

**TRADE PRACTICES ACT 1974**

**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION GIVEN FOR THE PURPOSES OF SECTION 87B**

**BY**

**STEPHEN BERNARD JOHNS**

**SEPTEMBER 2006**

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**PERSON GIVING UNDERTAKING**

- 1 This Undertaking is given to the Australian Competition and Consumer Commission (**Commission**) by Stephen Bernard Johns under section 87B of the *Trade Practices Act 1974 (TPA)*.

**BACKGROUND**

- 2 Stephen Bernard Johns was employed as Territory Manager for BIS Cleanaway Limited (formerly Brambles Australia Limited) (**BIS Cleanaway Limited**) between October 2000 and 9 February 2004.
- 3 The Commission commenced a proceeding in the Federal Court of Australia (QUD241 of 2004) against Stephen Bernard Johns and BIS Cleanaway Limited.
- 4 In these proceedings, the Commission alleged and the Federal Court declared that Stephen Bernard Johns engaged in misleading conduct and unconscionable conduct in contravention of sections 52 and 51AC of the TPA in connection with the conduct being described in paragraphs 5 to 7 below.
- 5 The Commission alleged and the Federal Court declared that Stephen Bernard Johns, as an employee of BIS Cleanaway Limited in November 2001:
- (a) visited the premises of a customer of BIS Cleanaway Limited ("the Customer");
  - (b) approached a representative of the Customer;
  - (c) stated words to the effect that the purpose of his visit to the Customer was to offer a new price for the services provided to the Customer by BIS Cleanaway Limited under the Customer's existing contract;
  - (d) handed to the Customer's representative a Service Agreement Form;

- (e) requested the Customer's representative to sign the Service Agreement Form;
- (f) stated words to the effect that the new form was required to be signed to reflect the new charges;
- (g) when providing the Service Agreement Form to the Customer's representative:
  - (i) did not disclose that the Service Agreement Form, if executed by or on behalf of the Customer, would comprise a contract between the Customer and BIS Cleanaway Limited ("Service Agreement");
  - (ii) did not disclose any of the terms of the Service Agreement; and
  - (iii) did not give the Customer's representative an opportunity to independently determine the nature of the Service Agreement Form and its effect if signed;

in circumstances where:

- (h) if executed on behalf of the Customer, a Service Agreement Form would become a Service Agreement;
- (i) Stephen Bernard Johns was attempting to obtain a Service Agreement between the Customer and BIS Cleanaway Limited; and
- (j) the Service Agreement included terms to the effect that:
  - (i) the term of the Service Agreement was 3 years from the commencement date shown on the Service Agreement;
  - (ii) the Customer agreed to acquire waste collection services at the address shown on the Service Agreement exclusively from BIS Cleanaway Limited;
  - (iii) the Service Agreement would be automatically renewed at the end of each term for a further 3 year term unless the Customer or BIS Cleanaway Limited gave the other written notice of termination at least 60 days before the end of the term;
  - (iv) BIS Cleanaway Limited could terminate the Service Agreement at any time by giving the Customer 60 days' notice; and
  - (v) if the Customer terminated the Service Agreement other than in accordance with the term referred to in (iii), the Customer was obliged to pay BIS Cleanaway Limited a sum (described as "damages") calculated by multiplying the total average monthly charge to the Customer for the period between the commencement date and the termination date of the Service Agreement by half the number of months remaining in the term of the Service Agreement

and Stephen Bernard Johns was thereby a party knowingly concerned in misleading conduct by BIS Cleanaway Limited in contravention of s.52 of the TPA.

6 The Commission alleged and the Federal Court declared that Stephen Bernard Johns as an employee of BIS Cleanaway Limited:

- (a) by making the statement referred to in paragraph 5(c), represented that the reason disclosed to the representative of the Customer was the only reason for visiting the Customer, whereas a reason for visiting the Customer was to obtain a signature on a Service Agreement Form on behalf of the Customer;
- (b) by expressing the request referred to in paragraph 5(e), represented that the Service Agreement Form, which was provided to a representative of the Customer was required to be signed only for the reason referred to in paragraph 5(f), whereas the Service Agreement Form would constitute, if signed on behalf of the Customer, a Service Agreement; and
- (c) by making the statement referred to in paragraph 5(f), represented that the Service Agreement Form was only a form of acknowledgement of the new charges to be made, whereas the Service Agreement Form would constitute, if signed on behalf of the Customer, a Service Agreement

thereby was a person knowingly concerned in misleading conduct of BIS Cleanaway Limited in contravention of s.52 of the TPA.

