

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Concise Statement
File Number:	VID971/2017
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v JJ RICHARDS & SONS PTY LTD (ACN 000 805 425)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 6/09/2017 4:29:38 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Concise Statement

No. VID of 2017

Federal Court of Australia  
District Registry: Victoria  
Division: General

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

**JJ RICHARDS & SONS PTY LTD (ACN 000 805 425)**

Respondent

### IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 The Applicant (the **ACCC**) alleges that since at least 13 November 2016, the Respondent (**JJ Richards**) has entered into standard form contracts with small businesses containing unfair contract terms within the meaning of s 23 of the *Australian Consumer Law* (**ACL**, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)). The claims involve JJ Richards' dealings with its customers and prospective customers.

### JJ RICHARDS' STANDARD FORM CONTRACTS

- 2 During the period 13 November 2016 to at least 26 April 2017 (the **Relevant Period**), JJ Richards conducted a business, in trade or commerce, providing waste management services (**JJR Waste Management Services**).
- 3 Since at least 13 November 2016, JJ Richards has entered into contracts with small business customers (**JJR Customers**), for the provision of JJR Waste Management Services. Small business customers are those who, at the time the relevant contract is entered into, employ fewer than 20 persons and the upfront price payable under the contract is less than \$300,000 and therefore the contracts with JJR Customers are small business contracts within the meaning of s 23(4) of the ACL.
- 4 During the Relevant Period, JJ Richards presented prospective JJR Customers for JJR Waste Management Services with pro forma contract terms entitled 'Terms and Conditions'

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Filed on behalf of	Australian Competition and Consumer Commission		
Prepared by	Graham Phillips		
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**(the Standard Terms).** An example contract using the Standard Terms is at Annexure A. The Standard Terms have been reproduced at Annexure B to aid legibility.

- 5 Where those prospective JJR Customers entered into a contract with JJ Richards for the provision of JJR Waste Management Services, the Standard Terms formed part of a standard form contract within the meaning of s 27 of the ACL.
- 6 The Standard Terms included terms relating to automatic renewal (clause 1), price variation (clause 4), agreed times (clause 6), no credit without notification (clause 7), exclusivity (clause 9(i)), credit terms (clause 16), indemnity (clause 17) and termination (clause 18) **(the Impugned Terms).**

**The automatic renewal clause (clause 1)**

- 7 The automatic renewal clause binds the JJR Customer to subsequent contract terms, each equal to the initial contract term, unless the JJR Customer cancels the contract within 30 days before the end of the initial or any subsequent term.
- 8 The automatic renewal and limited period of time within which a JJR Customer can terminate the contract may result in JJR Customers inadvertently missing the opportunity to terminate the contract and therefore remaining contracted to JJ Richards for extensive periods with no opportunity to change to an alternative supplier during the term of the renewed contract.
- 9 In the context of the whole contract the automatic renewal clause creates a significant imbalance in the respective rights and obligations of the parties as JJR is more likely to be aware of when customers' contracts are coming up for renewal than the JJR Customers, who as small businesses have limited resources and competing demands that mean they may not have effective systems in place to identify the termination period for their waste management contract. The significant imbalance arising from the operation of this clause is exacerbated by the operation of certain of the other Impugned Terms, such as the price variation and termination clauses.
- 10 Contracts with JJR Customers are usually low value with a low marginal cost to JJ Richards for each additional customer. Consequently, the automatic renewal clause is not reasonably necessary to protect JJ Richards' legitimate interests.

**The price variation clause (clause 4)**

- 11 The price variation clause allows JJ Richards to unilaterally increase the price of the JJR Waste Management Services.
  - 12 The price variation clause creates a significant imbalance by allowing JJ Richards to unilaterally raise prices for any reason, without any corresponding right given to the customer to negotiate any change in the scope or scale of the service provided by JJ Richards or a lower price.
  - 13 Although JJ Richards' costs may increase for reasons beyond its control, the price variation clause goes beyond what is reasonably necessary in order to protect JJ Richards' legitimate
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interests. For example, the price variation clause would allow JJ Richards to increase its prices simply because it desired to increase its revenue or profitability.

