

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

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by  
Millell Pty Ltd ACN 148 151 213

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

1.1 This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Millell Pty Ltd ACN 148 151 213 for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

### **2. Background**

*Millell Pty Ltd trading as Pet Circle*

2.1 Millell Pty Ltd trades as Pet Circle (**Pet Circle**) and is an online supplier of pet food and pet supplies. Pet Circle operates the website [www.petcircle.com.au](http://www.petcircle.com.au) (**Website**).

*Australian Consumer Law*

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

2.3 Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

2.4 Section 29(1)(i) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation with respect to the price of goods or services.

### **3. Alleged conduct**

*Conduct in relation to 'Higher Charge Conduct'*

3.1 From around August 2019, Pet Circle, in trade or commerce, in connection with the promotion, supply or possible supply of pet food and pet supplies to consumers, offered consumers the use of certain discount codes or vouchers in transactions on the Website. These discount codes or vouchers were published on the Website, in flyers, emails and SMS messages, and through third parties.

3.2 Pet Circle represented to consumers who used the discount codes or vouchers that the price they would be charged for their goods was the price displayed once the discount code or voucher was accepted during the checkout process (**Discount Code Statements**), when in fact Pet Circle charged those consumers a total price higher than the Discount Code Statements (**Higher Charge Conduct**).

- 3.3 Pet Circle estimates that more than 5,400 customers were charged, generally between \$10-20, more than the price represented by the Discount Code Statements.
- 3.4 Pet Circle claims the Higher Charge Conduct occurred because:
- (a) the customer was in fact ineligible to use the discount code or voucher, and following the completion of the transaction, Pet Circle's order management system recognised that the discount codes were applied to ineligible customers. This triggered a second payment from the customer equivalent to the value of the incorrectly allowed discount; or
  - (b) where the customer placed separate orders using separate discount codes close in time to each other, Pet Circle's order management system merged those orders into a single order, and incorrectly rejected one of the discount codes submitted. This triggered a second payment from the customer equivalent to the incorrectly rejected discount.

*Conduct in relation to 'Don't Pay Statements'*

- 3.5 From at least June 2019 to around 13 April 2023, Pet Circle, in trade or commerce, in connection with the promotion, supply or possible supply of pet food and pet supplies to consumers, advertised a range of products on the Website with the following statement: 'Don't Pay \$X, save Y%' (**Don't Pay Statement**). The Don't Pay Statement appeared adjacent to the words 'BEST PRICE GUARANTEE'.
- 3.6 By advertising its products with the Don't Pay Statement, Pet Circle made representations that the \$X price reflected a retail price recently offered to consumers by Pet Circle or otherwise reflected a price at which the same product is available at in the market when in fact in some cases:
- (a) the \$X reflected the recommended retail price (**RRP**) suggested by the manufacturer; or
  - (b) the \$X reflected the price being charged for the same product by one or more major competitors, in circumstances where Pet Circle did not have a formal process to verify the ongoing accuracy of the claim being made.

*ACCC concerns*

- 3.7 The ACCC considers that by engaging in the conduct described in paragraphs 3.1 to 3.6 above, Pet Circle is likely to have, in trade or commerce:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL; and

- (b) made a false or misleading representation with respect to the prices of goods, in contravention of section 29(1)(i) of the ACL.

#### **4. Admissions and resolution**

- 4.1 In response to the ACCC's investigation, and in response to the ACCC's concerns, Pet Circle:
- (a) admits that it was likely to have contravened sections 18 and 29(1)(i) of the ACL;
  - (b) has cooperated with the ACCC's enquiries; and
  - (c) offered this Undertaking to the ACCC.

#### **5. Commencement and term of this Undertaking**

- 5.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Pet Circle, and
  - (b) this Undertaking so executed is accepted by the ACCC (**Commencement Date**).
- 5.2 This Undertaking has effect for three years from the Commencement Date (**Term**).
- 5.3 Upon the commencement of this Undertaking, Pet Circle undertakes to assume the obligations set out in section 6 of this Undertaking for the purposes of section 87B of the CCA.

