

***The 4th Annual Michael Kirby Contract Law Moot  
Melbourne, Australia***

***29 September – 2 October 2014***

***Clarifications***

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Please note the following:

1. The clarification immediately below Clarification 29 is to be referred to as Clarification 29a.
2. The clarification immediately below Clarification 37 is to be referred to as Clarification 37a.
3. Clarification 12: The inclusion of "@" was a typographical error. The reference to the website address in the actual contract was correct, that is, it does not include "@".
4. Clarification 2 and 21: Industry's Graffiti Gobbler products come in different strengths.

1. **Exhibit 6, Clause 3: in what order should the procedures be performed? Is the cold water to be applied 48 hours before the solvents are applied?**

Water is to be applied after the application of the solvents.

2. **Additionally, the contract states that the "solvents" include "chemicals... packaged under Industry's brand name "Graffiti Gobbler"", are we to assume that the chemicals used by Graffiti Gangbusters (the sub-contractor) were packaged in Industry's "Graffiti Gobbler" brand name, such that those chemicals used were Industry's solvents?**

The chemicals used by Graffiti Gangbusters were Industry's supplied chemicals packaged under Industry's brand name.

3. **Under the damages claimed by the Claimant, how are the figures of "Lost Net Profits from Cancelled Tasmanian conference" and the "Lost Net Profits from Cancelled SA conference" determined?**

Those profit estimates were based on historical profit figures from previous like conferences in those States.

4. **What was the value of the net profits lost by the cancellation of the Melbourne conference, and is there a reason this is not included in the damages claimed by the Claimant?**

They were negligible and the Claimant decided not to claim them.

5. **How readily available are the additional terms on Industry's website? How difficult are they to find? Are they prominent on the main page of Industry's website?**

The hyperlink to the additional terms could be found at the bottom right on the main website page.

6. **Are we to assume that the Statement of Facts is an agreed statement of facts between the parties?**

Yes.

**7. Was MS Crystal Pye suffering a nervous breakdown at the time of signing of the contract?**

No.

**8. Did either the children and/or the three injured workers from Social Conscience thoroughly wash their skin with clean water within 15 minutes of coming into contact with the Solvents?**

Yes.

**9. What were the exact ages of the children?**

They were all 14 years of age.

**10. Exhibit 14: How was the interest amount calculated?**

The interest accrued daily. Refer to the contract for the interest rate.

**11. Can the claimant introduce tortuous claims against the respondent?**

Only where the Tribunal allows it. The justification needs to be given and the permission needs to be sought before each hearing. The tribunal ultimately will wish to hear claims which could have an impact on the relevant contractual claims.

**12. Is the “@” symbol on the website address a typographical error?**

Yes.

**13. Is sub-clause 24(b) provided in Exhibit 14 the full wording of the clause?**

“24(a) Clause 24 of these Additional Terms and Conditions shall apply to any agreement in writing relating to, or pertaining to graffiti removal entered into by or for Industry First Pty Ltd.

(b) In relation to any such agreement, where there is or may be any prospective liability to be borne or suffered by or on the part of Industry First Pty Ltd, then this clause limits any liability howsoever arising to \$20,000 including interest and costs.”

**14. Is the word “however” in Sub-clause 24(b) a typographical error? Should it be howsoever?**

Yes. The word should read “howsoever”.

**15. What is the full wording of sub-paragraph 26(4)(p)(ii)?**

The subparagraph reads: “(ii) Notwithstanding anything contained in the Australian Consumer Law, the provisions of the *Trade Practices Act 1974* (Cth) shall apply to any agreement in writing relating to, or pertaining to graffiti removal entered into by Industry First Pty Ltd.”

**16. “Terms” is defined as meaning additional terms. Is this a typographical error?**

In the Agreement, the defined expression “Terms” means only the Additional Terms and Conditions on the website.

The undefined expression “terms” in Recital B means all and any terms and conditions of the Agreement generally.

**17. Clause 10 of the agreement refers to “The term”. Was this a typographical error?**

No. This commonly used word, in context, means “duration”.

- 18. Exhibit 10 states “my company had to (d) send three employees to a doctor to check for skin irritation”. In Exhibit 7, Arnold references the events displayed on the news, stating members of the team were carried away. Were the employees that were taken to hospital employees of Social Conscience, Graffiti Gangbusters or of both?**

Exhibit 10 refers to the employees of Social Conscience while Exhibit 7 refers to Graffiti Gangbusters' team.

