

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : COMMISSIONER FOR CONSUMER PROTECTION  
-v- SUSILO [2014] WASC 50

**CORAM** : BEECH J

**HEARD** : 19 FEBRUARY 2014

**DELIVERED** : 27 FEBRUARY 2014

**FILE NO/S** : CIV 2633 of 2012

**BETWEEN** : COMMISSIONER FOR CONSUMER PROTECTION  
Plaintiff

AND

PATRICIA MIRAWATI SUSILO  
First Defendant

BRYAN ARTAWIJAYA SUSILO  
Second Defendant

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*Catchwords:*

Consumer and Competition Law - Admitted misleading conduct in promotion of  
rent-to-buy transactions - Appropriate pecuniary penalty

*Legislation:*

*Australian Consumer Law*, s 18, s 30, s 34, s 224  
*Real Estate and Business Agents Act 1978 (WA)*, s 4, s 26

*Result:*

Declarations made  
Injunctions granted  
Pecuniary penalty of \$17,500 for first defendant and \$12,000 for second  
defendant

*Category:* B

**Representation:**

*Counsel:*

Plaintiff : Mr W A S Keane  
First Defendant : Mr J L Edwards  
Second Defendant : Mr J L Edwards

*Solicitors:*

Plaintiff : Department of Commerce  
First Defendant : Not applicable (pro bono counsel)  
Second Defendant : Not applicable (pro bono counsel)

**Case(s) referred to in judgment(s):**

Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [No 2] [2002] FCA 559; (2002) 190 ALR 169  
Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2006] FCA 1730  
Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd [2007] FCAFC 146; (2007) 161 FCR 513  
Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd [2011] FCA 372  
Australian Competition and Consumer Commission v Halkalia Pty Ltd (No 2) [2012] FCA 535  
Australian Competition and Consumer Commission v Marksun Australia Pty Ltd [2011] FCA 695  
Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378  
Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd [1996] ATPR 41-515  
Australian Competition and Consumer Commission v Singtel Optus Pty Ltd [2010] FCA 1177  
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54

Australian Competition and Consumer Commission v Yellow Page Marketing  
BV (No 2) [2011] FCA 352; (2011) 195 FCR 1  
Australian Securities and Investments Commission v Ingleby [2013] VSCA 49;  
(2013) 275 FLR 171  
Barbaro v The Queen [2014] HCA 2  
BMW Australia Ltd v Australian Competition and Consumer Commission  
[2004] FCAFC 167  
Commissioner for Consumer Protection v Standley [2014] WASC 45  
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421  
Global One Mobile Entertainment Pty Ltd v Australian Competition and  
Consumer Commission [2012] FCAFC 134  
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd  
[2004] FCAFC 72  
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission  
(1996) 71 FCR 285  
Rural Press Ltd v Australian Competition and Consumer Commission [2003]  
HCA 75; (2003) 216 CLR 53  
Singtel Optus Pty Ltd v Australian Competition and Consumer Commission  
[2012] FCAFC 20; (2012) 287 ALR 249  
Trade Practices Commission v CSR Ltd [1991] ATPR 41-076  
Trade Practices Commission v Optus Communications Pty Ltd (1996) 64 FCR  
326  
Trade Practices Commission v TNT Australia Pty Ltd [1995] ATPR 41-375  
Warramunda Village Inc v Pryde [2001] FCA 61; (2001) 105 FCR 437

**BEECH J:**

**Introduction**

1 The defendants are brother and sister. They ran a business that promoted and facilitated transactions known as 'rent to buy'.

2 In this action the plaintiff (the Commissioner) claims that by their conduct in the business, the defendants engaged in misleading and deceptive conduct; the first defendant (Ms Susilo) carried on business as a real estate agent without a real estate business agent's licence; and the second defendant (Mr Susilo) was knowingly concerned in that contravention.

3 In the lead up to the trial, the defendants admitted the facts now alleged against them by the Commissioner, and admitted their contraventions.

4 These reasons concern the penalties and other remedies that should be given in relation to those contraventions.

5 For the reasons that follow, the declarations and injunctions in the form (ultimately) sought by the Commissioner should be granted, and pecuniary penalties in the sum of \$17,500 and \$12,000 should be imposed against Ms Susilo and Mr Susilo respectively.

**The facts**

6 The facts are not in dispute.

7 At all material times, namely from late 2010 to early 2013, Ms Susilo and Mr Susilo have carried on a business of promoting and facilitating rent to buy real estate transactions. The basic elements of the transactions the subject of that business were set out in the statement of claim, and admitted in the defence as follows:<sup>1</sup>

5. At all material times the First and Second Defendants have carried on a business of promoting and facilitating 'Rent to Buy' real estate transactions which were arranged as follows (**Option Rent to Buy Arrangement**):

- 5.1. the First Defendant publicises her interest in acquiring houses or apartments (**Property**) from potential vendors;
- 5.2. the First Defendant offers to buy from a potential vendor:

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<sup>1</sup> SC [5], Defence [3].

