

**TRADE PRACTICES ACT 1974**

**UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION**

**GIVEN FOR THE PURPOSES OF SECTION 87B**

**BY**

**MARK ANTON ZSCHECH**

**PETER ROBERT IRVINE**

**MARK CALDWELL**

**STEPHEN MAX CROUCH**

**YOUNG PIL SOHN**

**DARLENE JOYCE ZSCHECH**

**AND**

**CLARK PEARSON**

**PERSONS GIVING AN UNDERTAKING**

This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by each of Mark Anton Zschech, Peter Robert Irvine, Mark Caldwell, Stephen Max Crouch, Young Pil Sohn, Darlene Joyce Zschech and Clark Pearson (the Directors), under section 87B of the Trade Practices Act 1974 (the Act).

**BACKGROUND**

1. Each of Mark Anton Zschech, Peter Robert Irvine, Mark Caldwell, Stephen Max Crouch, Young Pil (Phil) Sohn, Darlene Joyce Zschech and Clark Pearson were directors or other office holders of Mercy Ministries Limited ACN 094 325 765 (MML) and/or Mercy Ministries Incorporated ABN 70106823922 (MMI) at some time in the period 1 January 2005 and 30 June 2008. MMI and MML are jointly referred to herein as Mercy Ministries. Mercy Ministries is a not-for-profit Christian-based organisation which offered a residential counselling program to young women.

2. Between 1 January 2005 and 30 June 2008, Mercy Ministries operated, in Australia, a program for young women affected by issues such as eating disorders, depression, self harm, unplanned pregnancy, drug and alcohol abuse, and effects of sexual or physical abuse (the Mercy Ministries Program). The Program was offered to young women whilst they resided in a Mercy Ministries home.
3. The day to day operation of the Mercy Ministries Program was conducted by MMI. MML owned the assets used by MMI and provided them to MMI. The staff used to run both MMI and MML were engaged and paid by MMI which provided them to MML at no cost. The operations of MMI were principally funded by donations from private individuals, foundations and churches, corporate sponsors, fundraising events, donations to it by MML, the sale of goods by MML and the Centrelink benefit payments from persons participating in the Mercy Ministries Program.
4. The Mercy Ministries Program was conducted at Glenhaven in New South Wales and at the Sunshine Coast in Queensland. The Sunshine Coast home closed in June 2008 and the Glenhaven home has not operated since February 2009 and was closed in October 2009.
5. In a three and a half year period from 1 January 2005 to 30 June 2008 (the relevant period) Mercy Ministries published brochures and other literature and provided information on its website [www.mercyministries.com.au](http://www.mercyministries.com.au). Within these publications it made representations to the public, in the course of soliciting donations, and to potential residents or residents in regard to the Mercy Ministries Program that:
  - 5.1. residents could live at Mercy Ministries' residential homes and participate in the program for free, or at no cost, or at no charge; and
  - 5.2. the program offered professional support from psychologists, dieticians, general practitioners, social workers, counsellors and program staff who contributed to providing daily education for residents.
6. Section 52 of the Act prohibits corporations from engaging in conduct that is misleading and deceptive or is likely to mislead or deceive. Section 53(aa) prohibits corporations from falsely representing that services are of a particular standard, quality, value or grade. Section 53(e) prohibits corporations from making false or misleading representations with respect to the price of goods or services. Individuals responsible for

the conduct or management of a corporation are also prohibited from knowingly causing or permitting the corporation to engage in such conduct.

