

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

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

by

**Delicia Franchising Pty Ltd (ACN 623 553 631)**

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

- 1.1. This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Delicia Franchising Pty Ltd (ACN 623 553 631) (Delicia Franchising) for the purposes of section 87B of the *Competition and Consumer Act 2010* (Undertaking).

### **2. Background**

#### Delicia Franchising

- 2.1. Delicia Franchising is an Australian proprietary limited company and the franchisor of the 'Delicia Acai + Protein Bar' franchise system. The business operated under the franchise is a health food and beverages bar.
- 2.2. Since January 2018, Delicia Franchising has required franchisees to enter into franchise agreements. These agreements are subject to the *Competition and Consumer (Industry Codes – Franchising) Regulations 2014* (Franchising Code), which is an applicable industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010* (CCA).

### **3. Alleged Conduct**

#### Franchising Code

- 3.1. Delicia Franchising's franchise agreements require franchisees to pay an 'Advertising Levy', which Delicia Franchising pays to an 'Advertising Account', this being a marketing fund or cooperative fund controlled or administered by or for Delicia Franchising (referred to as 'marketing fund' in this Undertaking).
- 3.2. For the financial years ended 30 June 2020, 2021 and 2022, Delicia Franchising prepared annual financial statements for the marketing fund within 4 months after the end of the relevant financial year as required under the Franchising Code.
- 3.3. However, Delicia Franchising failed to give franchisees a copy of these statements within 30 days of preparing them as required under the Franchising Code.
- 3.4. Further, the annual financial statements that Delicia Franchising prepared did not include sufficient detail of the marketing fund's receipts and expenses so as to give meaningful information about the fund's sources of income and items of expenditure, particularly with respect to advertising and marketing expenditure.

In particular, the statements described significant expenditures at only a high level of generality. For example, items such as 'advertising subscriptions' and 'online content' were given no explanatory information, such as the channels on which the advertising appeared and the percentage of the expenditure on a per channel basis.

3.5. The ACCC considers that by reason of the matters outlined in:

- a. paragraph 3.3, Delicia Franchising has contravened subclause 15(4) of the Franchising Code; and
- b. paragraph 3.3 and 3.4, Delicia Franchising has contravened subclause 15(2) of the Franchising Code,

and, consequently, Delicia Franchising has contravened section 51ACB of the CCA, which prohibits a corporation from contravening an applicable industry code.

#### **4. Admissions and Resolution**

4.1. In response to the ACCC's concerns, Delicia Franchising admits that by reason of the matters described in paragraphs 3.1 to 3.4, it has contravened subclauses 15(2) and 15(4) of the Franchising Code and section 51ACB of the CCA.

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

5.1. This Undertaking comes into effect when:

- a. this Undertaking is executed by Delicia Franchising; and
- b. this Undertaking so executed is accepted by the ACCC (Commencement Date).

5.2. This Undertaking has effect for 3 years from the Commencement Date (referred to as the "Undertaking Period").

5.3. Upon the commencement of this Undertaking, Delicia Franchising undertakes to assume the obligations set out in section 6 of this Undertaking for the purposes of section 87B of the CCA.

#### **6. Undertaking**

##### Compliance with the Franchising Code

6.1. Delicia Franchising undertakes that it will, consistent with its obligations under the Franchising Code:

- a. within 4 months after the end of each financial year, prepare an annual financial statement detailing all of the marketing fund's receipts and expenses for the last financial year;
- b. ensure that the marketing fund statement includes sufficient detail of the fund's receipts and expenses so as to give meaningful information about:
  - i. sources of income; and
  - ii. items of expenditure, particularly with respect to marketing (however described),

including by ensuring significant expenses on marketing, such as those for online content and advertising subscriptions (however they are described), specify the channels on which the advertising appears and the expenditure on a per channel basis;

- c. have the marketing fund statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates, unless agreement of franchisees is obtained;
- d. give each franchisee a copy of the marketing fund statement within 30 days of preparing it; and
- e. give each franchisee a copy of any auditor's report within 30 days of receiving it (if applicable).

- 6.2. Delicia Franchising undertakes to ensure the level of detail in the marketing fund statement includes sufficient detail to provide an ordinary reader (i.e., not just an accounting professional) with meaningful information about whether marketing funds are being put to appropriate use.

#### Corrective notice

- 6.3. Within 14 days from the Commencement Date, Delicia Franchising undertakes that it will, at its own expense, send or cause to be sent via email, a notice in the form and terms set out below and at **Annexure A** to this Undertaking to all franchisees:

- a. that are currently operating a Delicia Acai + Protein Bar franchise; and
- b. for whom Delicia Franchising has the franchisee's last known email address.

- 6.4. The email will attach:

- a. the marketing fund financial statements, and a copy of any auditor's report, for each of the financial years ending 30 June 2020, 2021 and 2022; and

b. a copy of this Undertaking.

6.5. Within 14 days from the Commencement Date, Delicia will provide written confirmation to the ACCC that it has complied with paragraphs 6.36-4 and 6.46-5 of this Undertaking.