- 5.2.1. a call option to buy the potential vendor's Property within a fixed period of time for a fixed price (**Vendor Option**);
- 5.2.2. the right to occupy the Property under a residential tenancy agreement (**Vendor Tenancy**);
- 5.3. if the potential vendor enters into the Vendor Option, the express terms of that agreement provide, in effect, that:
  - 5.3.1. the potential vendor grants the First Defendant an option to purchase the potential vendor's property for a specified purchase price in consideration of an option fee;
  - 5.3.2. the option fee comprises an upfront payment and ongoing instalments, which would be credited against the purchase price on exercise of the option;
  - 5.3.3. the option expires on a specified date but may be renewed or extended at the request of the First Defendant; and
  - 5.3.4. if the option expired or was terminated before the expiry date, the First Defendant forfeits any option fees paid to the vendor;
- 5.4. if the potential vendor is willing to enter into the Vendor Option and Vendor Tenancy, the First and Second Defendants market the Property for sale to potential purchasers;
- 5.5. the First Defendant offers to sell to potential purchasers:
  - 5.5.1. a call option to buy the Property within a fixed period of time for a fixed price (**Purchaser Option**); and
  - 5.5.2. the right to occupy the Property under a residential tenancy agreement (**Purchaser Tenancy**);
- 5.6. if a potential purchaser enters into the Purchaser Option, the express terms of that agreement provide, in effect, that:
  - 5.6.1. the First Defendant grants a potential purchaser an option to purchase the property for a specified purchase price in consideration of an option fee;

- 5.6.2. the option fee comprised an upfront payment and ongoing instalments, which would be credited against the purchase price on exercise of the option;
- 5.6.3. the option expired on a specified date but might be renewed or extended at the request of the potential purchaser; and
- 5.6.4. if the option expired or was terminated before the expiry date, the purchaser forfeited any option fees paid to the First Defendant;
- 5.7. If a potential purchaser enters into the Purchaser Tenancy, the express terms of that agreement provide, in effect, that:
  - 5.7.1. the First Defendant, purporting to be the owner of the property the subject of the Vendor Option, grants the potential purchaser either:
    - 5.7.1.1. a tenancy for a fixed period; or
    - 5.7.1.2. a periodic tenancy;
  - in respect of the property;
- 5.8. the First Defendant derives revenue from the difference between:
  - 5.8.1. the payments made by the potential purchaser to the First Defendant under the Purchaser Option and Purchaser Tenancy; and
  - 5.8.2. the payments made by the First Defendant to the potential vendor under the Vendor Option and Vendor Tenancy.

8 The defendants also carried on a business of promoting and facilitating rent to buy real estate transactions arranged as follows:

- 6. At all material times the First and Second Defendants, also carried on a business of promoting and facilitating 'Rent to Buy' real estate transactions which were arranged as follows (**Joint Venture Rent to Buy Arrangement**):
  - 6.1. the First Defendant and a potential vendor of a Property enter into a 'joint venture' agreement the express terms of which provide, in effect, that:
    - 6.1.1. the potential vendor agrees to contribute their Property to the 'joint venture';

- 6.1.2. the First Defendant does not contribute any money to the 'joint venture',
- 6.1.3. the First Defendant agrees to market and sell the Property on behalf of the 'joint venture' under an Instalment Contract as described in paragraph 6.3 below;
- 6.1.4. the First Defendant is entitled to be paid amounts derived from money paid by the potential purchaser under the Instalment Contract;
- 6.2 the First and Second Defendants market the Property on behalf of the potential vendor;
- 6.3 once a potential purchaser is located, the potential vendor and potential purchaser enter into a contract (**Instalment Contract**) the express terms of which provide, in effect, that:
  - 6.3.1. the potential purchaser agrees to purchase the Property;
  - 6.3.2. the purchase price is paid by way of a deposit and instalment payments, together with interest;
  - 6.3.3. the potential purchaser is entitled to possession of the Property while it performs its obligations under the Instalment Contract;
  - 6.3.4. in the event of a default in the instalment payments and a termination of the Instalment Contract, the potential vendor is entitled to retain the deposit and any instalment payments already made;
  - 6.3.5. the potential purchaser does not become the registered proprietor of the Property until the settlement date;
  - 6.3.6. the settlement date is not fixed but is defined as the date when the purchase price is paid.

