

Undertaking to the Australian Competition and Consumer Commission

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

Fowler Homes Pty Ltd

ACN 066 046 366.

1. Person(s) giving the Undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Fowler Homes Pty Ltd ACN 066 046 366 (**Fowler Homes**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

2. Background

Fowler Homes

- 2.1 Fowler Homes is a home building company based in New South Wales.
- 2.2 Consumers who engage the services of Fowler Homes, enter into a standard form home building contract (the **Fowler Homes Contract**) with Fowler Homes, which contains a combination of the standard Housing Industry Association (HIA) home building contract terms and Fowler Homes' 'Special Conditions', and sets out the terms of agreement between Fowler Homes and its customers.

Alleged conduct

- 2.3 Since around May 2017, the Fowler Homes Contract included Clause 48 titled '*Confidentiality of Contract*'. Under Clause 48, Fowler Homes included terms (among other things) that in effect:
- (a) prohibited customers from disclosing or publishing all aspects of the building contract, including any issues which may arise from Fowler Homes' performance of the contract;
 - (b) required customers to obtain permission from Fowler Homes before they make any public statements about the contract, including Fowler Homes' performance of the contract, including publication onto any website, social networking site or via any other electronic method including the internet; and
 - (c) required customers to indemnify Fowler Homes for any costs incurred by Fowler Homes in protecting its rights if the customer breached Clause 48 (together the **Non-disparagement Term**).
- 2.4 Since 1 July 2019, Fowler Homes has entered into approximately 434 Fowler Homes Contracts with customers that contain the Non-disparagement Term.
- 2.5 The ACCC considers that the Non-disparagement Term is unfair within the meaning of section 24 of the Australian Consumer Law (**ACL**), contained in Schedule 2 of the CCA. The ACCC considers that the Non-disparagement Term:
- (a) causes a significant imbalance in the parties' rights and obligations arising under the Fowler Homes Contract;
 - (b) is not reasonably necessary in order to protect the legitimate interests of Fowler Homes; and
 - (c) would cause detriment to Fowler Homes' customers if Fowler Homes applied or relied on it, including because this term has the effect of preventing the publication of genuine customer reviews online (or elsewhere) which accurately reflect experiences with Fowler Homes' services in the absence of any substantial corresponding right to the customer.

Admissions and Resolution

- 2.6 In response to the ACCC's concerns, Fowler Homes:
- (a) admits that,
 - (i) the Fowler Homes Contract is a standard form contract, and
 - (ii) the Non-disparagement Term is unfair within the meaning of section 24 of the ACL and is void pursuant to section 23 of the ACL;

- (b) has cooperated with the ACCC's enquiries; and
- (c) has offered this Undertaking to the ACCC to resolve the ACCC's concerns.

3. Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

- (a) this Undertaking is executed by Fowler Homes, and
- (b) this Undertaking so executed is accepted by the ACCC

(**Commencement Date**).

3.2 This Undertaking has effect for three years from the Commencement Date (the **Term**).

3.3 Upon the commencement of this Undertaking, Fowler Homes undertakes to assume the obligations set out in Section 4 of this Undertaking below for the purposes of section 87B of the CCA.

4. Undertaking

Cease conduct and desist future conduct

4.1 Fowler Homes undertakes, for the Term of this Undertaking, that it will not include in any Fowler Homes Contract the Non-disparagement Term, or any term that has the same effect as the Non-disparagement Term, in future contracts with customers.

4.2 Fowler Homes undertakes, for customers that have previously entered into a Fowler Homes Contract that includes the Non-disparagement Term or terms of the same effect, that it will not enforce or rely upon the Non-disparagement Term or terms of the same effect.

Corrective customer letter

4.3 Fowler Homes undertakes, within 21 days from the Commencement Date and at its own expense, that it will send or cause to be sent via email, a letter in the form and terms set out at **Attachment A** to this Undertaking to all customers:

- (a) who entered into a Fowler Homes Contract between 1 July 2019 and 25 August 2022, and
- (b) for whom Fowler Homes has the customer's email.