#### Training & compliance program

6.6. Within 3 months of the Commencement Date, Delicia Franchising must implement a compliance program with a particular focus on its obligations under the Franchising Code when dealing with franchisees and prospective franchisees, in accordance with the requirements set out in **Annexure B** (Compliance Program).

6.7. Delicia Franchising will maintain and continue to implement the Compliance Program for a period of 3 years from the Commencement Date.

6.8. Delicia Franchising will provide, at its own expense, a copy of any documents required by the ACCC in accordance with **Annexure B**.

### **7. ACCC Enquiries**

7.1. For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries of Delicia Franchising with respect to compliance with this Undertaking and Delicia Franchising will respond to such enquiries within 14 days or as otherwise agreed with the ACCC.

7.2. If requested by the ACCC during the Undertaking Period, Delicia Franchising will, at its own expense, cause to be produced and provide to the ACCC copies of such documents (excluding any legally privileged documents) in its power, possession or control evidencing Delicia Franchising's compliance with the obligations set out in this Undertaking.

### **8. Acknowledgements**

8.1. Delicia Franchising 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 Delicia Franchising Pty Ltd (ACN 623 553 631) pursuant to section 127(1) of the Corporations Act 2001 by:

|   |  |
|---|--|
|  |  |
| Signature of director   | Signature of a director/company secretary  |
| Scott Demulster   |  |
| Name of director (print)  | Name of director/company secretary (print) |
|   |  |
| Date 10/10/2023   | Date                                       |

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

12 December 2023

Date

and signed on behalf of the Commission:



Chair Acting Chair

12 December 2023

Date

**ANNEXURE A**  
**CORRECTIVE NOTICE FOR FRANCHISEES**

Notice to all current franchisees of Delicia Acai + Protein Bar:

The franchisor of Delicia Acai + Protein Bar wishes to inform you of a recent undertaking offered by Delicia Franchising Pty Ltd (Delicia Franchising) to the Australian Competition and Consumer Commission (ACCC).

This undertaking was offered to address various concerns raised by the ACCC regarding Delicia Franchising's compliance with the Franchising Code of Conduct.

**Franchising Code of Conduct non-compliance**

Delicia Franchising has admitted that it failed to comply with several clauses of the Franchising Code's requirements for annual marketing fund financial statements that it prepared for the financial years ending 30 June 2020, 2021 and 2022 (Statements), specifically by:

- failing to provide franchisees with copies of the Statements within 30 days of preparing them (clause 15(4)(a) of the Franchising Code)
- failing to have the Statements audited by a registered company auditor within 4 months after the financial year to which they relate (clause 15(2)(c) of the Franchising Code); and
- failing to provide sufficient detail in the Statements about the marketing fund's items of expenditure (clause 15(2)(b) of the Franchising Code).

Delicia Franchising has undertaken to provide current franchisees with copies of the Statements (see attachments to this notice) and to take steps to ensure its future compliance with the Franchising Code.

**The Undertaking**

Delicia Franchising has also committed to undertake training on its obligations under both the Franchising Code and the unfair contract provisions of the Australian Consumer Law.

A full copy of the undertaking provided to the ACCC can also be found on the ACCC's public register at [\[insert link to Delicia Franchising s 87B undertaking on the ACCC public register\]](#).

Should you have queries regarding this notice, you may contact me on [\[insert phone number and email address for Scott Dempster/Delicia Franchising\]](#).

Regards,  
Scott Dempster  
Managing Director  
Delicia Franchising Pty Ltd

## **ANNEXURE B COMPLIANCE PROGRAM**

Delicia Franchising Pty Ltd (Delicia Franchising) will establish a competition and consumer compliance program (Compliance Program) that complies with each of the following requirements:

### **Training**

1. Within 3 months of the undertaking under section 87B of the *Competition and Consumer Act 2010* (Cth) (CCA) provided by Delicia Franchising to the ACCC (Undertaking) coming into effect (Commencement Date), and thereafter at least once a year for 3 years, Mr Scott Dempster (Managing Director of Delicia Franchising), or any such other person appointed to this role however titled, will undertake training focusing on the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Franchising Code) and the Australian Consumer Law (ACL) provisions relating to unfair contract terms.

Delicia Franchising will ensure that the training referred to in paragraph 1 above is offered by a suitably qualified compliance professional or legal practitioner with expertise in the Franchising Code and the ACL provisions relating to unfair contract terms (Trainer). Delicia may elect to undertake the ACCC's online training module for small business on unfair contract terms in satisfaction of the training requirement on the ACL provisions relating to unfair contract terms.

2. Within 7 days from the time the initial training referred to in paragraph 1 is successfully completed, Delicia Franchising will provide confirmation of successful completion to the ACCC.

### **Complaints Handling System**

3. Within 3 months of the Commencement Date, Delicia Franchising will develop and implement procedures for identifying, classifying, storing and responding to franchise and consumer law complaints (Complaints Handling System).

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

4. Delicia Franchising will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than 5 years after the Commencement Date.
5. If requested by the ACCC during the period of the Undertaking or 5 years after the Undertaking's Commencement Date, Delicia Franchising will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 5.1. written confirmation that the training referred to in paragraph 1 has occurred;  
and
  - 5.2. an outline of the Complaints Handling System referred to in paragraph 3.

### **ACCC Recommendations**

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