variety. LSA Growers and LSA Resellers sell Sir Walter turf under LSA's trademarked name, 'Sir Walter DNA Certified'.
11. LSA regularly communicates with LSA Growers and LSA Resellers for the purposes of:
  - (a) ensuring adherence by LSA Growers and LSA Resellers with agreed and prescribed standards of quality and marketing in relation to LSA's turf products;
  - (b) facilitating sales of turf products to customers; and/or
  - (c) supporting LSA Growers and LSA Resellers in the management and operation of their businesses.

#### **Section 45(1)(c) of the CCA**

12. The CCA prohibits, among other things, anti-competitive concerted practices:
  - (a) A corporation is prohibited from engaging in a concerted practice with another person if that concerted practice has the purpose, effect, or likely effect of substantially lessening competition in a market (section 45(1)(c) of the CCA). Attempted concerted practices and attempts to induce others to engage in a concerted practice with the purpose, effect, or likely effect of substantially lessening competition in a market are also prohibited (sections 76(1)(b) and 76(1)(d) of the CCA).
  - (b) A concerted practice is any form of cooperation between two or more persons, or conduct that would be likely to establish such cooperation.
13. The ACCC considers that, where the products of a business are sold to retail customers through licensed retailers or intermediaries, the business risks engaging in an unlawful concerted practice if its conduct facilitates cooperation between those retailers or intermediaries, thereby replacing or reducing competitive, independent decision-making in a relevant market.

#### *LSA retailer market surveys*

14. On various occasions between 6 November 2017 and around May 2021, LSA:
    - (a) circulated among two or more LSA Growers the results of market surveys, which identified current prices of LSA Growers (and sometimes LSA Resellers) together with information on customer service and product offerings;
    - (b) in connection with the circulation of the market surveys referred to in (a) above, communicated requests and/or expectations to recipients that they:
      - (i) set their prices to adhere to a price benchmark such as LSA's RRP; and/or
      - (ii) cease discounting LSA turf below the RRP;
    - (c) identified individual LSA Growers or LSA Resellers that were not complying with LSA's requests or expectations, such as those set out in (b) above, including by market monitoring or through complaints from other market participants about pricing,
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and contacted relevant LSA Growers in circumstances where it can be inferred that LSA was putting pressure on them:

- (i) to adhere to a price benchmark such as the RRP and/or to encourage them not to offer discounts substantially below that benchmark; or
  - (ii) to contact an LSA Reseller who was offering prices substantially below the relevant benchmark, to convey a request or expectation that the LSA Reseller not offer prices substantially below the benchmark;
  - (d) discussed setting, and adhering to, RRP at meetings of growers, some or all of whom competed for sales in the regions where they operated
- (together, the **LSA Retailer Conduct**).

#### *Communications with competitor*

15. LSA communicated with a Rival Turf Breeder as follows:

- (a) on 14 March 2019, LSA contacted a Rival Turf Breeder in circumstances where it can be inferred that LSA was seeking to coordinate with the Rival Turf Breeder to discourage the Rival Turf Breeder's growers from setting lower prices for Buffalo turf (particularly turf with the "Sir Walter" brand) than LSA's price for its Sir Walter DNA Certified turf product;
  - (b) between March and May 2019, LSA, through one or more intermediaries, seeking to communicate with the Rival Turf Breeder about the prices of the Rival Turf Breeder's turf,
- (together, the **LSA Competitor Conduct**).

#### **ACCC concerns**

16. The ACCC is concerned that through the conduct described in paragraphs 14 to 15 above. LSA:

- (a) engaged with one or more persons in a concerted practice, including persons who supply turf in the greater Sydney region of New South Wales (**Relevant Market**); and/or
- (b) attempted to engage with one or more persons in a concerted practice, or attempted to induce others to engage in a concerted practice with one or more persons, including persons who supply turf in the Relevant Market,

in circumstances where that conduct had the capacity to, and appears to have been intended to, suppress or hinder price competition, including by facilitating cooperation between competitors, in the Relevant Market, and may have had the purpose, effect, or likely effect of substantially lessening competition in the Relevant Market, in contravention of section 45(1)(c) of the CCA.

17. The ACCC considers that LSA could have informed growers and resellers about its RRP and provided more general education about how to run profitable businesses, including how to set prices at sustainable levels, without engaging in the LSA Retailer Conduct.

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### Admissions

18. For the purposes of this Undertaking, LSA acknowledges that the ACCC has the concerns set out at paragraph 16 above, and further acknowledges that:
- (a) the LSA Retailer Conduct had the capacity to cause suppliers of LSA turf to cease discounting, thereby suppressing or hindering price competition in the Relevant Market;
  - (b) the LSA Competitor Conduct had the capacity to suppress or hinder price competition in markets for the supply of turf, including the Relevant Market; and
  - (c) the LSA Retailer Conduct and the LSA Competitor Conduct each raise concerns about LSA's compliance with section 45(1)(c) of the CCA.
19. LSA has offered this Undertaking to address those concerns by giving the undertakings set out at paragraphs 23-24 below.

### Commencement of the Undertaking

20. This Undertaking comes into effect when:
- (a) this Undertaking is executed by LSA; and
  - (b) this Undertaking so executed is accepted by the ACCC (**Commencement Date**).
21. This Undertaking has effect for three years from the Commencement Date (the **Term**).
22. Upon the Commencement Date, LSA undertakes to assume the obligations set out in paragraphs 23-24, including the obligations set out at **Annexure A**, for the purposes of section 87B of the CCA.

