



The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001
Email: adjudication@accc.gov.au

Your reference

Our reference

ACW/ACW/347643/5
AUM/1207101894.1

1 August 2014

By Post and Email

Dear General Manager

**NOTIFICATION OF THIRD LINE FORCING CONDUCT -
SUSTAINABILITY PTY LTD**

Please find enclosed:

- a Form G providing notification of third line forcing conduct proposed to be undertaken; and
- a cheque for \$100 made out to the Australian Competition and Consumer Commission, being the lodgment fee in respect of the above form.

Please contact Alec White on 03 9274 5144 should you wish to discuss.

Yours sincerely

Terence John O'Connor
Chief Executive Officer
Sustainability Pty Limited

Enc

Cc

Tony Webster-Smith
PICS Auditing

By email only: twebstersmith@picsauditing.com

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Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

- (a) Name of person giving notice:

Sustainability Pty Ltd (ABN 55 093 725 118) (**Sustainability**)

- (b) Short description of business carried on by that person:

Sustainability provides a diverse range of professional consulting services in relation to matters including personnel health and safety, the environment and the community in which businesses operate. These services include the provision of expertise in risk management, HSEQ Auditing, training, learning, development, maintenance and operations business systems.

- (c) Address in Australia for service of documents on that person:

Unit 3 / 118 Flora Terrace

North Beach WA 6020

Australia

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

All services provided by Sustainability and PICS Auditing Pty Ltd (**PICS**) as part of the process under which Sustainability procures that work is undertaken by third party sub-contractors.

- (b) Description of the conduct or proposed conduct:

Sustainability will not acquire services from third party sub-contractors unless they have obtained pre-approval from PICS. Pre-approval involves an assessment by PICS of the degree to which the third party sub-contractors comply with the contracting policies of Sustainability, including in respect of policies concerning matters such as qualifications, licensing requirements, insurance and health and safety. Third party sub-contractors

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register with PICS, provide various documentation and information and pay certain fees, in order that PICS can assess the extent to which the third party sub-contractor complies with the relevant policies and, where appropriate, grant pre-approval to the third party sub-contractor. Attachment 1 contains the letter which Sustainability proposes to send to its potential third party sub-contractors advising of the requirement to register with PICS in order to be considered for work.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:
Third party sub-contractors who may potentially undertake work for Sustainability.
- (b) Number of those persons:
 - (i) At present time:
More than 50.
 - (ii) Estimated within the next year:
More than 50.
- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:
Not applicable.

4. Public benefit claims

- (a) Arguments in support of notification:
Refer to attached submission.
- (b) Facts and evidence relied upon in support of these claims:
Refer to attached submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Refer to attached submission.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:

Refer to attached submission.

- (b) Facts and evidence relevant to these detriments:

Refer to attached submission.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Terence John O'Connor

Dated 1st August 2014

Signed by/on behalf of the applicant



(Signature)

Terence John O'Connor
(Full Name)

Sustainability Pty Limited
(Organisation)

Chief Executive Officer
(Position in Organisation)

Submission

Background

Sustainability frequently subcontracts work to third party sub-contractors. Sustainability has a number of policies and procedures that it requires third party sub-contractors to comply with such as, for example, requirements concerning occupational health and safety, environmental, anti-bribery and corruption.

PICS provides a service which assists in managing and monitoring the compliance of third party sub-contractors with those policies and procedures. In particular, PICS hosts an exchange platform through which third party sub-contractors can provide information and documentation regarding their compliance with those policies and procedures. PICS assesses the extent to which third party sub-contractors are compliant with those policies and procedures.

In order to obtain the full benefit of the efficiencies created by the PICS exchange platform, Sustainability intends to only acquire services from third party sub-contractors that have obtained pre-approval from PICS. This has the effect that all potential third party sub-contractors are required to register with PICS and provide the necessary documentation and information to enable PICS to assess the compliance of those third party sub-contractors.

The parties are notifying the Commission on the basis that there exists a technical risk that such an approach may be characterised as comprising third line forcing pursuant to sections 47(6) or 47(7) of the *Competition and Consumer Act 2010 (Cth) (Act)*. Sustainability and PICS believe that there are considerable public benefits arising from this conduct and no material public detriments such that the Commission may permit this notification to stand in accordance with sections 93(3A) and 93(7A) of the Act.