4.4 The letter is to be sent to the last email address known to Fowler Homes.

ACL Compliance Program

4.5 Fowler Homes undertakes, within three 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 B** to this Undertaking, being a program designed to minimise Fowler Homes' 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 B**.

ACCC enquiries

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

5. Acknowledgments

5.1 Fowler Homes 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,
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and

- (d) a summary of the ACCC Compliance Program review reports referred to in **Annexure B** of this Undertaking may be held with this Undertaking in the public register.

Executed as an Undertaking

Executed by Fowler Homes Pty Ltd ACN 066 046 366 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)
		Frank Grippaudo
Name of director (print)		Name of director/company secretary (print)
Date		Date 12/12/2022

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

13 December 2022

Date

and signed on behalf of the Commission:



Delia Ann Rickard, Acting Chair

Date 13 December 2022

Attachment A

Dear [Name]

RE: Amendment to your home building contract with Fowler Homes Pty Ltd (Fowler Homes)

Our records show that you entered into a standard form home building contract (**Fowler Homes Contract**) with us (**Fowler Homes**) on [Date], for the purpose of building a house located at [Address]. We are writing to inform you of a change to your Fowler Homes Contract.

Specifically, the change is that Clause 48, titled 'Confidentiality of Contract' is **void and will not be enforced**. As such, should you wish to do so, you are able to make public comment about Fowler Homes or the services provided by Fowler Homes without our prior permission and/or without the potential of being held liable to indemnify Fowler Homes for our costs associated with protecting our rights under Clause 48 if it was breached.

These amendments follow concerns raised by the Australian Competition and Consumer Commission (**ACCC**) that Clause 48 contained unfair contract terms under the Australian Consumer Law.

These terms allowed Fowler Homes to limit or prevent consumers from making any public statements, including any negative or critical comments which accurately reflect a consumer's experience of Fowler Homes' performance under the Fowler Homes Contract. The ACCC considers, and Fowler Homes agrees, that businesses must not prevent consumers from publishing or seeing genuine, relevant, and lawful reviews. In response to the ACCC's concern's, Fowler Homes acknowledges that the clause could have prevented clients from speaking out for fear of repercussions.

Fowler Homes has undertaken a formal contract review, and has amended the Clause in future Contracts so that it does not restrict clients' rights to openly discuss the services they have received. Additionally, Fowler Homes has provided the ACCC with a court enforceable undertaking in which it has admitted that the terms under Clause 48 were unfair and that they are void and will not be enforced or relied upon. A full copy of the undertaking provided to the ACCC can be found on the ACCC's public register at [Insert link to Fowler Homes s87B on the ACCC public register].

If you have any concerns regarding this letter and your Fowler Homes Contract, please contact us on [Insert relevant phone number for Fowler Homes].

Yours sincerely,

Attachment B

AUSTRALIAN CONSUMER LAW COMPLIANCE PROGRAM

LEVEL 2

Fowler Homes Pty Ltd ACN 066 046 366 (**Fowler Homes**) 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 Undertaking coming into effect, Fowler Homes will appoint a director or a senior manager of the business to be responsible for the development, implementation and maintenance of the Compliance Program (**the Compliance Officer**).

Compliance Officer Training

2. Within two months of the Undertaking coming into effect, Fowler Homes will ensure that the Compliance Officer attends practical training focusing on at least Part 2-3 (containing sections 23 and 24) of the Australian Consumer Law (**ACL**), in Schedule 2 of the *Competition and Consumer Act 2010 (CCA)*.
3. Fowler Homes will ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.

Staff Training

4. Fowler Homes will cause all employees of Fowler Homes whose duties could result in them being concerned with conduct that may contravene Part 2-3 of the ACL to receive regular (at least every 18 months) training administered by the Compliance Officer (once trained) or a qualified compliance professional or legal practitioner with expertise in competition and consumer law, that focuses on at least Part 2-3 of the ACL.

