

**UNDERTAKING TO THE AUSTRALIAN
COMPETITION & CONSUMER COMMISSION
GIVEN PURSUANT TO SECTION 87B OF THE
TRADE PRACTICES ACT 1974**

BY

CANTERBURY CITY COUNCIL

■ PHILLIPS FOX ■
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Ref:LXT:1000436:NJC

1. **BACKGROUND**

1.1 On or about 3 June 1995, the Council of the City of Canterbury ("**the Council**") called for tenders for the provision of a house-to-house recycling collection service to premises within the City of Canterbury.

1.2 On 13 July 1995, the Council resolved:

"THAT the tender from Progressive Recycling Pty Ltd be accepted to provide the recycling service for a lump sum of \$1,334,961 for three years from 27 February, 1996 in accordance with the tender documents."

1.3 On 7 August 1995, the Council and Progressive Recycling Pty Limited (ACN 002 920 210) ("**Progressive Recycling**") entered into an 'Agreement for the Collection of Recyclable Material' ("**the Contract**").

1.4 Clause 3 of the Contract, entitled 'Ownership and Disposal', provided:

"3.1 All Recyclable Materials collected become the sole property of the Contractor.

3.2 All Recyclable Materials must be sold to buyers in accordance with the directions of the Local Government Recycling Co-Operative Limited.

3.3 The Council will at its discretion have the power to direct from time to time as to the place or places where the Contractor must dispose of the Recyclable Materials collected pursuant to the Agreement provided that the Council may not direct such disposal at any place at a radial distance greater than fifteen (15) kilometres from the Canterbury City Council Administration Centre, 137 Beamish Street, Campsie."

1.5 On 7 May 1999, the Australian Competition and Consumer Commission ("**the Commission**") wrote to the Council and expressed its concerns that the operation of Clause 3 of the Contract may, among other things, constitute exclusive dealing in contravention of section 47 of the **Trade Practices Act 1974** ("**the Act**").

1.6 On 31 May 1999, Phillips Fox, solicitors for the Council, wrote to the Commission:

1.6.1 Stating that, after discussions with Council's management, they formed the opinion that Clause 3.2 of the Contract contravenes section 47 of the Act; and

1.6.2 indicating that a substantially similar provision had been included in the Council's current agreement with Collex Waste Management Pty Limited (ACN 051 316 584) ("**Collex**") for the collection of recyclable material, dated 28 January 1999 ("**the Collex Contract**").

1.7 In order to address the Commission's concerns, the Council has agreed to give the Commission an Undertaking pursuant to section 87B of the Act, as set out below.

2. UNDERTAKING

2.1 The Council undertakes for the purposes of section 87B of the Act that it will hereafter, whether by itself, its management, employees, or agents:

2.1.1 Take all necessary and appropriate action to amend, vary or terminate any contract or other arrangement or understanding to which it is a party, which restricts another party's freedom to choose with whom, or in what, it deals, in contravention of section 47 of the Act.

2.1.2 Refrain from entering into any contract or other arrangement or understanding that restricts another party's freedom to choose with whom, or in what, it deals, in contravention of section 47 of the Act.

3. COMPLIANCE COMPONENT

3.1 The Council will take all reasonable steps necessary to create and maintain at its own expense, a trade practices compliance program. In summary the Council will –

3.1.1 Demonstrate commitment to a trade practices policy of compliance and embed a culture of compliance throughout the Council.

3.1.2 Analyse and respond to the trade practices matters resulting in this undertaking.

3.1.3 Identify risk areas for trade practices breaches and develop systems to eliminate or minimise these risks.

3.1.4 Provide practical and verifiable training for all relevant management and employees so that breaches and potential breaches may be prevented or otherwise detected, referred and acted upon.

3.2 In particular the Council will –

3.2.1 Implement this compliance program within thirty (30) days of the signing of the undertaking.

3.2.2 Ensure that the compliance program covers all managers, employees and agents of the Council whose duties could result in their being concerned in conduct that might breach the Act.

3.2.3 Send a message from the General Manager to all Council managers, employees and agents stating that the Council is committed to achieving compliance with the Act. This statement should indicate that there would be sanctions for non-observance of the Act.

3.2.4 Appoint a senior Council officer as Compliance Manager with overall responsibility for trade practices compliance. The Council shall advise the Commission within two (2) months of

the signing of the undertaking of the person appointed as Compliance Manager.

