

**TRADE PRACTICES ACT 1974 - SECTION 87B
UNDERTAKING**

D01/50176



1. Person Giving Undertaking

1.1 This undertaking is given to the Australian Competition and Consumer Commission ("the Commission") by Recruitment & Consulting Services Association Ltd ABN 41 0 78 606 416 ("RCSA") under section 87B of the *Trade Practices Act 1974* ("the Act").

2. Background

2.1 RCSA is a company limited by guarantee, whose members are recruitment agencies, private employment agencies and labour hire firms throughout Australia and New Zealand.

2.2 RCSA was formed with the objects of:

- (a) promoting and encouraging co-operation and amicable relations between members;
- (b) raising and promoting the professional status of members;
- (c) formulating and fostering ethical and procedural standards for the conduct of business of the nature of those conducted by members; and
- (d) promoting and protecting the interests of members etc.

2.3 RCSA has produced a Code of Ethics and Practice Models, which either:

- (a) contain exclusionary provisions insofar as they purport to impose various limitations or restrictions on the ability of members to supply or acquire services in a variety of situations;
- (b) contain provisions which lessen competition; or
- (c) maintain a price.

2.4 The provisions are:

"Code of Conduct

Principle 3 ...

Members will not solicit, lure, or entice candidates that they have placed within the previous 12 months or employees of clients with whom they have an ongoing business relationship.

Members will not encourage or entice temporary/contract staff or collude with clients to encourage temporary/contract staff to transition from the employment of one member to another member"

..."

Principle 9 ...

Members and their employees will not solicit, lure or endeavour to entice away clients or candidates associated with their previous employer for a period of six months from the cessation of employment.”

Principle 10 Members agree to abide by Professional Practice Models that RCSA issues from time to time.”

“Professional Practice Model No.1 – Effective Referral

When the RCSA is called upon to adjudicate on the disputed fee, the RCSA seeks to ascertain which member created the Effective Referral. In this regard the appointed Ethics Committee will consider:

...

It should also be ascertained from the applicant if they have recently been referred to that same prospective employer for that specific position through another personnel consultancy.

As long as the Guidelines below are adhered to, “THE CONSULTANT WHO EFFECTS THE INTERVIEW, WHICH EFFECTS THE JOB OFFER, IS ENTITLED TO THE FEE.”

...

It should be noted that a number of members include in their conditions of business a proviso that a fee shall be payable if a referred applicant is appointed to any position within that company or an associated company within a given time frame from the date of original referral. These terms can be considered only where an “EFFECTIVE REFERRAL” has been made”

“Professional Practice Model No.3 – Transition of Temporary Employees/Contractors

a. where a client organization has elected to use the services of one member (the incoming member) over the services of another member (the incumbent member) then the following process shall apply

b. the incoming member shall ensure that the client gives notice to the incumbent member of the termination of service for existing temporary assignments or contractor contracts and that an “effective transition date” be established. The “effective transition” date shall be no less than 60 days from the date of giving notice unless there is mutual agreement from all parties

c. ...

d. ...

e. the incoming member shall not actively seek to recruit the temporary staff or contractors, rather the incumbent member must be given every opportunity to place the individual in a new assignment

f. the incoming member shall be free to recruit any temporary staff or contractors that approach them, however, transfer of employment shall not occur before the effective transition date...”

2.5 The Code and Practice Models are underpinned by disciplinary and appeals procedures, which have been established by RCSA and which provide for expulsion from membership, suspension, fine etc.

2.6 The Australasian Appeal Committee of RCSA has recently been seized of an appeal from a determination of the Victorian/Tasmanian Divisional Disciplinary Committee, which determined that a member had breached the relevant Code of Conduct and Practice Models and which imposed, by way of sanctions, a suspension of membership and fines. The sanctions have not been imposed and RCSA has discontinued its prosecution of the complaint and has so advised the member and the original complainant.

2.7 RCSA acknowledges that the determination and the suggested imposition of sanctions would potentially have breached Section 45 of the *Trade Practices Act*.

2.8 RCSA has previously imposed sanctions on other members in purported enforcement of the suspect provisions of the Code and Practice Models. The sanctions have rarely, involved the payment of a fine or the suspension or exclusion of a member. RCSA will make inquiry of its divisions and will separately provide to the Commission a confidential list of complaints or disputes that have been so resolved by RCSA over the last 3 years through application of the suspect provisions.

2.9 RCSA offers these undertakings to the Commission to address any concerns the Commission may have in respect of the actions by RCSA.

2.10 RCSA has sent a withdrawal letter to the member concerned whose appeal was before the RCSA Australasian Appeals Committee.

2.11 RCSA has circulated a special bulletin advising RCSA members that its action against the member has been withdrawn and advising members currently having complaints heard that all actions have been withdrawn. Any members sanctioned in purported enforcement of the suspect provisions of the compensation arrangements outlined below in paragraph 8 have been contacted.

2.12 RCSA has rescinded the suspect principles of the Code of Ethics and Practice Models and does not contemplate adopting any replacement unless and until the same have been authorised by the ACCC.

2.13 The Commission acknowledges the good faith of RCSA in voluntarily approaching the Commission in regard to this matter and has agreed to accept the undertaking from RCSA under Section 87B of the Act.

3. Commencement of the Undertaking

3.1 This Undertaking comes into effect when:

- (a) the Undertaking is executed by RCSA; and
- (b) the Undertaking is executed and accepted by the Commission.