Complaints handling

5. Within two months of the Undertaking coming into effect, Fowler Homes will develop procedures for recording, storing and responding to competition and consumer law complaints (**Complaints Handling System**). This Complaints Handling System, developed by Fowler Homes, will include procedures for recording, storing and responding to:
 - 5.1. complaints made directly to Fowler Homes; and
 - 5.2. enquiries relating to the Corrective Customer Letter referred to at paragraphs 4.3 and 4.4 of the Undertaking.

Reports to Managing Director

6. Fowler Homes will ensure that the Compliance Officer reports to Fowler Homes' Managing Director every six months on the continuing effectiveness of the Compliance Program.

Compliance Review

7. Fowler Homes will, at its own expense, cause a review of the Compliance Program (**the Review**) to be carried out every 18 months, in accordance with each of the following requirements:
 - 7.1. **Scope of Review** – the Review should be broad and rigorous enough to provide Fowler Homes and the ACCC with:
 - 7.1.1. verification that Fowler Homes has in place a Compliance Program that complies with the requirements of the Undertaking and is suitable for the size and structure of Fowler Homes; and
 - 7.1.2. the Compliance Reports detailed at paragraph 8 below.
 - 7.2. **Independent Reviewer** – Fowler Homes will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**). The Reviewer will qualify as independent on the basis that they:
 - 7.2.1. did not design or implement the Compliance Program;
 - 7.2.2. is not a present or past staff member or director of Fowler Homes;
 - 7.2.3. has not acted and does not act for, and does not consult and has not consulted to, Fowler Homes in any competition or consumer law related matters, other than performing Reviews under this Undertaking; and
 - 7.2.4. has no significant shareholding or other interests in Fowler Homes.
 - 7.3. **Evidence** – Fowler Homes 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 Fowler Homes’ possession or control, including without limitation:
 - 7.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of Fowler Homes;
 - 7.3.2. documents relating to Fowler Homes’ Compliance Program, including documents relevant to Fowler Homes’ Complaints Handling System, and Staff Training; and
 - 7.3.3. any reports made by the Compliance Officer to Fowler Homes’ Managing Director regarding Fowler Homes’ Compliance Program.
 - 7.4. Fowler Homes will ensure that a Review is completed within 18 months of this Undertaking coming into effect and that a subsequent review is completed within another 18 months.

Compliance Reports

8. Fowler Homes 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 Fowler Homes (**the Compliance Report**):

- 8.1. whether the Compliance Program of Fowler Homes includes all the elements detailed in paragraphs 1-6 above, and if not, what elements need to be included or further developed;
- 8.2. whether the Staff Training is effective, and if not, what aspects need to be further developed;
- 8.3. whether Fowler Homes' Complaints Handling System is effective, and if not, what aspects need to be further developed; and
- 8.4. whether there are any material deficiencies in Fowler Homes' 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/s¹.

Fowler Homes' response to Compliance Reports

9. Fowler Homes will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
 - 9.1. provides the Compliance Report to the Managing Director of Fowler Homes; and
 - 9.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to Fowler Homes' Managing Director identifying how Fowler Homes can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
10. Fowler Homes 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

11. Where a Material Failure has been identified by the Reviewer in the Compliance Report, Fowler Homes will:
 - 11.1. provide a copy of that Compliance Report to the ACCC within 30 days of Fowler Homes' Managing Director receiving the Compliance Report; and
 - 11.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
 - 11.3. otherwise outline the steps Fowler Homes 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

¹ 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

12. Fowler Homes will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
13. If requested by the ACCC during the period of five years, Fowler Homes will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 13.1. an outline of the Complaints Handling System;
 - 13.2. details of any complaints made and Fowler Homes' response to those complaints, which are recorded, stored, and responded to in accordance with the Complaints Handling System;
 - 13.3. Staff Training materials;
 - 13.4. all Compliance Reports that have been completed at the time of the request; and
 - 13.5. copies of the reports to Fowler Homes' Managing Director referred to in paragraphs 6 to 9 above.

ACCC Recommendations

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