- 14 If JJ Richards exercises its rights under the price variation clause a JJR Customer may be faced with higher costs for their service without any opportunity to negotiate or any corresponding benefit. Increased costs are likely to be detrimental to JJR customers, affecting their own profitability in circumstances where many small businesses operate with very tight margins. This detriment may be further exacerbated where operation of the automatic renewal clause and the termination clause have the potential to lock in customers for extended periods of time.

**The agreed times clause (clause 6)**

- 15 The agreed times clause removes any liability for JJ Richards where performance of the JJR Waste Management Services has been prevented or hindered, even where the JJR Customer is not in any way responsible for the prevention or hindrance.
- 16 The agreed times clause causes a significant imbalance in the parties' rights and obligations under the contract and goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests by absolving JJ Richards of its performance obligations and requiring JJR Customers to assume the risk of non performance under circumstances that they do not control, without any corresponding benefit to the JJR Customer.

**The no credit without notification clause (clause 7)**

- 17 The no credit without notification clause means JJ Richards can charge JJR Customers for services it has not rendered for reasons that are or may be beyond the JJR Customer's control. This causes a significant imbalance in the parties' rights and obligations under the contract. As JJ Richards is only required to use reasonable endeavours to perform collections at the agreed time due to the operation of clause 6, if JJ Richards attends the JJR Customer's premises at a different time and is unable to collect the waste for any reason, JJ Richards can still charge the JJR Customer. Further, the clause puts the onus on the JJR Customer to make a credit request, even if the non-performance is in no way the fault of the JJR Customer.
  - 18 The right to charge for services not rendered for reasons other than closure or lack of access at the agreed time of collection goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests. If JJ Richards attends a customer's premises at the agreed time but there is a fault with its equipment such that it is unable to collect the waste, it can still charge the JJR Customer.
  - 19 If JJ Richards fails to fulfil its obligations and relies on the no credit without notification clause, JJR Customers would be charged for services that were not supplied, causing them financial detriment. Further, the JJR Customer carries the administrative burden of making a credit request.
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**The exclusivity clause (clause 9(ii))**

- 20 The exclusivity clause requires JJR Customers to obtain all their waste management services from JJ Richards. This prevents JJR Customers from obtaining services from any alternative supplier, even when the customer is seeking additional services to those provided by JJ Richards.
- 21 Restricting JJR Customers from contracting with other parties for additional services causes a significant imbalance in the parties' rights and obligations under the contract as it removes JJR Customers' general right to contract with whomever they want. The exclusivity clause goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests.
- 22 Reliance by JJ Richards on this clause when a JJR Customer needs additional waste management services beyond those they have contracted for with JJ Richards, would prevent the JJR Customer from seeking a better or lower priced service, thereby causing the JJR Customer detriment.

**The credit terms clause (clause 16)**

- 23 The credit terms clause requires JJR Customers to pay for their account within 7 days and allows JJ Richards to suspend services if payment is not received. It also allows JJ Richards to continue charging the JJR Customer while services are suspended to cover costs associated with the overdue payment.
- 24 This term creates a significant imbalance in the parties' rights and obligations under the contract, as it confers no corresponding right on JJR Customers, such as the right to withhold payment for the failure to provide services.
- 25 The short credit term of seven days and the obligation on the JJR Customer to pay "normal charges" during suspension to cover expenses associated with the overdue payment without any limitations, irrespective of whether the JJ Richards had in fact incurred any expenses, goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests.
- 26 If JJ Richards were to rely on the credit terms clause, the extremely short time for payment means JJ Richards can suspend services for non-payment after only eight days and the JJR Customer would be required to pay for services where JJ Richards is not providing any JJR Waste Management Services to the JJR Customer.

