



TRADE PRACTICES ACT, 1974

UNDERTAKING TO
THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION
GIVEN FOR THE PURPOSE OF SECTION 87B

BY

PETER IAN ISHERWOOD

BACKGROUND

1. FujiFilm Australia Pty Ltd (formerly Hanimex Pty Limited) (ACN 000 064 433) ("**Hanimex**") is a subsidiary of Hanimex Australasia Pty Limited. Hanimex is principally a distributor of photographic and imaging products for both consumer and medical applications.
2. Peter Ian Isherwood ("**Mr Isherwood**") was employed by Hanimex from about August 1989 until 31 December 2003. In or about January 1996, he was appointed National Sales Manager –Direct Markets
3. From January 1996 until February 1999, Mr Isherwood was the Product and Sales Manager for Professional Video Products, Data Storage Media and Motion Picture film. From February 1999 until December 2003 he had sole responsibility for sales for Professional Video Products, Data Storage Media and Motion Picture film. From July 2001 to February 2003 Mr Isherwood was the National Sales Manager Direct Markets reporting to Mr Garth Hickey the then Director of Sales and Marketing.
4. On 17 September 2003, Hanimex made a submission ("**the Submission**") to the Australian Competition and Consumer Commission ("**the Commission**") pursuant to the Commission's Co-operation Policy for Enforcement Matters in relation to certain conduct of one its employees that Hanimex was concerned may have contravened the resale price maintenance provisions of the *Trade Practices Act 1974* ("**the TPA**").
5. In its Submission, Hanimex requested that both it, Senior Management and its present and previous employees, be granted immunity from any potential Commission initiated proceedings with respect to the matters raised in the Submission.

Conduct

6. Hanimex disclosed the following conduct in its Submission:

- (a) In August 2001, Hanimex became aware of a website with the Internet domain name www.digicamera.com.au (“**the Website**”) upon which certain Fuji digital cameras were being offered at a price below the standard reseller/dealer price;
- (b) On 12 September 2001, Mr Isherwood attended a meeting with the operator of the Website who, through another company, was also a wholesale customer of Hanimex (“**the Wholesale Customer**”). During this meeting, Mr Isherwood informed the Wholesale Customer that it was to cease selling Fuji cameras on the Website or Hanimex’s prices to that customer’s wholesale business would be increased to Trade less 15%;
- (c) In an email dated 17 September 2001 to the Wholesale Customer, Mr Isherwood stated:

“... The problem arose, because the prices on the Internet are much lower than the market prices for our products. When your site was brought to the attention of Hanimex, the management were compelled to investigate. The DigiCamera website is very professional and provides an excellent exposure for the Fujifilm digital camera range. ...Consequently we do not wish you to remove the Fuji product range from the site, however we would ask you to increase your prices in line with our Trade price, which is a RRP [recommended retail price].”

- (d) On or about 8 July 2003, Hanimex became aware that Mr Isherwood was alleged to have made certain statements to the Wholesale Customer in relation to the prices at which Fuji digital cameras were to be resold;
- (e) On 8 July 2003, Senior Management of Hanimex retained external legal counsel to advise and assist in its investigation of the allegations that had been made with a view to advising Hanimex as to the likelihood of a contravention of the TPA and assist it in compiling all relevant material to provide to the Commission in a submission under the Commission’s Co-operation Policy for Enforcement Matters;
- (f) As part of its investigation into this matter, Hanimex became aware of other communications allegedly made by Mr Isherwood that Hanimex was concerned may have contravened the resale price maintenance provisions of the TPA, in addition to the conduct of Mr Isherwood that is referred to in paragraphs 6(b) and 6(c) above. On 17 January 2003, Mr Isherwood sent an email to certain employees of a Direct Markets wholesale customer. Within this email, Mr Isherwood enclosed a copy of the January price list for wholesale customers of Fuji digital cameras and stated:

“I have had an opportunity to discuss the pricing with the PM [Product Manager] and there is no doubt that it is a sensitive issue. This has been brought about by some businesses selling at prices a long way below the RRP. We know from experience that

the RRP price is accepted by the market. I would ask you to ensure that you do not sell below the Reseller price. ...”.