### Undertakings

23. LSA undertakes that LSA and its officers and staff will not engage in one or more of the following:
- (a) a practice involving communicating retail pricing information to LSA Growers and/or LSA Resellers if the information discloses or could be used to infer the future, current or recent (within three months or less) pricing of other individual LSA Growers and/or LSA Resellers;
  - (b) communicating any request or expectation that LSA Growers and/or LSA Resellers:
    - (i) cease or do not commence discounting LSA turf; or
    - (ii) price LSA turf by reference to LSA's RRP or some other price benchmark (for the avoidance of doubt, LSA will continue to be able to issue RRP);
  - (c) asking LSA Growers to contact LSA Resellers and communicate a request or expectation that they:
    - (i) cease or do not commence discounting LSA turf; or
    - (ii) price LSA turf by reference to LSA's RRP or some other price benchmark;

- (d) facilitating or otherwise being involved with any meeting of two or more growers of LSA turf where the RRP or guidance for retail pricing of LSA turf is set or determined;
  - (e) communicating directly or indirectly with any of its Rival Turf Breeders, with a view to coordinating with the Rival Turf Breeder to:
    - (i) maintain or control retail turf prices of growers or resellers of instant turf; or
    - (ii) discourage price discounting or pricing below a particular price benchmark by growers or resellers of instant turf.
24. LSA further undertakes that, within three months of the Commencement Date and at its own expense, it will:
- (a) establish and implement a competition law compliance training program (the **Compliance Training Program**) for itself and for LSA Growers in accordance with the requirements set out in Annexure A to this Undertaking, being a program designed to minimise LSA's risk of future breaches of section 45(1)(c) of the CCA and to ensure its awareness of the responsibilities and obligations in relation to the requirements of section 45(1)(c) of the CCA; and
  - (b) maintain and continue to implement the Compliance Training Program for a period of three years.

#### **ACCC enquiries**

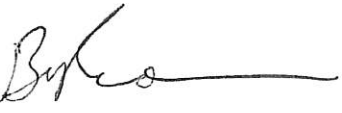

25. For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with LSA, and LSA will respond to such enquiries within a reasonable period of time.
26. If requested by the ACCC during the Term of this Undertaking, LSA will, at its own expense, provide to the ACCC copies of all documents evidencing LSA's compliance with the obligations set out in this Undertaking, excluding any documents protected by legal professional privilege.

#### **Acknowledgments**

27. LSA 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.
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### Executed as an Undertaking

Executed by Lawn Solutions Australia Group Pty Limited (ACN 161 332 323) pursuant to section 127(1) of the *Corporations Act 2001* by:

 Signature of director	 Signature of a director/company secretary (delete as appropriate, or entire column if sole director company)
BRENT REDMAN Name of director (print)	Gavin Rogers Name of director/company secretary (print)
Date 14/11/22	Date 14/11/22

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

18 November 2022

Date

And signed on behalf of the Commission:

Chair

by Cass. Jettitt

Date

18 November 2022

**ANNEXURE A**  
**COMPETITION AND CONSUMER COMPLIANCE PROGRAM**

The Compliance Training Program to be undertaken by LSA pursuant to this Undertaking will comply with each of the following requirements:

**Appointments**

1. LSA will appoint a director or senior manager to be responsible for the development, implementation and maintenance of the Compliance Training Program.
2. LSA will appoint a suitably qualified, external, compliance professional with expertise in competition law, to advise LSA in relation to the contents and method of delivery of the Compliance Training Program (**the Compliance Advisor**).
3. The Compliance Advisor is to be a person approved by the ACCC.

**Scope**

4. The following matters comprise, for the purposes of this Annexure, the **Training Matters**:
  - (a) the requirements of Part IV and in particular section 45 of the CCA; and
  - (b) the penalties applicable to contravention of such provisions.

**Corporate training**

5. LSA will cause all employees of LSA whose duties could result in them being concerned with conduct that may contravene Part IV of the CCA to receive, at least once per year, training in accordance with the advice of the Compliance Advisor, concerning the Training Matters.
6. LSA will cause all new employees of LSA whose duties could result in them being concerned with conduct that may contravene Part IV of the CCA to receive, in addition to the training prescribed in paragraph 5 above, induction training in accordance with the advice of the Compliance Advisor, concerning the Training Matters.

**Grower training**

7. LSA will provide by correspondence (including email or hardcopy newsletter) to all LSA Growers information pertaining to the Training Matters. The information on the Training Matters provided by these means will be prepared or approved by the Compliance Advisor and be such that, over the course of the first year after the Commencement Date, LSA will have provided LSA Growers with all the information in writing concerning the Training Matters, which is specified by the Compliance Advisor.
8. Further, LSA will, at least once per year, provide the LSA Growers with the opportunity to attend a training session either in-person or remotely, the session to address such of the Training Matters as are specified by the Compliance Advisor.
9. LSA will take reasonable steps to ensure that each of the LSA Growers attends one of the training sessions referred to in paragraph 8 above at least once per year.

### **Records, reporting and recommendations**

10. LSA will maintain a record of and store all documents relating to and constituting the Compliance Training Program (**Records**) for the period during which this Undertaking is in force and an additional two years after that period (**Reporting Period**).
  11. If requested by the ACCC during the Reporting Period, LSA will, at its own expense, cause to be produced and provided to the ACCC copies of any Records requested by the ACCC.
  12. LSA will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that LSA maintains and continues to implement the Compliance Training Program in accordance with the requirements of this Undertaking.
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