

Undertaking to the Australian Competition and Consumer Commission

Given under s 87B of the *Competition and Consumer Act 2010* (Cth) by Ivy Contractors Pty Ltd ACN 143 776 710 and Brent Cameron Callan-Kerkenezov.

Person giving the Undertaking

1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:

1.1. Ivy Contractors Pty Ltd ACN 143 776 710 (**Ivy Contractors**); and

1.2. Brent Cameron Callan-Kerkenezov (**Kerkenezov**),

for the purposes of s 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Background

2. Ivy Contractors provides roofing services in the greater Sydney area. Ivy Contractors has a sole director, being Kerkenezov.
3. Prior to 20 December 2018, Kerkenezov became a member of the public Facebook page titled "[REDACTED]" accessible at the URL [REDACTED].
4. [REDACTED] has hundreds of members. At least some of the members of [REDACTED] provide roofing services in the greater Sydney area (**Roofers**) and compete with Ivy Contractors.

Competition and Consumer Act 2010 (Cth) (CCA)

5. The CCA prohibits, among other things, cartel conduct and anti-competitive concerted practices.
 - 5.1. A corporation is prohibited from making a contract or arrangement, or arriving at an understanding, with an actual or potential competitor that contains a 'cartel provision' (s 45AJ of the CCA).
 - 5.2. The definition of a 'cartel provision' includes a provision that has the effect, likely effect, or purpose of fixing, controlling, or maintaining the price of a good or service that is supplied, or likely to be supplied, by at least one party to the contract, arrangement, or understanding (s 45AD of the CCA).
 - 5.3. 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 (s 45(1)(c) of the CCA).
 - 5.4. A 'concerted practice' is any form of cooperation between two or more persons, or conduct that would be likely to establish such cooperation. The ACCC considers a business to be particularly at risk of engaging in an unlawful concerted practice if it replaces or reduces competitive, independent decision making by cooperating with its competitors.
 - 5.5. Section 76 of the CCA provides that the Court may order a person to pay a pecuniary penalty if it is satisfied that the person has:
 - 5.5.1. attempted; and/or
 - 5.5.2. induced, or attempted to induce, others (whether through threats, promises, or otherwise),

to contravene a provision in Part IV of the CCA, including sections 45AJ and/or 45(1)(c).

Conduct of concern

Conduct

6. On or about 20 December 2018, a [REDACTED] member posted to [REDACTED] a photograph of two large hail stones, with the statement *"I think this latest storm is the perfect opportunity for the roofers of Sydney to increase pricing across the board as a standard that doesn't decrease!"* (**Post**).
7. On or about 20 December 2018, Kerkenezov:
 - 7.1. 'liked' the [REDACTED] Post;
 - 7.2. replied to the [REDACTED] Post with the comment, *"I got contacted by insurance company saying they want us to remove, supply and install for \$55/SQM... aaah no thanks... if any roofers go in and do this work for that kind of SQM rate you need an uppercut!"*; and
 - 7.3. replied to a comment on the [REDACTED] Post with the comment: *"Let's all agree that we start from \$65 and go up"* (**\$65 Comment**).
8. In response to the \$65 Comment, a [REDACTED] member commented, *"Brent Kerkenezov even that's too cheap"* (**Response Comment**).
9. On or about 20 December 2018, Kerkenezov liked the Response Comment.
10. There are Roofers in the greater Sydney area who 'liked' the \$65 Comment, or have informed the ACCC that they understood the purpose of the \$65 Comment was to get Roofers to increase the prices for roofing services.

Admissions and resolution

11. Ivy Contractors and Kerkenezov admit that Kerkenezov's conduct, as set out at **paragraph 7**, was undertaken in his capacity as a director of Ivy Contractors.
12. The ACCC advises and Ivy Contractors and Kerkenezov accept that other roofers who were members of [REDACTED] may have interpreted the \$65 Comment, either in isolation or when read in the context of the other posts set out at **paragraphs 6 - 9**, as an attempt to make a contract or arrangement, or arrive at an understanding, to increase prices across certain roofing services in the greater Sydney area (or an attempt to induce the same).
13. Ivy Contractors and Kerkenezov accept the ACCC allegation that the conduct outlined in **paragraphs 7 and 9**, likely constituted an attempt to contravene, or an attempt to induce a contravention of, s 45AJ of the CCA through the fixing, maintaining or controlling of prices for the supply of certain roofing services in the greater Sydney area.
14. Ivy Contractors and Kerkenezov accept the ACCC allegation that in some circumstances, conduct of the kind set out in **paragraphs 7 and 9** could raise concerns under section 45(1)(c), which prohibits a corporation from engaging with one or more persons in a concerted practice that has the purpose, effect or likely effect, of substantially lessening competition.
15. Ivy Contractors and Kerkenezov agree to resolve the ACCC's concerns in relation to these matters by providing this Undertaking.
16. The ACCC notes that since engaging in the conduct referred to at **paragraphs 7 - 9**, Kerkenezov has left the [REDACTED] group.

Commencement of this Undertaking

17. This Undertaking comes into effect when:

- 17.1. the Undertaking is executed by Ivy Contractors and Kerkenezov; and
- 17.2. the ACCC accepts the Undertaking so executed (**Commencement Date**).

18. Upon the commencement of this Undertaking:

- 18.1. Ivy Contractors undertakes to assume the obligations set out in **paragraph 19**; and
- 18.2. Kerkenezov undertakes to assume the obligations set out in **paragraph 20 and 21**,

for the purpose of section 87B of the CCA.

Undertaking

- 19. Ivy Contractors undertakes, for a period of three years from the Commencement Date, not to make any communication or engage in any conduct, whether on social media or otherwise, that would amount to a contravention, an attempted contravention or an attempt to induce a contravention, of the CCA, and in particular, ss 45(1)(c) or 45AJ of the CCA.
- 20. Kerkenezov undertakes, for a period of three years from the Commencement Date, not to make any communication or engage in any conduct, whether on social media or otherwise, that would amount to a contravention, an attempted contravention or an attempt to induce a contravention, of the CCA, and in particular, ss 45(1)(c) or 45AJ of the CCA.
- 21. Kerkenezov undertakes, within 3 months of the Commencement Date:
 - 21.1. to complete practical competition and consumer law training from a suitably qualified legal practitioner, focusing in particular on Pt 4, Div 1 of the CCA, and s 45(1)(c) of the CCA; and
 - 21.2. to provide the ACCC with written confirmation/certification from the suitably qualified legal practitioner that evidences completion of the training described in **paragraph 21.1** above.

Acknowledgments

- 22. Ivy Contractors and Kerkenezov acknowledge that:
 - 22.1. 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;
 - 22.2. the ACCC will, from time to time, make public reference to this Undertaking including in news, media statements and in ACCC publications; and
 - 22.3. 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 Ivy Contractors Pty Ltd ACN 143 776 710 pursuant to section 127(1) of the *Corporations Act 2001* by



Signature of Brent Cameron Callan-Kerkenezov,
sole director and company secretary

3-12-2019

Date

Executed by Brent Cameron Callan-Kerkenezov of 3 Julia Grove, Castle Hill, NSW, 2154:



Signature

3-12-2019


Date

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

9/12/19

Date

and signed on behalf of the Commission



Chair

9/12/19

Date