Public Benefit Claims

The notified conduct gives rise to a number of public benefits including the following:

1. Efficiency of contracting by Sustainability:

Sustainability subcontracts a large amount of work using a large number of third party sub-contractors. Third party sub-contractors undertaking such work must comply with a number of policies and procedures such as those outlined above. The service provided by PICS would enable Sustainability to easily see which of its potential third party sub-contractors comply with its policies and procedures and could thus be contracted to provide work.

As such, this service would be efficiency enhancing by removing the need for Sustainability to check the compliance status of a large number of potential third party sub-contractors for each of the many pieces of work that it outsources and therefore freeing up its employees to award contracts more quickly and with greater focus on other aspects of the contract.

2. *Efficiency for third party sub-contractors in standardised management and monitoring of compliance issues*

Third party sub-contractors seeking to undertake work for Sustainability are required to comply with a number of policies and procedures. The service provided by PICS would enable those third party sub-contractors to easily provide the information and documentation necessary to demonstrate compliance with those policies and procedures. Further, it would remove the need for such documentation and information to be provided more than once, even if the third party sub-contractor was tendering for multiple projects with Sustainability or other clients of PICS.

As such, the service provided by PICS would be efficiency enhancing by decreasing the administrative burden on third party sub-contractors of ensuring compliance with the policies and procedures of Sustainability

3. *Efficiency of information flow between Sustainability and third party sub-contractors:*

Sustainability has a number of policies and procedures which must be complied with by a number of third party sub-contractors.

It is necessary for all potential third party sub-contractors to demonstrate that they comply with each of the relevant policies and procedures in order to be considered for work. The service provided by PICS would increase the efficiency of that process because of the standardised and easy to use format in which the information is provided to Sustainability.

4. *Improved quality of work undertaken by third party sub-contractors*

Increasing the efficiency of the contracting process has the potential to result in higher quality work being undertaken by third party sub-contractors for a number of reasons including the following. First, those third party sub-contractors can shift resources from administrative issues such as demonstrating compliance with certain contracting policies to the completion of the substantive work. Second, the fast provision, and easy to use format, of the compliance information provided by PICS places Sustainability in a better position to choose the best third party sub-contractor to undertake the work. Third, reducing the cost of compliance may allow the parties to spend

a larger percentage of their respective budgets on the substantive work being undertaken.

5. *Consistency of assessment of contractors*

The service provided by PICS allows for the assessment of the compliance of third party sub-contractors to be undertaken on a consistent basis by dedicated, full time professional staff that are solely dedicated to the task. This comprises a benefit for both Sustainability and the third party sub-contractors.

It is not easy to quantify the value of these benefits. As such, Sustainability has not sought to do so.

Market definition

The markets relevant to the notification are the markets for:

1. the supply and acquisition of third party contracting services; and
2. the supply of services to manage and monitor compliance with contracting policies of entities acquiring services from third party sub-contractors.

Public detriments

The notified conduct does not give rise to any public detriment of significance. In this regard, it is useful to explain the following in order to remove any potential misconceptions:

1. *Requirement for third party sub-contractors to deal with a separate supplier of services to manage and monitor compliance with policies and procedures such as PICS:*

Under the proposed arrangements, third party sub-contractors would be required to register with PICS and provide various documentation and information. At a superficial level, this would place an administrative burden on third party sub-contractors and may result in some third party sub-contractors being ineligible to receive certain work from Sustainability.

However, absent the pre-approval review undertaken by PICS, Sustainability would need to undertake an equivalent review. To facilitate that review, each third party sub-contractor would have to submit the same documents and information to Sustainability and Sustainability employees would have to spend time undertaking the review. In consequence, the arrangements are not likely not create any additional administrative burden or reduce to any material degree the number of third party sub-contractors that are able to undertake work for Sustainability.

2. *Requirement for third party subcontractors to deal with PICS rather than alternative suppliers of services to manage and monitor compliance with policies and procedures:*

Sustainability is able to harness the full efficiencies of the service offered by PICS by ensuring that its potential third party sub-contractors are all registered with PICS. As such, the use by Sustainability of a single supplier of services to manage and monitor compliance with policies and procedures enhances the efficiency of the proposed arrangements.