7. The representations referred to in paragraph 5.1 were false, misleading and deceptive and likely to contravene sections 52, 53(aa) and 53(e) of the Act because Mercy Ministries services were not always provided free of charge, as the majority of residents were required to assign their Centrelink payments to Mercy Ministries for the duration of their stay.
8. The representations referred to in paragraph 5.2 were false, misleading and deceptive and likely to contravene sections 52, 53(aa) and 53(e) of the Act because professional support in the terms represented was not available from Mercy Ministries staff.
9. The Directors were aware of the facts in paragraphs 5, 7 and 8. They did not take appropriate steps to prevent the representations being made or to stop the assignment of Centrelink payments, or to ensure that the homes had the professional staff as had been represented. The Directors acknowledge that they were persons ultimately responsible for the conduct of MMI and MML. The Directors each admit they permitted Mercy Ministries to engage in conduct that was false, misleading and deceptive, and was likely to contravene sections 52, 53(aa) and 53(e) of the Act.
10. By end August 2008 Mercy Ministries stopped requiring the assignment of Centrelink payments, had changed its website, and was continuing the review of promotional materials to ensure they contained no misleading statements about the services they offered or for the costs of those services. On 31 July 2008 and 31 August 2008 Mercy Ministries refunded to the residents Centrelink payments received since 1 July 2008.
11. None of the Directors were directors of MMI or MML after 1 July 2008. MMI and MML are in the process of being wound up and are accordingly no longer able to offer undertakings or remedies of any sort. The Directors acknowledge the concerns of the ACCC with the conduct of Mercy Ministries described herein and wish to offer to the former residents of the Mercy Ministries Program their apology and, in the absence of Mercy Ministries being able to do so, to offer in lieu of Mercy Ministries, the payment described below.

#### **COMMENCEMENT**

12. This Undertaking comes into effect when:

12.1. the Undertaking is executed by each of the Directors; and

12.2. the ACCC accepts the undertakings so executed.

**(“the commencement of this Undertaking”)**

13. Upon the commencement of this Undertaking, each of the Directors undertakes to assume the obligations set out in paragraphs 14 to 17 below.

**UNDERTAKINGS**

14. The Directors each hereby undertake for the purposes of section 87B of the Act, for a period of three years from the commencement of this Undertaking that each of them will not cause or permit or counsel any corporation with which they are associated, whether by itself or by the conduct of its directors, servants, agents or employees:

14.1. to make representations with respect to the price of its services, which representations are not true;

14.2. to make representations with respect of the standard or quality or value of the services it provides, which representations are not true.

**OFFER TO THOSE AFFECTED BY OUR ACTIONS**

15. The Directors hereby undertake for the purposes of section 87B of the Act that they will, jointly and severally:

15.1. cause on behalf of Mercy Ministries and themselves, the offer of a payment of \$1050 to each of the former residents named in **Confidential Annexure A** to this Undertaking, and to each former resident in the Mercy Ministries Program, who assigned Centrelink payments to Mercy Ministries between 1 January 2005 and 30 June 2008 (the Recipients) by the following process and in the following manner:

15.1.1. within 14 days of the commencement of this Undertaking they will cause the sum of \$118,154.00 to be forwarded to a trust account nominated by the ACCC for the purpose of making the said payments;

15.1.2. the ACCC will write to each of the Recipients (as identified from information confidentially provided to the ACCC by Mercy Ministries) for which it has a last known address, offering to make the said payment from the Directors, and enclose the letter of apology referred to below;

- 15.1.3. the Recipients will be offered four months from the date their letter is sent to claim the said payment;
- 15.1.4. the ACCC will make the said payment to each Recipient who makes a claim in approved form within four months of the date their letter is sent to them;
- 15.1.5. upon the expiration of the four month claim period referred to in 15.1.4 above, the ACCC will, within two months, return to Kennedys Lawyers such part of the \$118,154.00 as remains after all claims have been paid;
- 15.1.6. the ACCC may retain such part of the balance to be returned to Kennedy Lawyers as does not exceed its outlays (including but not limited to postage and bank fees and charges) incurred to operate the fund and make the payments, **provided that** the total liability of the Directors shall not exceed \$118,154.00.

#### **LETTER OF APOLOGY TO AFFECTED FORMER RESIDENTS**

- 16. The Directors hereby undertake for the purposes of section 87B of the Act, within 7 days of the commencement of this Undertaking, to provide to the ACCC a joint open letter of apology, signed by each of the Directors, to former residents of the Mercy Ministries program during the relevant period, in the form of **Annexure B** to this Undertaking.
  - 16.1. The Directors acknowledge that the letter of apology will be sent to the Recipients by the ACCC, for whom it has a last known address, and will otherwise be made public.

#### **TRADE PRACTICES COMPLIANCE TRAINING**

- 17. Each of the Directors, other than Young Pil Sohn, who no longer resides in Australia, undertake for the purposes of section 87B of the Act to attend trade practices compliance training as set out in paragraphs 17.1 to 17.3 below.
  - 17.1. Within three months of the commencement of this Undertaking, and thereafter at least once a year for the period of the Undertaking, each Director will, at their own expense, attend practical trade practices training focussing of the relevant provisions of Part V of the Act.