#### **6. Undertakings**

*Cease conduct and desist from engaging in future conduct*

- 6.1 Pet Circle undertakes that, for the Term of this Undertaking, that it will not:
- (a) publish the Don't Pay Statement when advertising products on the Website without first verifying that the published price reflects a price recently offered by Pet Circle and/or reflects a price at which the product is available for in the market; and
  - (b) charge consumers an additional amount for a transaction higher than the Discount Code Statement or price represented at checkout after the checkout process has been completed, without first contacting the consumer, explaining why the additional charge is required, and then

obtaining consent from the consumer to proceed with the transaction at the higher price.

*Remediation for customers affected by misleading 'Discount Code Statements'*

- 6.2 Pet Circle has already contacted all customers affected by the Higher Charge Conduct by using their last known contact details to offer a refund or credit.
- 6.3 Pet Circle undertakes for all customers who respond to Pet Circle's contact described at paragraph 6.2, to provide a refund as soon as practicable to those customers equal to the amount of the second payment charged to them.

*Donation*

- 6.4 To the extent that Pet Circle is aware of any customers potentially affected by the Higher Charge Conduct but has not provided remediation in accordance with paragraph 6.3 above, Pet Circle undertakes, within 5 months from the Commencement Date, to donate to a charity organisation an amount equivalent to the amount of the refund that it would otherwise provide to customers affected by the Higher Charge Conduct under this Undertaking.

*Report*

- 6.5 Within 6 months from the Commencement Date, Pet Circle will provide a report to the ACCC setting out:
  - (a) the total number of customers affected by Higher Charge Conduct;
  - (b) the total amount of remediation owing to the customers set out in (a);
  - (c) the number of customers affected by the Higher Charge Conduct to whom Pet Circle has provided remediation, including the total amount paid; and
  - (d) receipt of the donation in accordance with paragraph 6.4 above.

*ACL Compliance Program*

- 6.6 Pet Circle undertakes, within 4 months from the Commencement Date and at its own expense, that it will:
  - (a) establish and implement a Level 2 ACL Compliance Program (**Compliance Program**) in accordance with the requirements set out at **Attachment A** to this Undertaking, being a program designed to minimise Pet Circle's risk of future breaches of the ACL;
  - (b) maintain and continue to implement the Compliance Program for the Term of this Undertaking; and

- (c) provide at its own expense, copies of any documents required by the ACCC in accordance with this Undertaking, including **Attachment A**.

*ACCC enquiries*

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

**7. Acknowledgements**

7.1 Pet Circle 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 Millell Pty Ltd ACN 148 151 213 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)
BENJAMIN GISZ	MICHAEL FRIZELL
Name of director (print)	Name of director/company secretary (print)
Date 24/7/2023	Date 24/7/2023

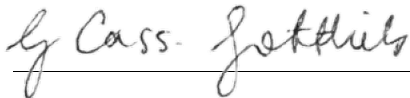
Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

28 August 2023

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Date

and signed on behalf of the Commission:



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Chair

28 August 2023

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Date

## **Attachment A**

### **AUSTRALIAN CONSUMER LAW COMPLIANCE PROGRAM**

#### **LEVEL 2**

Millell Pty Ltd ACN 148 151 213 (**Pet Circle**) will establish an Australian Consumer Law Compliance Program (**Compliance Program**) that complies with each of the following requirements:

#### **Appointments**

1. Within one month of the Commencement Date, Pet Circle will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as responsible for ensuring that the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).

#### **Compliance Officer Training**

2. Within two months of the Commencement Date, Pet Circle will ensure that the Compliance Officer attends practical training focusing on at least Parts 2-1 and 3-1 of the Australian Consumer Law (**ACL**), in Schedule 2 of the Competition and Consumer Act 2010 (**CCA**).
3. Pet Circle will ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.

#### **Staff Training and Induction**

4. Within four months of the Commencement Date, Pet Circle will ensure that ACL training is provided to all directors, officers, employees, representatives and agents of Pet Circle whose duties could result in them being concerned with conduct that may contravene the ACL. This training will explain Pet Circle's obligations and responsibilities under the ACL, including its obligation not to contravene Parts 2-1 and 3-1 of the ACL.
5. Pet Circle will also ensure that the Compliance Program provides for regular (at least every 18 months) training for all directors, officers, employees, representatives and agents of Pet Circle, whose duties could result in them being concerned with conduct that may contravene Parts 2-1 and 3-1 of the ACL.
6. Pet Circle must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in the ACL.
7. Pet Circle will ensure that the Compliance Program includes a requirement that awareness of the ACL forms part of the induction of all new directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct that may contravene Parts 2-1 and 3-1 of the ACL.