9 In the lead up to the trial, the legal representatives of the parties prepared a detailed statement of agreed facts.

10 There are cases in which judges have expressed concern about whether the statement of agreed facts presented to the court provided a suitable, accurate and sufficiently comprehensive framework for

determining the appropriate penalty.<sup>2</sup> In such a case, the court can request further information from the parties.<sup>3</sup>

11 No such concerns arise in this case. To the contrary, having examined the documents comprising the proposed trial bundle I am satisfied that the statement of agreed facts is accurate and sufficiently comprehensive to ensure the court is fully informed in fixing the penalty.

12 The agreed facts are as follows:

1. The Plaintiff is the regulator for the purposes of the *Australian Consumer Law (WA) (ACL)* and has standing to bring this matter per s 100(1)(b) *Fair Trading Act 2010 (FTA)*.
2. The FTA and *Real Estate and Business Agents Act 1978 (REBA Act)* are both administered by the Minister for Commerce.
3. The Defendants are brother and sister.
4. Neither Defendant holds, or has ever held, a real estate agent's licence issued pursuant to the REBA Act.
5. At all material times:
  - 5.1. the First Defendant carried on a business, in trade or commerce, involving the promotion and sale of residential property in Western Australia (**Business**);
  - 5.2. the First Defendant was the sole director, secretary and shareholder of the company 700 Dollar Houses.Com Pty Ltd (ACN 147 514 618) (**Company**);
  - 5.3. the First Defendant through the Company, operated the website [www.sellhouseeasy.com.au](http://www.sellhouseeasy.com.au) (**Company Website**) to promote the Business; and
  - 5.4. the Second Defendant was involved in the carrying on of the Business.
6. The Second Defendant was born on 21 February 1994 and was a minor until 21 February 2012.
7. The Company is the registrant of the domain name for the Company Website but does not carry on any other aspect of the Business or receive income from the Business.

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<sup>2</sup> See, for example, *Australian Securities and Investments Commission v Ingleby* [2013] VSCA 49; (2013) 275 FLR 171 [31].

<sup>3</sup> *ASIC v Ingleby* [33], [35], [73] - [75]; *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 [79].



**RENT TO BUY ARRANGEMENTS**

8. The Business involved the First and Second Defendant promoting and facilitating 'Rent to Buy' arrangements in relation to residential properties in Western Australia.

**RENT TO BUY TRANSACTIONS**

Option Rent to Buy Arrangements

9. The First Defendant entered into the Option Rent to Buy transactions pleaded in paragraph 11 of the Further Re-Amended Statement of Claim.

*Huntingdale Property*

10. From September to November 2010, the Defendants promoted and facilitated the entering into of a Rent to Buy Transaction in respect of a property located at 9 Matilda Street, Huntingdale (**Huntingdale Property**) between Christine and Robert Bransby (prospective vendors) and Michael O'Dea and Kim Crocker (prospective purchasers) (**Huntingdale Transaction**).

11. The Huntingdale Transaction was arranged in the form of the Option Rent to Buy Arrangement, in that:

- 11.1. on 17 September 2010:

11.1.1. the First Defendant entered into arrangements involving a Vendor Option and Vendor Tenancy pursuant to which the First Defendant was required to pay to the prospective vendors of the Huntingdale Property an option fee of \$2,100.00 per month;

11.1.2. the prospective vendors gave to the First Defendant an Irrevocable power of attorney limited to dealings with the Huntingdale Property; (Plaintiff's Trial Bundle (**Bundle**), 321).

- 11.2. on 10 November 2010, the First Defendant entered into arrangements involving a Purchaser Option and a Purchaser Tenancy pursuant to which the prospective purchasers were required to pay an upfront option fee of \$1,000.00 plus an ongoing option fee of \$148.00 per week and rent of \$1,160.00 per fortnight; (**Bundle**, 1 and 4)

- 11.3. on 19 November 2010:

11.3.1. the First Defendant varied the arrangement with the prospective vendors by entering into another

Vendor Option and Vendor Tenancy. This Vendor Option and Vendor Tenancy superseded the earlier Vendor Option and Vendor Tenancy, both dated 17 September 2010. Pursuant to the Vendor Option the First Defendant was required to pay to the prospective vendors of the Huntingdale Property an option fee of: \$1 upfront; \$533.52 per month; and \$20,000 on or before 25 November 2012. Pursuant to the Vendor Tenancy the First Defendant was required to pay to the prospective vendors \$1,722.89 per month (**Bundle**, 6 and 16);

11.3.2. the prospective vendors gave to the First Defendant another power of attorney limited to dealings with the Huntingdale Property (power of attorney provided for under s 143 of the *Transfer of Land Act 1893* (WA)); (**Bundle**, 22);

11.3.3. the First Defendant paid the prospective vendors \$2,500, being part payment of the \$20,000 referred to in 11.3.1.