- 17.2. Each Director will ensure that the training referred to in paragraph 17.1 above is administered by a suitably qualified, compliance professional or legal practitioner with expertise in trade practices law.
- 17.3. Each Director will provide a written statement or certificate from the trade practices professional who conducts the training referred to in paragraph 17.1 above to the ACCC within 14 days of completion of the training verifying that such training has occurred. The statement or certificate will outline:
- (i) the title of the training;
  - (ii) the name of the person(s) who conducted the training; and
  - (iii) the date of attendance at the seminar.

**ACKNOWLEDGEMENTS**

18. The Directors acknowledge that:
- 18.1. the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of s87B Undertakings on its website;
  - 18.2. the ACCC will, from time to time, make public reference to the Undertaking including in news media statements and in ACCC publications;
  - 18.3. this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

**EXECUTED BY**

.....  
 Signed by Mark Anton Zschech  
 This day of 2009

.....  
 Signed by Peter Robert Irvine  
 This day of 2009

.....  
 Signed by Mark Caldwell  
 This day of 2009

.....  
 Signed by Stephen Max Crouch  
 This day of 2009



.....  
Signed by Darlene Joyce Zschech

This    day of    2009

.....  
Signed by Young Pil Sohn

This 8 day of DEC 2009

.....  
Signed by Clark Pearson

This    day of    2009

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



.....  
Graeme Julian Samuel

Chairman

This 16<sup>th</sup> day of December 2009

CONFIDENTIAL ANNEXURE A

## ANNEXURE B : APOLOGY LETTER

### APOLOGY BY FORMER DIRECTORS OF MERCY MINISTRIES FOR MISLEADING INFORMATION

Between 1 January 2005 and 30 June 2008, each of the persons named below were directors or other office holders of Mercy Ministries Limited and/or Mercy Ministries Incorporated (jointly referred to as Mercy Ministries). Mercy Ministries operated the Mercy Ministries program in Australia, and records show that you were a resident at a Mercy Ministries home during this period.

During this period Mercy Ministries published in its brochures, in other promotional material, and on its website that it offered its program for free or at no cost. It also represented that its Mercy Ministries program offered professional support for its residents from psychologists, dieticians, general practitioners, social workers and counsellors.

However, during this period, the majority of residents were required to assign their Centrelink payments to Mercy Ministries. Also, Mercy Ministries did not employ on staff the range of professionals referred to above and, instead, Mercy Ministries facilitated access to external professionals upon request from residents.

The Australian Competition and Consumer Commission (ACCC) considers the conduct was misleading and deceptive, in misrepresenting the program was free, when Mercy Ministries received Centrelink payments on behalf of most residents. The ACCC also considers you were misled that the full range of professionals referred to above were on Mercy Ministries staff and available on site, when that was not the case.

Each of the former directors acknowledge that they were ultimately responsible for the conduct of Mercy Ministries. The former directors each admit Mercy Ministries' conduct was misleading, and they wish to offer to you their sincere apology for any hurt or inconvenience arising from these matters. The former directors also wish to offer you a payment of \$1050. Whilst this payment is made without admission of legal liability on the part of Mercy Ministries or the former directors, you should note that accepting this payment has no effect on any rights or claim you may have.

The method for claiming this payment is set out in the covering letter from the ACCC. You will note that if you wish to make a claim for this payment, you must do so within four months of the date of the letter from the ACCC.

Each of the former directors has endeavoured to co-operate with the ACCC to address these issues, and has given the ACCC a court enforceable Undertaking to resolve the matter (details available at [www.accc.gov.au](http://www.accc.gov.au))

We again apologise for any hurt or inconvenience our conduct may have caused.

Yours sincerely

\_\_\_\_\_  
Mark Anton Zschech

\_\_\_\_\_  
Peter Robert Irvine

\_\_\_\_\_  
Mark Caldwell

\_\_\_\_\_  
Stephen Max Crouch



\_\_\_\_\_  
Young Pil (Phil) Sohn  
DEC 8, 2009

\_\_\_\_\_  
Darlene Joyce Zschech

\_\_\_\_\_  
Clark Pearson