**The indemnity clause (clause 17)**

- 27 The indemnity clause creates an unlimited indemnity in favour of JJ Richards, even where the loss incurred by JJ Richards is not the fault of the JJR Customer. There is no corresponding benefit for the JJR Customer. This broad indemnity causes a significant imbalance in the parties' rights and obligations under the contract and goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests.
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- 28 Reliance on this term by JJ Richards if it suffered a loss as a result of conduct arising from circumstances beyond the JJR Customers' control would cause the JJR Customer financial detriment.

**Termination clause (clause 18)**

- 29 The termination clause prevents JJR Customers from terminating their contracts with JJR if they have payments outstanding and entitles JJ Richards to continue charging JJR Customers equipment rental after the termination of the contract, despite the fact that no services are provided.
- 30 This causes a significant imbalance in the parties' rights and obligations under the contract as the JJR Customer has no corresponding right and obtains no benefit from the term.
- 31 Where monies remain outstanding from a JJR Customer, JJ Richards could recover those funds through ordinary legal recovery processes. By enabling JJ Richards to continue to charge JJR Customers for equipment they no longer require, and that JJ Richards could collect through other means, this clause goes beyond what is reasonably necessary to protect JJ Richards' legitimate interests in recovering outstanding monies.
- 32 If JJ Richards relied on the termination clause the JJR Customer would suffer detriment by being charged unnecessary ongoing costs, thereby increasing their debt to JJ Richards. Further detriment may occur where a JJR Customer is prevented from terminating under this clause and the contract is then automatically renewed in accordance with clause 1.

**PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

- 33 The ACCC alleges that each of the Impugned Terms:
- (a) causes a significant imbalance in the parties' rights and obligations;
  - (b) is not reasonably necessary to protect the legitimate interests of JJ Richards; and
  - (c) would cause detriment to JJR Customers if relied on by JJ Richards.
- 34 The ACCC alleges that any Impugned Terms included in any contract with a JJR Customer for the provision of JJR Waste Management Services which contained the Standard Terms during the Relevant Period are unfair by virtue of s 24 of the ACL and void by virtue of s 23 of the ACL.

**RELIEF SOUGHT FROM THE COURT**

- 35 The ACCC seeks the relief set out in the accompanying Originating Application.

Date: 6 September 2017




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Signed by Graham Phillips

Lawyer for the Applicant

**Certificate of lawyer**

I, Graham Alan Phillips, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 6 September 2017



.....  
Signed by Graham Phillips

Lawyer for the Applicant

Released under FOI





SERVICE AGREEMENT

Tel No: (03) 9794 5722  
Fax No: (03) 8772 9590  
Website: www.jjrichards.com.au  
ABN: 40 000 805 425  
Address: PO BOX 207, Hampton Park 3976

Customer Number:

Agreement Date:

THIS FIVE YEAR AGREEMENT (In accordance with the Terms and Conditions) is between

J.J. Richards & Sons Pty Ltd

and

Trading as

Postal Address

Contact:

Tel No:

Fax No:

Mobile:

Email:

Service(s) located at

For the provision of

Please refer to the Original Agreement for the signature

Authority:

Position:

Signed Date:

Terms 7 Days from receipt of Invoice. Credit Claims within 7 Days.