11.4. on or about either 7 March 2011, the First Defendant varied the arrangement with the prospective purchasers by entering into another Purchaser Option and Purchaser Tenancy pursuant to which the prospective purchasers were required to pay a lump sum option fee of \$2,456.00 plus an ongoing option fee of \$696.00 per fortnight and rent of \$800.00 per fortnight; (**Bundle**, 34 and 41). This Purchaser Option and Purchaser Tenancy superseded the earlier Purchaser Option and Purchaser Tenancy, both dated 10 November 2010; and

11.5. on 26 June 2011, the First Defendant entered into amended or varied arrangements involving a further Purchaser Option and a further Purchaser Tenancy. (**Bundle**, 54 and 59)

12. The First Defendant did not occupy or seek to occupy the Huntingdale Property pursuant to the Vendor Tenancy.

#### *Orelia Property*

13. In or about July 2011, the Defendants promoted and facilitated the entering into of a Rent to Buy Transaction in respect of a property located at 3 Paul Way, Orelia (**Orelia Property**) from Tania Louise Smith (nee De Abreu) and Mathew David Smith (prospective vendors) to Wi David Hokai and Andrea Toru (prospective purchasers) (**Orelia Transaction**).

14. The Orelia Transaction was arranged in the form of the Option Rent to Buy Arrangement, in that:
  - 14.1. on 18 July 2011, the prospective vendors gave the First Defendant an enduring power of attorney restricted to dealings with the Orelia Property; (**Bundle**, 64 and 71);
  - 14.2. on or about 21 July 2011, the First Defendant entered into an arrangement with the prospective vendors for a Vendor Option pursuant to which the First Defendant was required to pay to Mr and Mrs Smith an upfront option fee of \$2.00 and an ongoing option fee of at least \$2,221.00 per month plus council rates, water rates, land tax and insurances. Rent paid under the Vendor Tenancy constituted part payment of the option fee; (**Bundle**, 45);
  - 14.3. on 28 July 2011, the First Defendant entered into arrangements involving a Purchaser Option and a Purchaser Tenancy pursuant to which the prospective purchasers were required to pay an upfront option fee of \$15,000.00, payable in weekly instalments of \$358, plus an ongoing option fee of \$342.00 per week and rent of \$300 per week; (**Bundle**, 86 and 82);
  - 14.4. on or about 6 August 2011, the First Defendant entered into a Vendor Tenancy with the prospective vendors pursuant to which the First Defendant was required to pay to Mr and Mrs Smith rent of \$240.00 per week; (**Bundle**, 198); and
  - 14.5. on or about 1 March 2012, the First Defendant entered into amended or varied arrangements involving a further Purchaser Option. The option fee comprised:
    - 14.5.1. \$10,584 that the prospective purchasers had already paid to the First Defendant; and
    - 14.5.2. an ongoing payment of \$342.00 per week. (**Bundle**, 329).
15. The First Defendant did not occupy or seek to occupy to Orelia Property pursuant to the Vendor Tenancy.

*Vines Property*

16. In or around August 2011 the Defendants promoted and facilitated the entering into of a Rent to Buy Transaction in respect of a property located at 3 Banchory Way, The Vines (**Vines Property**) from Sebastian Wildley (prospective vendor) to Sarah-Jane Oliveri and Colin Clark (prospective purchasers) (**Vines Transaction**).

17. The Vines Transaction was arranged in the form of the Option Rent to Buy Arrangement, in that:
  - 17.1. on a date unknown, the prospective vendors gave to the First Defendant a power of attorney limited to dealings with the Vines Property; (**Bundle**, 217);
  - 17.2. on or about 24 July 2011 the First Defendant entered into an arrangement with the prospective vendor for a Vendor Option; (**Bundle**, 76);
  - 17.3. on or about 7 August 2011 the First Defendant varied the arrangement with the prospective vendor by entering into another Vendor Option pursuant to which the First Defendant was required to pay to Mr Wildey an upfront option fee of \$1.00 plus an ongoing option fee of approximately \$1,125.00 per week; (**Bundle**, 204);
  - 17.4. on 4 August 2011, the First Defendant entered into arrangements involving a Purchaser Option and a Purchaser Tenancy pursuant to which the prospective purchasers were required to pay an upfront option fee of \$10,000.00, payable in two instalments of \$2,000 and one instalment of \$6,000.00 on various dates, plus an ongoing option fee of \$787.00 per week and rent of \$600.00 per week; (**Bundle**, 142 and 150);
  - 17.5. on 7 August 2011, the First Defendant entered into a Vendor Tenancy with the prospective vendors pursuant to which the First Defendant was required to pay to the prospective vendor rent of \$550.00 per week. (**Bundle**, 213);
18. The Vines Transaction did not proceed further after the prospective purchasers withdrew from the arrangement shortly after 7 August 2011.