7 The Commission alleged and the Federal Court declared that Stephen Bernard Johns as an employee of BIS Cleanaway Limited in or about March 2002 attempted to enforce the Service Agreement that was entered into by the Customer as a result of the conduct referred to in paragraphs 5 and 6 herein by:

- (a) insisting on the performance of the terms of the Service Agreement;
- (b) informing the Customer that the Customer was not entitled to obtain waste collection services at the address set out in the Service Agreement Form from anyone other than BIS Cleanaway Limited; and
- (c) threatening legal action if the Customer did not act in accordance with the terms of the Service Agreement

in circumstances where Stephen Bernard Johns knew that:

- (d) the Customer had not intended by signing the Service Agreement Form to enter into a Service Agreement;
- (e) the Service Agreement had been obtained as a consequence of the conduct described in paragraphs 5 and 6 herein; and
- (f) if not for the Service Agreement, the Customer was able, or was likely to be able, to acquire equivalent services to those provided by BIS Cleanaway Limited under the Service Agreement from a person other than BIS Cleanaway Limited on more favourable terms than those set out in the Customer's Service Agreement,

and where:

- (g) BIS Cleanaway Limited was in a stronger bargaining position than the Customer;

(h) BIS Cleanaway Limited thereby used unfair tactics against the Customer;  
and

(i) BIS Cleanaway Limited thereby did not act in good faith;

and Stephen Bernard Johns was thereby a party knowingly concerned in unconscionable conduct of BIS Cleanaway Limited in contravention of section 51AC of the TPA.

8 As part of the resolution of the proceeding as between the Commission and Stephen Bernard Johns, Stephen Bernard Johns is providing this Undertaking to the Commission in the terms set out below for the purposes of section 87B of the TPA.

#### **COMMENCEMENT OF UNDERTAKING**

9 This Undertaking comes into effect when:

- (a) the Undertaking is executed by Stephen Bernard Johns; and
- (b) the Commission accepts this Undertaking so executed by Stephen Bernard Johns.

#### **UNDERTAKINGS**

10 Stephen Bernard Johns hereby undertakes for the purpose of section 87B of the TPA that:

- (a) Within 3 months of this Undertaking coming into effect, Stephen Bernard Johns will attend practical trade practices training focusing on Part V of the TPA, and in particular sections 52 and 51AC of the TPA.
- (b) Stephen Bernard John will ensure that the training referred to in paragraph (a) above is administered by a suitably qualified, compliance professional or legal practitioner with expertise in trade practices law.
- (c) Stephen Bernard Johns will provide a written statement or certificate from the trade practices professional who conducts the training referred to in paragraph (a) above to the Commission within 14 days of completion of the training verifying that such training has occurred.

#### **ACKNOWLEDGEMENTS**

11 Stephen Bernard Johns acknowledges the Commission's right to make this Undertaking available to the public, including by placing it on a register, publishing it and allowing third parties to publish it.

12 Stephen Bernard Johns further acknowledges that the Commission may issue a media release about this Undertaking and may, from time to time, publicly refer to this Undertaking.

13 Stephen Bernard Johns further acknowledges and accepts that this Undertaking in no way derogates from the rights and remedies available to any other person other than the Commission arising from or relating to the alleged conduct.

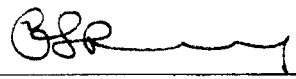
Executed by Stephen Bernard Johns )  
)  
)

  
\_\_\_\_\_  
Signature

Stephen Bernard Johns  
Print Name

This 7<sup>th</sup> day of September 2006

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

  
\_\_\_\_\_  
[insert name] GRAEME JULIAN PATUEL  
Chairman

This 3<sup>rd</sup> day of October 2006