3. *No reduction in competition arising from the proposed arrangements*

The degree of competition in the market for the supply of third party contracting services is not diminished by the proposed conduct. Instead, the proposed conduct represents a more efficient means for the acquirer, and the suppliers, of third party sub-contracting services to monitor and manage compliance with the policies of the acquiring entity. For example, a third party sub-contractor which does not have up to date occupational health and safety certification would likely not achieve pre-approval. However, that same supplier would not have been likely to win a tender in the absence of the PICS process because the tenderer would have identified in reviewing the tender response that the supplier did not have that certificate (which may result in non-compliance with the tenderer's policies).

Indeed, the service provided by PICS is likely to improve efficiency in the market for the supply of third party sub-contracting services by making it easier for third party sub-contractors to ensure compliance with the relevant policies and by making it easier for tenderers to ensure compliance with those policies so that they can devote resources to other areas.

The degree of competition in the market for the supply of services to monitor and manage compliance is not diminished by the proposed conduct. This because there are a very large number of entities that acquire services from third party sub-contractors and the proposed conduct is only being undertaken by a single entity.

In consequence, the public benefits clearly outweigh the non-existent public detriments.

Attachment 1 - Proposed letter from Sustainability

ATTENTION:

Sustainability Contractors, Suppliers, Subcontractors, Vendors & Prospective Suppliers

Supplier Qualification Procedure

In an effort to improve the Health & Safety of our employees and suppliers, Sustainability has contracted with a third-party provider – PICS Auditing - to assist with their Supplier Prequalification process. We are confident the system will provide valuable services and benefits to our suppliers as you prequalify and / or maintain your Supplier qualification at Sustainability. Both Sustainability and PICS will strive to make the transition to the new system as seamless as possible for our suppliers.

The new system will commence immediately and we require all contractors, service suppliers, vendors, and subcontractors that service Sustainability to be registered in the PICS system by October 1, 2014 and all documentation must be completed for successful qualification by December 1, 2014.

Supplier Benefits

Using the PICS website (<http://supplier.picsauditing.com/SUSTAINABILITY>) will expedite the process for qualifying suppliers, service providers, and subcontractors. Benefits to suppliers who are members of PICS include:

- Exposure – Once registered in the PICS system, suppliers can search for additional business opportunities in the system. Your company and services will be readily available to large organizations that are a part of the PICS consortium.
- Assistance – PICS provides suppliers with individualized customer service to help complete the prequalification form, provide guidance on safety programs and address insurance questions and concerns.
- Consistency – Sustainability will apply the same qualification standard to all service providers.
- Cost Savings – PICS will improve process efficiencies, reduce overhead and improve communication.

Membership Fee

There is an annual membership fee and a one-time registration fee for new members. The annual membership is based on your client's requirements and the number of sites or business units where products & services are provided. The fee structure is available on the PICS website during the registration phase where your responses determine your cost based on the pricing schedule.

Please note the following registration process:

1. **Register Online** - Start by registering on the PICS website at <http://supplier.picsauditing.com> and select the Sustainability client site.
2. **Complete the Prequalification Form (PQF)** - The first part of the review process requires suppliers, service providers and subcontractors to complete and submit a prequalification form. Please note, if you are already a registered member with PICS, you must log in to the website, link your company to the Sustainability client site and complete the required information.



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NORTH BEACH WA 6920 Australia

3. **Upload Your Safety Documentation and Insurance Certificate.** Even if you have already provided Sustainability with a copy of your safety program and insurance certificate, please upload your current information on the PICS website. Be sure to verify that your insurance certificate meets the Sustainability insurance requirements before uploading.
4. **Respond to any Audit questions.** After your paperwork is submitted, PICS representatives will reach out and ask for any clarification or additional information after the Safety Manual Audit or review of the PQF. PICS is there to help provide guidance.
5. **Complete the Annual Updates.** Every January, you will need to update your PQF on your PICS account and provide your occupational safety statistics.

It is critical that you register and submit your prequalification information to PICS. If you have questions or concerns about this request, please contact PICS directly or notify your Sustainability representative immediately to discuss.

Registration must be completed by October 1, 2014 and qualified in the PICS system by 1st December 2014. Supplier HSE qualification is a requirement for ongoing work across the Sustainability Group.

If you have any questions, feel free to contact a customer service representative at PICS:

1800 502 142

Kind regards



General Manager, Operations



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