*Common features of Option Rent to Buy Arrangements*

19. In respect of the Option Rent to Buy Arrangements for the Orelia Property and the Huntingdale Property, the First Defendant:
  - 19.1. paid to the prospective vendors the option fee due under the Vendor Option;
  - 19.2. received from the prospective purchasers of the subject property:
    - 19.2.1. the option fee due under the Purchaser Option;  
and

- 19.2.2. the rent due under the Purchaser Tenancy; and
- 19.3. retained, for her use and benefit, the difference between the sums paid to the First Defendant by the prospective purchasers and the sum paid by the First Defendant to the prospective vendors.

The Calista Property - Joint Venture Rent to Buy Arrangement

20. In or about February and March 2012, the Defendants promoted and facilitated the purported sale of the property located at 19 Sawyer Road, Calista (**Calista Property**) from Rita Chilla, Steven Anthony Mansueto, Rosanna Mansueto, Francesca Maria Blogna and Giuseppe Blogna (prospective vendors) to Trevor and Debbie Pettigrove (prospective purchasers).
21. This transaction was arranged in the form of a Joint Venture Rent to Buy Arrangement.
22. On or about 16 February 2012, the prospective vendors and the First Defendant entered into a Joint Venture Agreement, the express terms of which provided, in effect, that (**Bundle**, 323):
  - 22.1. the prospective vendors agreed to contribute the Calista Property to the joint venture valued at \$280,000; and
  - 22.2. the First Defendant contributes her skill in selling the Calista Property by using a vendor finance arrangement (by option and lease or instalment contract) or by standard sale.
23. On or about 6 March 2012, the prospective vendors entered into a contract of sale by instalment with the prospective purchasers whereby the payment of the purchase price was to be made in weekly instalments of a variable sum over a period of 25 years. (**Bundle**, 335).

**STATEMENTS MADE IN ADVERTISING MATERIAL**

Orelia advertisements

24. In or around July 2011:
  - 24.1. the Second Defendant published an advertisement on the internet website [www.gumtree.com.au](http://www.gumtree.com.au) (**Gum Tree Website**) for the Orelia Property (**First Orelia Advertisement**). (**Bundle**, 75); and
  - 24.2. the First Defendant was knowingly concerned in the publication of the First Orelia Advertisement.

25. The First Orelia Advertisement contained the following written statements:
  - 25.1. *'OWN MY HOME - No Banks Needed!'*
  - 25.2. *'Take my 3x1 home in Orelia! Must sell! Move straight into this home.'*
  - 25.3. *'Price \$538.00'.*
  - 25.4. *'\$538p.wk'.*
26. In or around July 2011:
  - 26.1. the Second Defendant published an advertisement on the internet website [www.renttoownhome.com.au](http://www.renttoownhome.com.au) (**Rent to Own Website**) for the Orelia Property (**Second Orelia Advertisement**). (**Bundle**, 154); and
  - 26.2. the Second Defendant was knowingly concerned in the publication of the Second Orelia Advertisement.
27. The Second Orelia Advertisement contained the following written statements:
  - 27.1. *'WA \$558 per week'.*
  - 27.2. *'OWN MY HOME! Must Sell.'*
  - 27.3. *'STUFF THE BANKS! Move in today. No Banks Needed'.*
  - 27.4. *\$558 p.wk + outgoings'.*
  - 27.5. *'Price (per week) \$558.00'.*
28. The First Defendant was knowingly concerned in the publication of the First Orelia Advertisement and the Second Orelia Advertisement because:
  - 28.1. she knew that the Second Defendant published the advertisements;
  - 28.2. she knew the kind of statements that the Second Defendant would use in the advertisements;
  - 28.3. she acquiesced in the publication of the advertisement; and
  - 28.4. she facilitated the publication of the advertisement by assisting the Second Defendant to establish an account with Gum Tree.

29. In or around July 2011 the Defendants placed two signs at the front of the Orelia Property (**Bundle**, 318).
30. The first sign contained the following written statements:
  - 30.1. *'Home 4 sale'*.
  - 30.2. *'\$557 p-wk 3x1 + outgoings'*.
31. The second sign contained the following written statements:
  - 31.1. *'Own this Home: No Banks Needed'*.
  - 31.2. *'3x1, 728m2 \$557 pWk'*.