**Terms and Conditions**

- 1 The Term. Both Parties agree the prices overleaf reflect a long-term relationship and that is the spirit of the agreement.  
**The term of this agreement shall be for an initial period of five years.**  
The term shall be automatically renewed for further periods of five years thereafter unless terminated by either party giving written notice within 30 days prior to the end of the initial term or any renewed term.
- 2 Competitive Pricing. During the term of the agreement, except during agreed fixed price periods, JJ Richards and Sons P/L (JJR) undertakes to consider any bona fide\* offer by another party in writing to the customer to perform the services described overleaf. At its discretion, JJR may offer a new five years contract at an agreed price for the services. If agreement cannot be reached for a new contract then the existing contract and terms and conditions will remain in place. Please note this clause does not apply to compaction equipment or where the capital value of the equipment supplied exceeds \$5000.
- \* For the purpose of this agreement a 'Bona Fide Offer' is an offer from a competitors regular price list provided in writing on company letterhead and excludes any specials or discounted offers that are uncommercial, predatory or under-cost.
- 3 Ownership. The customer acknowledges that unless purchased through a separate agreement, equipment remains the property of JJR at all times.
- 4 Price Variations. JJR may adjust its prices during the term of the agreement for reasons such as but not limited to increased operation costs, changes in disposal fees, site profitability, changes to disposal facility locations or increased government charges and levies by giving customers 30 days notice of such increase.
- 5 Scheduled Runs. The prices quoted are for pickups on a regular scheduled run. JJR will attempt to schedule the pickup for a time suitable to the customer. If the customer requires a pickup at a time that does not fit into a scheduled run additional charges may apply.
- 6 Agreed Times. JJR will use all reasonable endeavours to perform the collection at the times agreed but accepts no liability where such performance is prevented or hindered in any way.
- 7 No credit without notification. Unless previously notified JJR shall be entitled to render charges for the service if it attends the customer's premises and is unable to perform the service due to holiday closure, lack of access or other reason. All credit requests must be within 14 days of invoice date.
- 8 Change of address not to invalidate. If the customer changes address this agreement will remain in effect at the new address and JJR will transport the equipment at it's expense. All installation costs at the new site, if applicable, are to be paid by the customer.
- 9 The customer agrees to:
- a) Not compact waste except where the equipment provided is compaction equipment.
  - b) Maintain the equipment in a fit for purpose and sanitary condition.
  - c) Instruct all personnel in the safe and proper use of the equipment.
  - d) Not remove the equipment from the site to which it was delivered without permission.
  - e) Not deface or otherwise damage the equipment.
  - f) Reimburse JJR for the cost of repairs for damage to the equipment while in direct control or possession of the customer except for fair wear and tear.
  - g) Inform JJR if the equipment is damaged, in a dangerous condition or in need of repair.
  - h) Inform JJR of the presence of any possible contaminants within the waste which may put JJR staff, equipment or the public at risk.
  - i) Grant JJR exclusive rights to the removal of waste, recyclables, combustible liquids and dangerous goods from the premises specified and not engage a second party for waste, recyclables, combustible liquids and dangerous goods removal during the term of this agreement.
- 10 Ground Surfaces. The customer warrants the ground surfaces traversed by JJR's vehicles are suitable for the purpose and acknowledges JJR will not be liable for any damage resulting except in a case of gross negligence by JJR.
- 11 Weight. The customer acknowledges that the weight of the waste deposited in the equipment shall not exceed 80 kilograms per cubic metre. Excessive weight may be invoiced as an extra charge at the discretion of JJR.
- 12 Allowable Waste Only. The customer shall ensure no flammable, combustible, regulated, prescribed, hazardous or dangerous goods are placed in the equipment provided, unless specifically cited in a written agreement with JJR. The Company, including its directors, officers, agents and employees shall not be held responsible for the incorrect and unauthorised disposal of such goods in the provided equipment.
- 13 Collection of Combustible Liquid. Combustible Liquid will be collected from the customer, for the Price, if it contains less than 10% water or coolant (calculated either separately or as a mixture). If the Combustible Liquid contains greater than 10% water or coolant (calculated either separately or as a mixture) the Customer will be charged an additional collection fee dependent on the level of contamination present which will be determined at the complete discretion of JJR.
- 14 Undisclosed Contaminants. All waste streams covered by this agreement will be deemed contaminated if the product as described by the Customer contains Undisclosed Contaminants which may include but are not limited to Flammable Liquid and Polychlorinated Biphenyls (PCBs). Additional charges may apply. For the purpose of this agreement:
- a) 'Combustible Liquid' means as a liquid that has a flash point of greater than 60.5 degrees Celsius.
  - b) 'Flammable Liquid' means a liquid that has a flash point of less than or equal to 60.5 degrees Celsius.
  - c) 'Undisclosed Contaminants' means a chemical or compound that was not disclosed or is above the level disclosed to JJR by the customer.
- 15 Dangerous Goods. The Customer is responsible for identifying the type, nature and quantity of dangerous goods to be collected including the provision of a Material Safety Data Sheet and/or laboratory analysis. All dangerous goods must be correctly marked, labelled and packaged prior to collection.
- 16 Credit terms 7 days. The customer agrees to pay for the service subject to the credit terms and acknowledges service may be suspended if payment is not received. During the period of suspension normal charges will apply to cover expenses associated with the overdue payment including but not limited to, interest, administration, legal and equipment capital return.
- 17 Indemnity. To the maximum extent permitted by law, the customer shall be responsible for and indemnify JJR from and in respect of all liabilities, claims, damages, actions, costs and expenses which may be incurred by JJR on a full indemnity basis (whether successful or not) as a result of or arising out of or otherwise in connection with this agreement, including any breach by the customer of any of the warranties, covenants and conditions herein.
- 18 No termination without final payment. Payment in full of all monies outstanding must be made before this agreement can be terminated. The equipment will not be removed until such payment is made and rental for the equipment may be charged if delays in payment of the final account occur.

