

**COMPETITION AND CONSUMER ACT 2010**

Undertaking to the Australian Competition and Consumer Commission (**the ACCC**)  
given for the purposes of section 87B of  
the *Competition and Consumer Act 2010* (**the Act**)

by

Mr Peifa Philip Wu

and

Mr Graeme Andrew Faulkner

**Persons giving this undertaking**

- (1) This undertaking is given to the ACCC by Mr Peifa Philip Wu (**Mr Wu**) and Mr Graeme Andrew Faulkner (**Mr Faulkner**), both of 308 Holmes Road, Forrestfield, Western Australia, for the purposes of section 87B of the Act.

**Background**

- (2) Mr Wu and Mr Faulkner carry on business in partnership as a wholesale importer and distributor of aquarium products under the registered business name AquaDepot Imports (**AquaDepot**).
- (3) On 4 August 2010, Mr Wu sent an email on behalf of AquaDepot to a corporation that was a retailer of AquaDepot's products, which stated:

*below is the standard message to all retailers...Please note that by paying for your TUNZE order, you are agreed to retail the products no more than +-10% difference from this retail list. TUNZE head office and AquaDepot Imports as the distributor for Australia reserve the right to change the discount rate for those reselling lower than 10% from this retail pricing.'*

- (4) On 18 October 2010, Mr Wu sent an email on behalf of AquaDepot to the retailer which stated:

*Dear all retailers in Australia for the Vertex range products...Please also note that the retail of this range must be within 10%+- from the recommended retail pricing. Selling any items lower than 10% of the RRP might result in being refused for supply. Thanks for your understanding.*

- (5) On 29 October 2010, Mr Wu sent an email on behalf of AquaDepot to the retailer which stated:

*Hi dear AquaDepot customer...Please stay + - 5% from the recommended retail pricing. Retailing for less than 10% from the R/R will result in not supplied.*

- (6) On or about 12 January 2011, AquaDepot ceased supply of products to the retailer.

**Conduct of concern**

- (7) The ACCC considers that by engaging in the conduct described in paragraphs 2 to 6 above Mr Wu and Mr Faulkner, trading as AquaDepot, have contravened section 48 of the Act by:
- (a) making it known to a retailer that AquaDepot would not supply it with Vertex and Tunze brand aquarium goods, unless it agreed not to sell those goods at prices lower than ten per cent below AquaDepot's recommended retail prices;
  - (b) inducing, or attempting to induce, a retailer not to sell Vertex and Tunze brand aquarium goods at prices that were lower than ten per cent below AquaDepot's recommended retail prices;
  - (c) entering into an agreement, or offering to enter into an agreement, with a retailer for the supply of Tunze brand aquarium goods containing a term to the effect that the retailer would not sell those goods at prices that were lower than ten per cent below AquaDepot's recommended retail prices; and
  - (d) withholding the supply of Vertex and Tunze brand aquarium goods from a retailer for the reason that that retailer advertised Vertex goods for sale at prices that were lower than ten per cent below AquaDepot's recommended retail prices.
- (8) Mr Wu and Mr Faulkner admit that the conduct described at paragraphs 2 to 6 above is likely to have contravened section 48 of the Act
- (9) In response to concerns raised by the ACCC, Mr Wu and Mr Faulkner have ceased the conduct, and have informed the retailer in question that AquaDepot will reinstate its supply of Vertex and Tunze products. Mr Wu and Mr Faulkner have also offered these court enforceable undertakings to the ACCC pursuant to section 87B of the Act.

**Commencement of undertaking**

- (10) This undertaking comes into effect when:
- (a) the undertaking is executed by Mr Wu and Mr Faulkner; and
  - (b) the ACCC accepts the undertaking so executed.

- (11) Upon the commencement of this undertaking, Mr Wu and Mr Faulkner jointly and severally undertake to assume the obligations set out in paragraphs 12(a) to (f) below.

### **Undertakings**

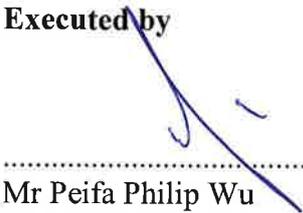
- (12) Mr Wu and Mr Faulkner each undertake for the purposes of section 87B of the Act:
- (a) that for a period of three years they will not:
    - (i) make it known to any retailer that they will not supply goods to the retailer, unless the retailer agrees not to sell those goods at a price less than a price specified by them;
    - (ii) induce, or attempt to induce, any retailer not to sell goods at a price less than a price specified by them;
    - (iii) enter into an agreement, or offer to enter into an agreement, with any retailer for the supply of goods containing a term to the effect that the retailer will not sell those goods at prices lower than a price specified by them; and
    - (iv) withhold the supply of goods from any retailer for the reason that the retailer advertised goods obtained from them for sale at a price lower than a price specified by them;
  - (b) that they will, at their own expense, within 14 days of this undertaking coming into effect, arrange for a letter to be sent on behalf of AquaDepot in the terms of **Annexure A** to each retailer supplied by AquaDepot from 1 June 2010 to 30 June 2011 (**the Retailers Letter**);
  - (c) that they will, within 28 days of this undertaking coming into effect, provide the ACCC a report setting out a list of retailers that have been sent the Retailers Letter, and the date that it was sent, by way of a statutory declaration given by Mr Wu or Mr Faulkner;
  - (d) that they will, within 14 days of this undertaking coming into effect, arrange for the corrective notice set out in **Annexure B** to be published on behalf of AquaDepot on the website (<http://www.aquadepot.com.au>) so that it:
    - (i) shall be viewable by clicking a 'click-through' icon located at the top of the homepage of the website, which contains the words 'Resale Price Maintenance by AquaDepot Imports – Corrective Notice' prominently in white text on a black background, accompanied by the words 'click here';
    - (ii) shall occupy the entire webpage that is accessed via the 'click-through' icon;