- 19. Are the marquee and banners property of Social Conscience?**

Yes.

- 20. Is the latex and Teflon porous or non-porous?**

They were porous.

- 21. What were the exact chemicals used on the marquees, banners and signage? Exhibit 7 demonstrates that the Claimant believed them to be “unknown liquids with the attributes of sulphuric acid.”**

Although the team brought a combination of different graffiti removal products into the site, they decided to use the strongest product which in their experience has fully removed graffiti in the shortest amount of time. This product contains a mixture of hydrofluoric acid, low odour solvents, caustics additives and emulsifying detergents.

- 22. Was the latex that was used in the Social Conscience’s signage and banners synthetic or natural latex?**

Synthetic.

- 23. Does Crystal/Arnold have a history of mental illness or psychiatric injury?**

No.

- 24. Did the children and the supervisor provided by Graffiti Gangbusters hold Australian Citizenships?**

Yes.

- 25. After the application of the solvents, were the marquees hosed down with water?**

Yes.

- 26. Did Graffiti Gangbusters manufacture this by combining individual chemicals and solutions and was this sold under a trade name?**

See item 21 above.

A product of Industry First Pty Ltd which is and was also used by Graffiti Gangbusters for its own business.

- 27. Did the graffiti removalists wear any protective equipment?**

Yes, work boots and Graffiti Gangbusters cotton/polyester “hoodies” with embossed “Graffiti-Gang” company logos, over normal day-today clothing.

- 28. What was the nature of the reciprocal arrangement between Industry and Graffiti Gangbusters?**

As and when required (if teams are available). No formal arrangements or agreements.

**29. How many times has the reciprocal arrangement between Industry and Graffiti Gangbusters been utilised?**

The arrangement was entered into in 2012 and since then Graffiti Gangbusters has been utilised four times. In one of those times, there was a minor incident involving one of Graffiti Gangbusters' workers who received some burns on his hands. The incident was investigated by Graffiti Gangbuster and it was found that the protective clothing was not of a good quality and had failed to protect the worker from possible exposure to chemicals. The worker decided to quit soon after.

**a. If the arrangement had been utilised before, was the same team deployed by Graffiti Gangbuster to fulfil any removal requests?**

No. Team members vary from time to time.

**30. Does Industry First provide services to households or solely commercial entities?**

Industry First caters for both markets.

**31. Was security employed by Social Conscience to guard the marquee or the conference, including at night?**

No.

**32. Did Social Conscience insure the marquee?**

No.

**33. How many TV News crews and Newspaper journalists were present at the conference location at 5.30pm?**

Many.

**34. How many news crews and journalists were present prior to the clean-up crew arriving?**

Many.

**35. How many were present after it became known that Graffiti Gangbusters were employing children?**

Many.

**36. Had the future conferences been paid for in any way?**

No. Invitations and advertisements had been sent out only a few days beforehand.

**37. Is John Nerdle's current position Graffiti Co-ordinator or is he manager as indicated in his statutory declaration?**

He was promoted to Manager on or about 1 March 2014.

**a. Were permits issued for the children to work?**

Yes.

**38. Was the damage to the Teflon a result of the chemicals or is this an error in the question?**

Chemical (solvents) damage.

**39. Has the whole marquee been destroyed or is it only the “high intensity stretch yarn” that has been destroyed rather than whole marquee including its frame?**

All damaged and disposed of in the turmoil of events.

**40. Please clarify the composition of the high intensity stretch yarn material used to construct the marquee.**

A blended 80/20% mixture of continuous textile filaments and thermoplastic filaments, lightly twisted and heat set for durability purposes.

**41. Does the issue of quantum need to be addressed when determining remedies?**

No. Submissions on this will be heard at a later date.

**42. Were the graffiti removalists properly trained?**

Industry First enters into reciprocal agreements with a handful of subcontractors who are fully licensed to provide all the relevant services associated with the removal of graffiti.

Industry First also carries a random audit on its sub-contractors to ensure compliance with Industry First's stringent OH&S training requirements.

No audit was however been undertaken on Graffiti Gangbusters because it was not a subcontractor of Industry First. Industry First simply invoiced Social Conscience per its Agreement and, in turn Graffiti Gangbusters would subsequently send an invoice (at its own rates) to Industry First Pty Ltd.

Industry First soon expects an invoice from Graffiti Gangbusters in the range of \$37,000 to \$40,000 per previous reciprocal experiences.