I acknowledge that I am authorised to sign and that I have read and understand the terms and conditions of this agreement

Signature: [REDACTED]

Authority: [REDACTED]

Position: [REDACTED]

Signed Date: [REDACTED]



## Annexure B

1. The Term. Both parties agree the prices overleaf reflect a long-term relationship and that is the spirit of the agreement.

**The term of this agreement shall be for an initial period of five years.**

The terms shall be automatically renewed for further periods of five years thereafter unless terminated by either party giving written notice within 30 days prior to the end of the initial term or any renewed term.

2. Competitive pricing. During the term of the agreement, except during agreed fixed price periods, JJ Richards and Sons (P/L) (JJR) undertakes to consider any bona fide\* offer by another party in writing to the customer to perform the services described overleaf. At its discretion, JJR may offer a new five years contract at an agreed price for the service. If agreement cannot be reached for a new contract then the existing contract and terms and conditions will remain in place. Please note this clause does not apply to compaction equipment or where the capital value of the equipment supplied exceeds \$5000.

\* For the purpose of this agreement a 'Bona Fide Offer' is an offer from a competitors regular price list provided in writing on company letterhead and excludes any specials or discounted offers that are uncommercial, predatory or under-cost.

3. Ownership. The customer acknowledges that unless purchased through a separate agreement, equipment remains the property of JJR at all times.
  4. Price Variations. JJR may adjust its prices during the term of the agreement for reasons such as but not limited to increased operation costs, changes in disposal fees, site profitability, changes to disposal facility locations or increased government charges and levies by giving customers 30 days notice of such increase.
  5. Scheduled Runs. The prices quoted are for pickups on a regular scheduled run. JJR will attempt to schedule the pickup for a time suitable to the customer. If the customer requires a pickup at a time that does not fit into a scheduled run additional charges may apply.
  6. Agreed Times. JJR will use all reasonable endeavours to perform the collection at the times agreed but accepts no liability where such performance is prevented or hindered in any way.
  7. No credit without notification. Unless previously notified JJR shall be entitled to render charges for the service if it attends the customer's premises and is unable to perform the service due to holiday closure, lack of access or other reason. All credit requests must be within 14 days of invoice date.
  8. Change of address not to invalidate. If the customer changes address this agreement will remain in effect at the new address and JJR will transport the equipment at it's expense. All installation costs at the new site, if applicable, are to be paid by the customer.
  9. The customer agrees to:
    - a. Not compact waste except where the equipment provided is compaction equipment.
    - b. Maintain the equipment in a fit for purpose and sanitary condition.
    - c. Instruct all personnel in the safe and proper use of the equipment.
    - d. Not remove the equipment from the site to which it was delivered without permission.
    - e. Not deface or otherwise damage the equipment.
    - f. Reimburse JJR for the cost of repairs for damage to the equipment while in direct control or possession of the customer except for fair wear and tear.
    - g. Inform JJR if the equipment is damaged, in a dangerous condition or in need of repair.
    - h. Inform JJR of the presence of any possible contaminants within the waste which may put JJR staff, equipment or the public at risk.
