



## Trade Practices Act 1974

### Undertaking to the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION given for the Purposes of s.87B

BY

**BRAMALCO PTY LTD**  
**ACN 008 160 334**

#### Background

1. Bramalco Pty Ltd (ACN 008 160 334) ("Bramalco") is incorporated under the Corporations Law and registered in South Australia.
2. Bramalco is an Australian company which provides home improvement services to consumers such as roof restoration, re-roofing and guttering, security alarm systems and roller shutters.
3. In providing these services, Bramalco engage sales staff to visit consumers' homes in response to enquiries relating to Bramalco products. The sales staff discuss the product with the consumer and provide a quote. Upon acceptance of the quote, the consumer will enter into a contract with Bramalco for the provision of the service.
4. On the reverse of the contract the "Conditions of Sale" are outlined in finer print. Bramalco's contract with consumers included a provision in the event of cancellation of the contract. The clause states:

*"Cancellation: if the Customer shall, after the expiry of any cooling off period if applicable purport to cancel this Agreement or otherwise repudiate the same prior to, or after the date of the commencement, or delay the commencement of work, the Customer shall pay to the Seller the costs incurred by the Seller to the date of such purported cancellation or repudiation or delay in commencement (as the case may be) plus twenty (20) per centum of the total contract price stated herein as and by way of liquidated damages and not by way of penalty"*

Bramalco advised the ACCC that the clause was drafted by and inserted on the advice of Bramalco's lawyers.

5. The ACCC considers that this clause may go beyond Bramalco's right to claim an amount to cover the company's loss incurred as a result of a consumer breaking the contract. It is ACCC's view that genuine liquidated damages would encompass any losses incurred by Bramalco directly as a result of a cancellation but would not extend to a claim covering general business costs incurred by Bramalco, such as advertising or administration.

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6. For this reason, it is the ACCC's view that the clause may be an unenforceable penalty clause and, to the extent that is the case, the claim to be able to assert such a right of payment is capable of being misleading in breach of section 52 of the *Trade Practices Act 1974*.
7. The ACCC raised its concerns with Bramalco and, notwithstanding that Bramalco has not sought to enforce the clause, both parties agreed that the clause should be amended to ensure that consumers are not misled by the conditions of cancellation.

### **Commencement of Undertakings**

8. This Undertaking comes into effect when:
  - (a) The Undertaking is executed by Bramalco, and;
  - (b) The ACCC accepts the Undertakings so executed.

### **Undertakings**

9. Bramalco gives the following undertakings to the ACCC for the purposes of Section 87B of the *Trade Practices Act 1974*.
10. Bramalco acknowledges the ACCC's concerns that the cancellation clause in its consumer contracts may be misleading.
11. Bramalco agrees to remove or amend any cancellation clauses in its consumer contracts to ensure they do not impose an unenforceable penalty.
12. Bramalco agrees to review and remove or amend any similar clauses present in all other consumer contracts.
13. Bramalco agrees not to assert a right to payment of an amount which does not reflect the actual losses incurred as a direct result of a cancellation of a contract.
14. Bramalco agrees, within a period of 50 days of the execution of this Undertaking, to identify and retain an appropriately qualified independent compliance professional ("the compliance professional") for the purpose of developing an appropriate compliance program to ensure Bramalco's ongoing compliance with Part V of the *Trade Practices Act*.
15. Bramalco undertakes that it will cause the compliance professional to analyse Bramalco's business and develop a program consistent with Australian Standard 3806 and that such compliance program will be forwarded to the ACCC for comment within 45 days of the appointment of the compliance professional, and implemented within 30 days of the ACCC's comments on the program.

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16. The compliance program will remain in force for a minimum period of 3 years and during that time both parties may agree to amend the program to accord with relevant changes to the *Trade Practices Act*.
17. As part of the implementation of the compliance program, Bramalco will:
- (a) Appoint a senior person to oversee Trade Practices compliance;
  - (b) Conduct regular Trade Practices training to relevant staff including senior managers;
  - (c) Ensure a complaint handling system is maintained;
  - (d) Ensure that Trade Practices compliance is accepted into Bramalco's policies and practices with the approval or an endorsement of the Board and Management;
  - (e) Maintain a register of Trade Practices breaches and complaints.
18. Bramalco will have its compliance program audited by an independent compliance professional at 12 monthly intervals, commencing 12 months following the implementation of the program. In making such review:
- (a) The auditor will conduct a critical review of both the compliance management system and its effectiveness in securing compliance with the *Trade Practices Act*;
  - (b) The auditor will make such recommendations as the auditor considers necessary to ensure that the compliance program is effective;
  - (c) Bramalco will promptly implement any recommendations which are necessary to ensure that such compliance program is effective;
  - (d) The auditor will provide the ACCC with a copy of the audit report no later than 30 days after the completion of each audit report.
  - (e) Bramalco will, if requested by the ACCC, provide documents and information in respect of matters the subject of the compliance program resulting from this Undertaking.

### **Acknowledgements**

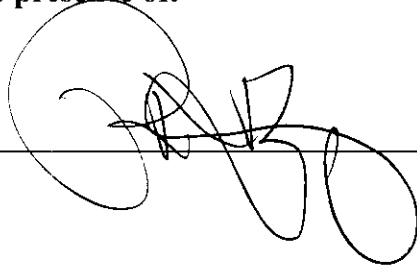
19. Bramalco acknowledges that the Commission will make this Undertaking available for public inspection.
20. Bramalco acknowledges that the Commission may refer publicly to this Undertaking from time to time.

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21. Bramalco acknowledges that this Undertaking in no way derogates from the rights and remedies available to any person who is not a party to this Undertaking as a result of the conduct set out above.

**IN WITNESS** of these Undertakings and its agreement the Common Seal of Bramalco Pty Ltd (ACN 008 160 334) was hereunto affixed by authority of its Director in the presence of:

Director: \_\_\_\_\_



Dated the 29<sup>th</sup> day of July 2004

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

Chairman: \_\_\_\_\_



Dated the 17<sup>th</sup> day of August 2004