#### **Complaints handling**

8. Within two months of the Undertaking coming into effect, Pet Circle will develop procedures for recording, storing and responding to competition and consumer

law complaints (**Complaints Handling System**). This Complaints Handling System, developed by Pet Circle, will include procedures for recording, storing and responding to complaints made directly to Pet Circle.

9. Pet Circle will ensure that staff and customers are made aware of the Complaints Handling System.

### **Reports to CEO**

10. Pet Circle will ensure that the Compliance Officer reports to Pet Circle's CEO every six months on the continuing effectiveness of the Compliance Program.

### **Compliance Review**

11. Pet Circle will, at its own expense, cause a review of the Compliance Program (**Review**) to be carried out every 18 months, in accordance with each of the following requirements:

- 11.1. **Scope of Review** – the Review should be broad and rigorous enough to provide Pet Circle and the ACCC with verification that Pet Circle has in place a Compliance Program that complies with each of the requirements of this Attachment.

- 11.2. **Independent Reviewer** – Pet Circle will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**Reviewer**). The Reviewer will qualify as independent on the basis that they:

- 11.2.1. did not design or implement the Compliance Program;

- 11.2.2. is not a present or past staff member or director of Pet Circle;

- 11.2.3. has not acted and does not act for, and does not consult and has not consulted to, Pet Circle in any competition or consumer law related matters, other than performing Reviews under this Undertaking; and

- 11.2.4. has no significant shareholding or other interests in Pet Circle.

- 11.3. **Evidence** – Pet Circle 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 Pet Circle's possession or control, including without limitation:

- 11.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of Pet Circle;

- 11.3.2. documents relating to Pet Circle's Compliance Program, including documents relevant to Pet Circle's Complaints Handling System, and Staff Training and Induction program; and

- 11.3.3. any reports made by the Compliance Officer to Pet Circle's CEO regarding Pet Circle's Compliance Program.



- 11.4. Pet Circle will ensure that a Review is completed within 18 months of the Commencement Date and that a subsequent review is completed within another 18 months.

### **Compliance Reports**

12. Pet Circle 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 Pet Circle (**Compliance Report**):
  - 12.1. whether the Compliance Program of Pet Circle includes all the elements detailed in paragraphs 1-10 above, and if not, what elements need to be included or further developed;
  - 12.2. whether the Staff Training and Induction is effective, and if not, what aspects need to be further developed;
  - 12.3. whether Pet Circle's Complaints Handling System is effective, and if not, what aspects need to be further developed; and
  - 12.4. whether there are any material deficiencies in Pet Circle'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/s<sup>1</sup>.

### **Pet Circle's response to Compliance Reports**

13. Pet Circle will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
  - 13.1. provides the Compliance Report to the CEO of Pet Circle; and
  - 13.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to Pet Circle's CEO identifying how Pet Circle can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
14. Pet Circle will implement promptly and with due diligence any reasonable recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

### **Reporting Material Failures to the ACCC**

15. Where a Material Failure has been identified by the Reviewer in the Compliance

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<sup>1</sup> In addition to the meaning given at paragraph 12.4, 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 any 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 Compliance Review period

Report, Pet Circle will:

- 15.1. provide a copy of that Compliance Report to the ACCC within 30 days of Pet Circle's CEO receiving the Compliance Report; and
- 15.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
- 15.3. otherwise outline the steps Pet Circle proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

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

16. Pet Circle will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
17. If requested by the ACCC during the period of five years, Pet Circle will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 17.1. an outline of the Complaints Handling System;
  - 17.2. details of any complaints made and Pet Circle's response to those complaints, which are recorded, stored, and responded to in accordance with the Complaints Handling System;
  - 17.3. Staff Training and Induction materials;
  - 17.4. all Compliance Reports that have been completed at the time of the request; and
  - 17.5. copies of the reports to Pet Circle's CEO referred to in paragraphs 10 to 13 of this Attachment.

**ACCC Recommendations**

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