Action taken by Hanimex

7. At the completion of its investigation, both Hanimex’s internal and external legal counsel had specific discussions with Mr Isherwood as to the scope of the resale price maintenance provisions of the TPA.
8. On 12 July 2003, Hanimex implemented a new program for compliance with the TPA (“**the New Compliance Program**”). The New Compliance Program consists of a checklist, a compliance manual and training modules for staff.
9. At the National Sales and Marketing Conference held on 12 July 2003, Mr Dave Marshall, the Managing Director of Hanimex, had a specific message for all Hanimex employees that endorsed and required participation in the New Compliance Program and emphatically stated the requirement for “100% compliance with Trade Practices Laws by all employees”.

Leniency Submission by Hanimex

10. Hanimex has in its Submission made the following submission for leniency in accordance with the Commission’s Co-operation Policy for Enforcement Matters:
 - (a) Hanimex has voluntarily come forward and fully disclosed both the nature of the received allegations and the extent of its investigation into the allegations (including providing the Commission with relevant documents resulting from the investigation). In Hanimex’s opinion it has provided the Commission with “valuable and important evidence” of which to the best of Hanimex’s knowledge “the Commission is otherwise unaware”. Furthermore, in disclosing the nature of its investigation and in providing the relevant documents Hanimex has complied with the “full and frank disclosure” criteria for leniency;
 - (b) On becoming aware of the initial allegations on 8 July 2003, Senior Management immediately decided that, if the allegations seemed to be supportable, they should be reported to the Commission and, as indicated above, instructed internal and external counsel to begin an investigation into such allegations and to begin preparation of the Submission. Upon the realisation that issues may have arisen with respect to the pricing of digital cameras, Senior Management authorised the specific steps to be taken. Accordingly, Hanimex has taken “prompt and effective action” to terminate any activity which may be in breach of the TPA;
 - (c) The conduct in question did not form part of a Senior Management directive but rather arose from the activity of a single sales representative. Accordingly, this is not conduct which Hanimex compelled or induced any other corporation to take part in;

- (d) Hanimex is prepared to provide certain of its customers that may have been affected by the alleged conduct with a letter setting out its concerns in respect of any communications in regard to pricing and, within the context of that letter, invite such persons to bring to Hanimex's attention any incidents or concerns that those customers have in this regard;
- (e) By way of Deed of Settlement dated 26 September 2003 between Hanimex and one of its wholesale customers, Hanimex agreed to pay the customer an amount by way of restitution for any losses that may have been suffered by that customer as a result of the alleged resale price maintenance conduct. Hanimex is also prepared to discuss the issue of restitution with another two of its wholesale customers in connection with the alleged conduct. However, Hanimex is of the view that significant restitution is not appropriate;
- (f) None of the wholesalers in the Direct Markets channel were required to carry Hanimex distributed products to the exclusion of competing products. It was, accordingly, at all relevant times open to any distributor to carry and resell a camera brand other than Fuji. Indeed, Hanimex believes that at least some wholesalers carried, and continue to carry, competing brands of cameras. Given the highly competitive nature of the digital camera business and the variety in sources of supply it is unlikely, in Hanimex's view, that any wholesaler's overall business has been materially injured by Hanimex's conduct;
- (g) Hanimex has taken immediate steps to ensure that the conduct in question has ceased. In addition, in committing itself to ensure that future pricing policies be vetted by internal counsel and in implementing its Existing Compliance Program, Hanimex has ensured that similar incidents will not occur again. In this regard, Hanimex expresses a willingness to review the scope of its Existing Compliance Program with the Commission and enter into undertakings with regard to its implementation; and
- (h) Hanimex notes that it does not have a prior record of TPA or related offences and has a corporate culture which encourages compliance with the law.

Leniency Submission by Mr Isherwood

11. Mr Isherwood came forward to assist the Commission with its enquiries and provided the Commission with a statutory declaration that was signed and declared on 22 March 2004 detailing his part in the conduct disclosed in the Submission ("**the Statutory Declaration**").
12. Mr Isherwood does not have a prior record of TPA or related offences.

Commission Action

13. Upon receiving the Submission, Commission staff made extensive further enquiries of Hanimex, relevant current and former employees of Hanimex, certain customers of Hanimex and the Wholesale Customer and certain of its former staff, in relation to the disclosed conduct to verify the information contained in the Submission. Commission staff also made further extensive enquiries of Mr Isherwood to verify the information contained in his Statutory Declaration.
14. Mr Isherwood admits that his conduct as disclosed in the Submission and Statutory Declaration may constitute resale price maintenance conduct in breach of section 48 of the TPA.
15. On the basis of the contents of Hanimex's Submission, Mr Isherwood's Statutory Declaration and the Commission's further enquiries, the Commission is prepared to accept Mr Isherwood's application for leniency. The Commission is prepared to give Isherwood a commitment that it will not commence court proceedings against him in respect of the conduct which is voluntarily disclosed in Hanimex's Submission, his statutory declaration and is the subject of this Undertaking in return for, and strictly on the condition of, the giving of this Undertaking.