    - i. Grant JJR exclusive rights to the removal of waste, recyclables, combustible liquids and dangerous goods from the premises specified and not engage a second party for waste, recyclables, combustible liquids and dangerous goods removal during the term of this agreement.
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10. **Ground Surfaces.** The customer warrants the ground surfaces traversed by JJR's vehicles are suitable for the purpose and acknowledges JJR will not be liable for any damage resulting except in a case of gross negligence by JJR.
  11. **Weight.** The customer acknowledges that the weight of the waste deposited in the equipment shall not exceed 80 kilograms per cubic metre. Excessive weight may be invoiced as an extra charge at the discretion of JJR.
  12. **Allowable Waste Only.** The customer shall ensure no flammable, combustible, regulated, prescribed, hazardous or dangerous goods are placed in the equipment provided, unless specifically cited in a written agreement with JJR. The Company, including its directors, officers, agents and employees shall not be held responsible for the incorrect and unauthorised disposal of such goods in the provided equipment.
  13. **Collection of Combustible Liquid.** Combustible Liquid will be collected from the customer, for the Price, if it contains less than 10% water or coolant (calculated either separately or as a mixture). If the Combustible Liquid contains greater than 10% water or coolant (calculated either separately or as a mixture) the Customer will be charged an additional collection fee dependent on the level of contamination present which will be determined at the complete discretion of JJR.
  14. **Undisclosed Contaminants.** All waste streams covered by this agreement will be deemed contaminated if the product as described by the Customer contains Undisclosed Contaminates which may include but are not limited to Flammable Liquid and Polychlorinated Biphenyls (PCBs). Additional charges may apply. For the purpose of this agreement:
    - a. 'Combustible Liquid' means as a liquid that has a flash point of greater than 60.5 degrees Celsius.
    - b. 'Flammable Liquid' means a liquid that has a flash point of less than or equal to 60.5 degrees Celsius.
    - c. 'Undisclosed Contaminants' means a chemical or compounds that was not disclosed or is above the level disclosed to JJR by the customer.
  15. **Dangerous Goods.** The Customer is responsible for identifying the type, nature and quantity of dangerous goods to be collected including the provision of a Material Safety Data Sheet and/or laboratory analysis. All dangerous goods must be correctly marked, labelled and packaged prior to collection.
  16. **Credit terms 7 days.** The customer agrees to pay or the service subject to the credit terms and acknowledges service may be suspended if payment is not received. During the period of suspension normal charges will apply to cover expenses associated with the overdue payment including but not limited to interest, administration, legals and equipment capital return.
  17. **Indemnity.** To the maximum extent permitted by law, the customer shall be responsible for and indemnify JJR from and in respect of all liabilities, claims, damages, actions, costs and expenses which may be incurred by JJR on a full indemnity basis (whether successful or not) as a result of or arising out of or otherwise in connection with this agreement, including any breach by the customer of any of the warranties, covenants and conditions herein.
  18. **No termination without final payment.** Payment in full of all monies outstanding must be made before this agreement can be terminated. The equipment will not be removed until such payment is made and rental for the equipment may be charged if delays in payment of the final account occur.
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