- (iii) is displayed for a continuous period of four weeks; and
  - (iv) contains a hyperlink to the website [www.accc.gov.au](http://www.accc.gov.au).
- (e) that they will, within 14 days of this undertaking coming into effect, arrange for a new 'announcement' to be created on behalf of AquaDepot on the AquaDepot Imports Individual Business Forum of the Marine Aquarium Society of Australia webpage, located at <http://www.masa.asn.au/phpBB3/viewforum.php?f=143&start=0> so that it:
- (i) is entitled 'Breach of the Competition and Consumer Act by AquaDepot Imports – corrective notice';
  - (ii) contains the text of the corrective notice set out in **Annexure B**;
  - (iii) is displayed for a continuous period of four weeks; and
  - (iv) contains a hyperlink to the website [www.accc.gov.au](http://www.accc.gov.au)
- (f) that within three months of this undertaking coming into effect, and thereafter at least once a year for the period of three years from the commencement of this undertaking, Mr Wu and Mr Faulkner will attend practical training focusing on Part IV, Division 2, of the Act. In addition, Mr Wu and Mr Faulkner will:
- (i) ensure that the training is administered by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law; and
  - (ii) provide a written statement or certificate from the trade practices professional who conducts the training to the ACCC within 14 days of completion of the training verifying that such training has occurred.

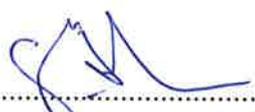
### **Acknowledgments**

- (13) Mr Wu and Mr Faulkner acknowledge 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 the 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 by

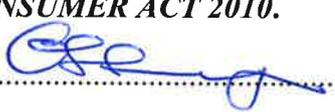
  
.....  
Mr Peifa Philip Wu

This.....20.....day of.....July.....2011

  
.....  
Mr Graeme Andrew Faulkner

This.....20.....day of.....July.....2011

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION PURSUANT TO SECTION 87B OF THE *COMPETITION AND  
CONSUMER ACT 2010.***

  
.....  
Graeme Julian Samuel  
Chairman

This.....28.....day of.....July.....2011

**ANNEXURE A**  
**LETTER TO AQUADEPOT RETAILERS**

[To be placed on AquaDepot letterhead] [To AquaDepot Retailer] [insert address]

Dear Sir/madam (or personalise)

**Re: Recent action by the Australian Competition and Consumer Commission (ACCC)**

Between August 2010 and October 2011, we, Peifa Philip Wu and Graeme Andrew Faulkner of AquaDepot Imports (**AquaDepot**), sent emails to a retailer stating that if the retailer advertised our products at a price lower than 5 – 10% below our recommended retail prices, that retailer would no longer be supplied by AquaDepot. In January 2011, AquaDepot ceased supply to that retailer, because the retailer had advertised products purchased from AquaDepot at prices lower than 5 – 10% below the AquaDepot recommended retail prices.

The ACCC contacted AquaDepot and expressed the concern that by engaging in the above conduct, we were likely to have engaged in resale price maintenance in breach of section 48 of the *Competition and Consumer Act 2010 (the Act)*.

Resale price maintenance is an attempt by a supplier (such as AquaDepot) to set a minimum price below which its retailers cannot sell, advertise, display or offer for goods for sale. It is prohibited by section 48 of the Act, regardless of whether the goods are being sold online, or in a traditional retail store.

In response to the ACCC's concerns, AquaDepot has admitted that the above conduct is likely to have contravened the Act, and has agreed to cease the conduct and offered to reinstate the supply of the affected retailer. We have also provided court enforceable undertakings to the ACCC to avoid any further contraventions in the future. We are writing to you pursuant to those undertakings, which are available to be viewed on the ACCC's undertakings register at [www.accc.gov.au](http://www.accc.gov.au).

Please note that as a retailer of AquaDepot products, you are free to set the minimum price at which you advertise or resell products purchased from AquaDepot. Any 'recommended retail price' or 'RRP' set or used by AquaDepot (or any other supplier) is a suggestion only.

You can obtain further information about the Act from the ACCC website at [www.accc.gov.au](http://www.accc.gov.au).

Yours sincerely

Peifa Philip Wu & Graeme Andrew Faulkner  
AquaDepot Imports

## AN IMPORTANT MESSAGE FROM AQUADEPOT IMPORTS

Between August 2010 and October 2011, Peifa Philip Wu and Graeme Andrew Faulkner of AquaDepot Imports (**AquaDepot**), sent emails to a retailer stating that if the retailer advertised our products at a price lower than 5 – 10% below our recommended retail prices, that retailer would no longer be supplied by AquaDepot. In January 2011, AquaDepot ceased supply to that retailer, because the retailer had advertised products purchased from AquaDepot at prices lower than 5 – 10% below AquaDepot's recommended retail prices.

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