COMMENCEMENT OF UNDERTAKING

16. This undertaking comes into effect when:
 - (a) the undertaking is executed by Mr Isherwood; and
 - (b) the Commission accepts the undertaking so executed.

UNDERTAKING

17. Mr Isherwood undertakes to the Commission for the purposes of section 87B of the TPA that he will not, for a period of 5 years, be in any way, directly or indirectly, knowingly concerned in, or party to, any conduct by a corporation of the following kind:
 - (a) making it known to customers of a corporation or any other person, that the corporation or any other person, will not supply cameras or any other products supplied by the corporation unless customers agree not to sell those cameras or other products at prices less than those specified by that corporation or any other person;
 - (b) inducing, or attempting to induce, customers not to sell, at prices less than those specified by a corporation or any other person, any of the cameras or other products supplied to customers by the corporation or any other person;

- (c) entering into agreements, or offering to enter into agreements, for the supply of any of the cameras or other products to customers being agreements one of the terms of which is, or would be, that customers are not to sell those cameras or other products supplied by the corporation at prices less than those specified by the corporation or any other person; and
 - (d) using in relation to any of the cameras or other products supplied, or to be supplied, by a corporation or any other person to customers a statement of price that is likely to be understood by customers as the price below which those products are not to be sold.
- 18. Mr Isherwood further undertakes to fully cooperate with and assist the Commission in any legal proceedings the Commission may commence against any person or persons (excluding Mr Isherwood) alleged to have engaged in or been involved in the conduct the subject of the Undertaking. Full cooperation and assistance by Mr Isherwood includes:
 - (a) making himself available to be interviewed as required by the Commission and/or its legal representatives; and
 - (b) providing evidence for use in any subsequent hearing including signing and swearing or affirming affidavits as requested by the Commission or its legal representatives that fairly reflect the information or evidence that has been provided to the Commission.
- 19. Mr Isherwood further undertakes that he will, at his own expense, within 3 months of the date of this Undertaking coming into effect, undertake trade practices education and training by completing a trade practices compliance course of not less than 5 hours (1 day) duration designed to ensure his awareness of his responsibilities and obligations specifically in relation to sections 48, 96, 96A, 97, 98, 99 and 100 of the TPA, such training course to be provided by a suitably qualified compliance professional with expertise in trade practices law.
- 20. Mr Isherwood further undertakes that he will, within 7 days of completing the trade practices compliance course referred to in paragraph 19 above, notify the Commission in writing of his successful completion of the said course.

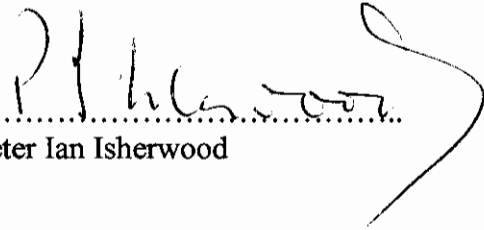
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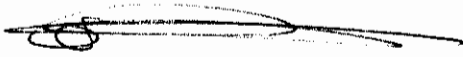
- 21. Mr Isherwood acknowledges that the Commission will make this Undertaking available for public inspection.
- 22. Mr Isherwood further acknowledges that the Commission will, at its absolute discretion, from time to time publish and publicly refer to this Undertaking.
- 23. Mr Isherwood further acknowledges and accepts that this Undertaking in no way derogates from the rights and remedies available to any other person

arising from the conduct of Hanimex and Mr Isherwood referred to in paragraphs 6(b), 6(c) and 6(f) above.

SIGNED by **PETER IAN ISHERWOOD**)

on the 15th day of July 2004 in the presence of:


.....
) Peter Ian Isherwood

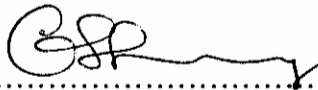


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Signature of Witness

CLARE STAMPA.....

Name of Witness (Please print)

**Accepted by the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974**



.....
Graeme Samuel
Chairman

This 26th day of October 2004