Vines advertisements

32. On or about 1 August 2011:
  - 32.1. the Second Defendant published an advertisement on the Gum Tree Website for the Vines Property (**First Vines Advertisement**). (**Bundle**, 155); and
  - 32.2. the First Defendant was knowingly concerned in the publication of the First Vines Advertisement.
33. The First Vines Advertisement contained the following written statements:
  - 33.1. *'Take my 4x2 home in the Vines! MUST SELL!'*
  - 33.2. *'Get in Straight away! No Bank Qualifying!'*
34. In or about August 2011:
  - 34.1. the Second Defendant published an advertisement on the Rent to Own Website for the Vines Property (**Second Vines Advertisement**). (**Bundle**, 157); and
  - 34.2. the First Defendant was knowingly concerned in the publication of the Second Vines Advertisement
35. The Second Vines Advertisement contained the following written statements:
  - 35.1. *'WA \$1,257 per week'*.
  - 35.2. *No Banks Home!*
  - 35.3. *TAKE MY HOME! Must Sell!*
  - 35.4. *'\$1,257 p. wk'*.

36. The First Defendant was knowingly concerned in the publication of the First Vines Advertisement and the Second Vines Advertisement because:
- 36.1. she knew that the Second Defendant published the advertisements;
  - 36.2. she knew the kind of statements that the Second Defendant would use in the advertisements;
  - 36.3. she acquiesced in the publication of the advertisement; and
  - 36.4. she facilitated the publication of the advertisement by assisting the Second Defendant to establish an account with Gum Tree.

## **REPRESENTATIONS MADE IN ADVERTISING MATERIAL**

### My Home Representations

37. In publishing the First Orelia Advertisement, in particular the words 'OWN MY HOME - No Banks Needed!' and 'Take my 3x1 home in Orelia! Must sell! Move straight into this home.', the Defendants represented to potential purchasers of properties that they were, either solely or jointly, the owners of the freehold title of the Orelia Property.
38. In publishing the Second Orelia Advertisement, in particular the words 'OWN MY HOME! Must Sell' and 'Contact Bryan Property Owner/Consultant', the Defendants represented to potential purchasers of properties that they were, either solely or jointly, the owners of the freehold title of the Orelia Property.
39. In publishing the First Vines Advertisement, in particular the words 'BUY MY HOME', 'For Rent By Owner' and 'Take my 4x2 home in the Vines! MUST SELL!', the Defendants represented to potential purchasers of properties that they were, either solely or jointly, the owners of the freehold title of the Vines Property.
40. In publishing the Second Vines Advertisement, in particular the words 'Contact Bryan'. 'Property Owner/Consultant' and 'TAKE MY HOME! Must sell!', the Defendants represented to potential purchasers of properties that they were, either solely or jointly, the owners of the freehold title of the Vines Property.
41. The First and Second Defendants were not, at any time, the owners, whether solely or jointly, of the freehold title to the Orelia Property or the Vines Property.



No Bank Loan Representations

42. In publishing:
- 42.1. the First Orelia Advertisement, in particular the words 'OWN MY HOME - No Banks Needed!';
  - 42.2. the Second Orelia Advertisement, in particular the words 'STUFF THE BANKS! Move in today. No Banks Needed.';
  - 42.3. the First Vines Advertisement, in particular the words 'Get in straight away! No Bank Qualifying!'; and
  - 42.4. the Second Vines Advertisement, in particular the words 'No Banks Home!';

the Defendants represented to potential purchasers of properties that those purchasers could purchase the advertised property without obtaining a bank loan.

43. Each of these representations was a representation as to a future matter, namely, the future ability of a potential purchaser to purchase a property without a bank loan.
44. The Defendants did not have reasonable grounds for making these representations because:
- 44.1. The Defendants have never promoted or participated in any Rent to Buy arrangement in which a prospective purchaser acquired the freehold title to the relevant property without arranging finance from a bank or similar financial institution; and
  - 44.2. the nature of the Rent to Buy arrangements that they promoted was such that the prospective purchaser would not become the registered proprietor of the property until they paid the full purchase price for the property and there was a significant risk that a potential purchaser would not be able to buy the property without arranging finance from a bank or similar institution.

Own My Home Representations

45. In publishing the First Orelia Advertisement, in particular the words 'OWN MY HOME - No Banks Needed!' and 'Take my 3x1 home in Orelia! Must sell! Move straight into this home.', the Defendants represented to potential purchasers of properties that the freehold interest in the Orelia Property was offered for immediate sale.