4. Compliance Program

4.1 RCSA undertakes to create and maintain at its own expense a trade practices compliance program with respect to Part IV of the Act. RCSA will use its best endeavours to ensure that the program complies with the Australian Standard AS 3806 for Compliance Programs and will be tailored to suit RCSA's circumstances.

4.2 RCSA will:

- (a) Demonstrate commitment to a policy of compliance and embed a culture of compliance throughout the organization.

- (b) Analyse and respond to the trade practices matters resulting in this undertaking.
- (c) Identify risk areas for trade practices breaches and develop systems to eliminate or minimise these risks.
- (d) State that the company will take action internally against those responsible for breaches and will not indemnify them.
- (e) Provide practical and verifiable training for all relevant staff and management so that breaches and potential breaches may be prevented or otherwise detected, referred and acted upon.
- (f) Provide trade practices reference material to its executive, including a trade practices compliance manual and monthly reports on trade practices issues relevant to RCSA.

5. Implementation

5.1 RCSA will commence to develop and implement the trade practices compliance program within one month of acceptance of these undertakings and will implement the program fully within four months.

5.2 As part of the compliance program RCSA undertake to do the following:

- (a) conduct trade practices compliance training for its Board members and staff, with particular regard to part IV of the Act;
- (b) the training will aim to create a culture of compliance within the Company and to prevent, so far as reasonably possible, any contraventions of part IV of the Act by RCSA or its officers, employees or agents;
- (c) the training will cover those officers, employees and agents of RCSA whose duties could result in their being concerned in conduct that might breach part IV of the Act.

5.3 Within two months of acceptance of the undertaking, RCSA will appoint its Chief Executive Officer as compliance manager. The compliance manager will be responsible for the implementation and effectiveness of the compliance program.

6. External Compliance Officer

6.1 Within two months of acceptance of the undertaking, RCSA will appoint an external Designated Compliance Officer, who will advise and assist RCSA to develop and implement the compliance program.

7. Education and Training for RCSA Members

7.1 RCSA undertakes to create and maintain at its own expense a trade practices education program with respect to Part IV of the Act for all members.

7.2 The program will aim to do the following:

- (a) Inform members of their obligations under the Trade Practices Act, especially with regard to Part IV of the Act and how these relate to small business;

(b) Inform and advise RCSA members of their obligations under the Trade Practices Act with regard to Consumer Protection and Price Exploitation and how the Trade Practices Act impacts upon labour market and employment matters;

(c) Provide trade practices reference material to members; and

(d) The education program will aim to create a culture of compliance within the industry and to prevent, so far as reasonably possible, any contraventions of the Act by RCSA members.

8. Compensation for Members/Former Members

8.1 RCSA will use its best endeavours to settle any claims for compensation by reimbursing members or former members upon whom sanctions have been imposed for breach of the suspect provisions within the last three years (or such shorter time during which the suspect provisions have been in operation).

8.2 Reimbursement under clause 8.1 shall:

(a) be by way of payment for reasonable costs and losses incurred directly as a result of the imposition of such sanctions, upon production by members of documentation substantiating their loss, and shall be limited to repayment of:

(i) any fine imposed by RCSA and paid by the claimant for compensation; and

(ii) legal or other representation costs, reasonably incurred by the claimant for compensation in the defence of the proceedings that resulted in the imposition of sanctions; and

(b) in a case where sanctions have involved expulsion or suspension of membership, further be in the form of reinstatement of membership, upon request by the member or former member, provided that the member or former member shall be eligible in all other respects to hold such membership.

8.3 In the event that there is any dispute regarding a claim for compensation, RCSA will agree to submit the dispute to a process of mediation or commercial arbitration by a mediator or arbitrator appointed by the President for the time being of the Law Society (or equivalent body) of the Nation, State or Territory in which the claimant carried on the business in respect of which the claim is made.

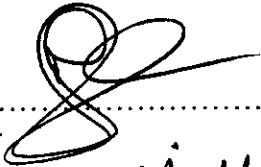
9. Acknowledgements

9.1 RCSA acknowledge and accept that:

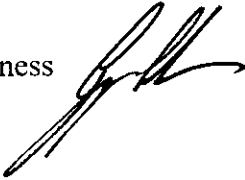
(a) the Commission will make these undertakings available for public inspection including by placing it on a register, publishing it and allowing third parties to publish it, and the Commission may, from time to time, publicly refer to these undertakings, including by way of media release;

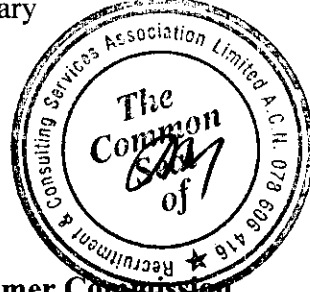
(b) this undertaking in no way derogates from the rights and remedies which may be available to any other person arising from the alleged conduct.

SIGNED SEALED AND DELIVERED)
 by **Recruitment & Consulting Services**)
Association Ltd by authority)
 of a resolution of the board of directors)
 under the hands of the director and the)
 secretary who certify that they are the)
 proper officers to affix such seal and)
 in the presence of:)

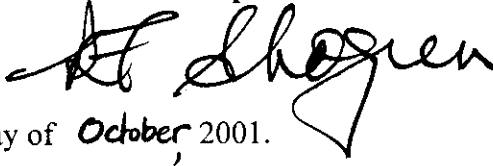
.....
 Director 

 Secretary *Julie Mills*

Witness 



Accepted by the Australian Competition and Consumer Commission

A/C Chairman 
 Dated *22nd* day of *October*, 2001.