- 3.2.5 Ensure that the Compliance Manager is accountable to the Council for compliance issues. The Compliance Manager shall ensure that trade practices compliance becomes a standing agenda item at Council's meetings for its quarterly review of its Management Plan.
- 3.2.6 Put systems and procedures in place to ensure all compliance breaches are reported to the Compliance Manager immediately. When a breach is detected, all Council managers, employees and agents involved are to be immediately re-trained about their trade practices obligations and tested to ensure that they understand their obligations. Operating systems and procedures must be altered so as to prevent recurrence of the breach.
- 3.2.7 Keep an accurate record of compliance failures and complaints and of the rectification of such failures and compliance.
- 3.2.8 Where compliance issues or concerns are complex, ensure that the Compliance Manager immediately brings them to the attention of the Council's solicitors.
- 3.2.9 Ensure, for the period of three (3) years and thirty (30) days from the signing of the undertaking, that the Commission is notified within thirty (30) days of any appointment of a new senior Council officer to the position of Compliance Manager.
- 3.2.10 Produce a Compliance Manual containing:
 - (a) an explanation of the obligations imposed by the Act and how to avoid contravening the Act;
 - (b) a written policy of commitment to compliance with the Act;
 - (c) a description of how compliance with the Act will be achieved; and
 - (d) a disciplinary policy for breaches of the Act by relevant persons.
- 3.2.11 Provide the Commission with a copy of the Compliance Manual for approval within two (2) months of the signing of the undertaking. The Council shall make any changes reasonably requested by the Commission to the Compliance Manual, within one month of that recommendation.
- 3.2.12 Ensure all relevant Council employees, including those who administer contracts and tenders, and those responsible for producing advertising material, are provided with a copy of the Compliance Manual within thirty (30) days of the Commission's written notification of its approval.

- 3.2.13 Integrate compliance considerations into forms, contracts, administrative procedures and financial evaluations.
- 3.2.14 Arrange for all relevant Council employees, including those who administer contracts and tenders, and those responsible for producing advertising material, to attend a trade practices compliance seminar. This seminar shall be conducted by suitably qualified compliance professional(s) within three (3) months of the signing of the undertaking.

4. AUDIT REQUIREMENT

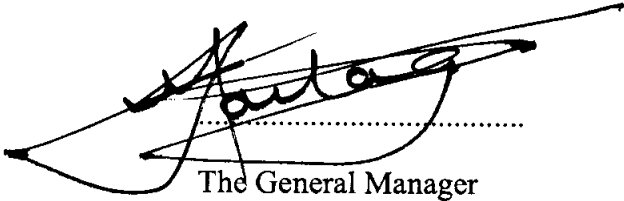
- 4.1 The Council will cause, at its own expense, an independent audit of its compliance program to be conducted annually from thirty (30) days after the date of acceptance of the undertaking for a period of 3 years. A suitably qualified compliance professional ("the auditor") who is entirely independent of the Council will carry out the audit. The auditor will qualify as independent on the basis that he or she:
 - 4.1.1 is not a present or past member or employee of the Council;
 - 4.1.2 has not acted or does not act for the Council;
 - 4.1.3 is not retained by the Council in any other capacity;
 - 4.1.4 has not and does not provide consultancy or other services for the Council; and
 - 4.1.5 has no other interest in the Council.
- 4.2 The auditor will review and report on –
 - 4.2.1 the Council's adherence to the undertaking;
 - 4.2.2 the implementation of the compliance program and the achievement of its objectives over the preceding twelve (12) months; and
 - 4.2.3 any recommended changes to the compliance program that may be necessary to ensure achievement of its objectives.
- 4.3 The date for the completion of the first such audit, and the provision of the auditor's report to the Commission shall be one year and 30 days after the signing of the undertaking. Consequently, audit reports shall be prepared and presented by or on the same date in each following year, with the last report due three (3) years and thirty (30) days after the signing of the undertaking.
- 4.4 The Commission shall review the recommendations contained in each audit report. Subject to Commission approval the Council shall implement the auditor's recommendations within one (1) month of the Commission's written notification of its approval. Within the same period, the Council shall also make any changes reasonably requested by the Commission to the compliance program.

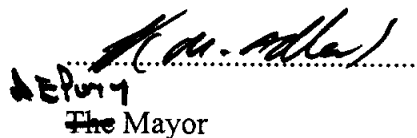
5. **ACKNOWLEDGEMENTS**

- 5.1 The Council acknowledges that the Commission will make this undertaking available for public inspection.
- 5.2 The Council further acknowledges that the Commission will from time to time publicly refer to this undertaking.
- 5.3 The Council further acknowledges that this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.
- 5.4 The Council further acknowledges that all audit reports and the trade practices compliance program as in force from time to time will be held with this undertaking on the Commission's public register.

IN WITNESS of these undertakings
and its agreement the common seal of the
CANTERBURY CITY COUNCIL
was hereunto affixed in pursuance of a resolution passed
by the said Council on the day of
2000

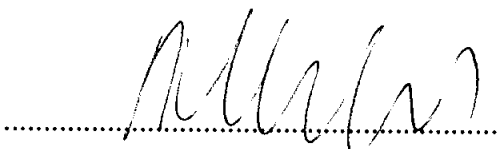



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The General Manager


.....
Deputy
The Mayor

This *eleventh* day of *May*, 2000

**ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT
1974**


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(Professor Allan Fels)
Chairperson

This *21* day of *May* 2000