46. In publishing the Second Orelia Advertisement, in particular the words 'OWN MY HOME! Must Sell' and 'STUFF THE BANKS! Move in today. No Banks Needed.', the Defendants represented to potential purchasers of properties that the freehold interest in the Orelia Property was offered for immediate sale.
47. In publishing the First Vines Advertisement, in particular the words 'Take my 4x2 home in the Vines! MUST SELL!' and 'Get in straight away! No Bank Qualifying!', the Defendants represented to potential purchasers of properties that the freehold interest in the Vines Property was offered for immediate sale.
48. In publishing the Second Vines Advertisement, in particular the words 'TAKE MY HOME! Must sell!', the Defendants represented to potential purchasers of properties that the freehold interest in the Vines Property was offered for immediate sale.
49. At the time of publishing each of the representations in paragraph 45 to 48, the Defendants were not the owners of the freehold interest, whether solely or jointly, in the Orelia and Vines Properties and were not offering the freehold interest for immediate sale.

Price Representations

50. In publishing the First Orelia Advertisement, in particular the words 'Price \$538.00' and '\$538 p.wk', the Defendants represented to potential purchasers of that property that they could purchase the Orelia Property for \$538 per week.
51. In publishing the Second Orelia Advertisement, in particular the words 'WA \$558 per week' and '\$558 p.wk + outgoings', the Defendants represented to potential purchasers of that property that they could purchase the Orelia Property for \$558 per week.
52. In publishing the First Vines Advertisement, in particular the words '\$1257 p.wk', the Defendants represented to potential purchasers of that property that they could purchase the Vines Property for \$1,257 per week.
53. In publishing the Second Vines Advertisement, in particular the words 'WA \$1,257 per week' and '\$1257 p.wk', the Defendants represented to potential purchasers of that property that they could purchase the Vines Property for \$1,257 per week.
54. At the time of publishing each of the representations in paragraphs 50 to 53 a person could not purchase or occupy the advertised property only by the payment of the stated sum per week but could only purchase or occupy the Orelia Property if the purchaser:

- 54.1. paid an up-front option fee;
- 54.2. entered into an Option Rent to Buy Arrangement in respect of the Orelia Property;
- 54.3. exercised the option to purchase the property by the end of the term of the relevant Purchaser Option (or any agreed extension to that term); and
- 54.4. paid the balance of the full purchase price.

General Facts

- 55. The Gum Tree Website and the Rent to Own Home Website were accessible to any person with access to the internet. Each website, and the representations made on those websites by the Defendants, could be accessed in a number of ways, including, but not limited to:
  - 55.1. directly accessing the website and either browsing through the website to the advertisements or using an internal website search function;
  - 55.2. receiving direct links to the advertisements through email mailing lists established by a user of the website; or
  - 55.3. accessing the websites or individual advertisement directly by means of search terms entered into a third party 'search engine' that would direct the user of that 'search engine' to the website or the individual advertisements.
- 56. The target audience of the representations on the Gum Tree Website and the Rent to Own Home Website were people who wanted to purchase a home but had difficulty qualifying for a conventional bank loan.

**STATEMENTS ON COMPANY WEBSITE**

- 57. Since on or about 25 June 2012, the First Defendant caused and has continued to cause the Company to publish the following statements on the Company Website (**Bundle**, 416 - 418):
  - 57.1. *We buy: Expired Listings, Vacant Houses, Ugly/Smelly Houses, Almost Finished Houses, Debt Ridden Houses \ We Buy Houses Australia Wide - Any Price, Any Condition! If you don't want it, we do!*
  - 57.2. *'We're part of a group of real estate investors who buy houses and units directly from you in any area, any price, and any condition throughout Australia.'*

- 57.3. *'We typically buy 3-4 bedroom houses and units Australia wide. We do not buy vacant blocks of land, farms, or other rural property.'*; and
- 57.4. *'We can buy your house fast. Agents can't.'*
58. On or about 25 June 2012, the First Defendant caused the Company to publish a short animated film on the Company Website (**Bundle, 414**).
59. The animated film included the following statements:
- 59.1. *'Think of us as your friendly real estate pawn shop'.*
- 59.2. *'A place for you to come in and trade your unwanted property for cash. So remember we buy houses Australia wide in any area, condition or price'.*
- 59.3. *'We can buy your house fast'.*
- 59.4. *'We do not charge any commissions or fees to buy your house'.*

## REPRESENTATIONS ON THE COMPANY WEBSITE

### We Buy Houses Representation

60. By publishing the statements referred to at paragraphs 57 and 59, the First Defendant represented to potential vendors of houses that she, or the business she operates, buys houses (**We Buy Houses Representation**).
61. Contrary to this representation, the Defendants' business:
- 61.1. did not buy houses;
- 61.2. used Option Rent to Buy Arrangements or Joint Venture Rent to Buy Arrangements under which:
- 61.2.1. the First Defendant only acquired an option to purchase the house under a Vendor Option; and
- 61.2.2. would not exercise that option unless a potential purchaser could be found who would enter into and subsequently exercise a Purchaser Option.

### Group of Investors Representation

62. By publishing the statements referred to at paragraph 57, the First Defendant represented to potential vendors of houses that she was

part of a group of real estate investors who buy houses and units (**Group of Investors Representation**).

63. Contrary to the Group of Investors Representation, the First Defendant was not at any relevant time, part of a group of real estate investors who buy houses and units.

We Buy Houses Fast Representation

64. By publishing the statements referred to at paragraph 57, the First Defendant represented to potential vendors of houses that she could buy their houses fast (**We Buy Houses Fast Representation**).
65. Contrary to the We Buy Houses Fast Representation any sale of a property as part of a Rent to Buy Arrangement would not be completed immediately or within a short period of time and the First Defendant was not in a position to purchase a Property immediately or within a short period of time.

No Commission or Fees Representation

66. By publishing the statement 'We do not charge any commissions or fees to buy your house' on the Company Website the First Defendant represented to potential vendors of houses that she would not charge any commissions or fees to buy a Property (**No Commissions or Fees Representation**).
67. The No Commissions or Fees Representation was a representation as to future matters, namely, what the First Defendant would charge a potential vendor for the sale of their property.
68. The First Defendant did not have reasonable grounds for making the No Commissions or Fees Representation because the nature of the Rent to Buy arrangements that she promoted was such that she would derive fees in the form of the difference between the amounts paid to the First Defendant by a potential purchaser and the amounts paid by the First Defendant to a potential vendor.

General Facts

69. The Company Website was accessible to any person with access to the First Defendant, could be accessed in a number of ways, including, but not limited to:
- 69.1. directly accessing the website; or
- 69.2. accessing the websites by means of search terms entered into a third party 'search engine' that would direct the user of that 'search engine' to the website.

70. The target audience of the representations on the Company Website were people that needed to sell their homes quickly, in particular people under financial stress.

**THE REBA ACT**

71. The First Defendant is not, and has never been the holder of a licence or triennial certificate under the REBA Act.

Orelia Property

72. On 18 July 2011, Mr and Mrs Smith gave the First Defendant an enduring power of attorney restricted to dealings with the Orelia Property.

Vines Property

73. In about mid-2011, the Defendants met with Mr Wildey at the Vines Property and discussed:
- 73.1. the value of the property; and
  - 73.2. the renovations required to the property.
74. The Defendants attended the Vines Property on several further occasions for the purpose of estimating the costs of renovation works required to the property.
75. [In] August 2011, the Defendants met Mr Wildey at a Red Rooster restaurant in Success. At this meeting the Defendants and Mr Wildey spent a considerable amount of time discussing:
- 75.1. the selling price for the Vines Property;
  - 75.2. the terms of the Vendor Option.
76. At this meeting, Mr Wildey signed an enduring power of attorney in favour of the First Defendant (**Bundle**, 217).
77. On or about 1 August 2011, the Defendants met Ms Oliveri and Mr Clark at the Vines Property and showed them around the property, including the renovations that needed to be completed at the property.
78. During the course of that meeting, Ms Oliveri and Mr Clark completed a 'Request to Own' form.
79. On or about 4 August 2011, the Defendants met Ms Oliveri and Mr Clark at a Dome cafe in Applecross during which the Defendants and Ms Oliveri and Mr Clark:

- 79.1. discussed the terms of the contract to be entered into;
  - 79.2. discussed renovations required to the property and the date by which they had to be completed; and
  - 79.3. negotiated an extension to the dates by which the renovations had to be completed.
80. Approximately a few days after the meeting of 4 August 2011, the Defendants met Ms Oliveri and Mr Clark at a McDonalds restaurant in Applecross during which the Defendants and Ms Oliveri and Mr Clark discussed Ms Oliveri's and Mr Clark's doubts about the transaction.

#### Huntingdale Property

81. On 17 September 2011, Mr and Mrs Bransby, the owner of the Huntingdale Property, gave to the First Defendant an Irrevocable Power of Attorney limited to dealings with the Huntingdale Property.

#### Calista Property

82. In about February 2012, the Second Defendant had a telephone conversation with Rita Chila, one of the owners of the Calista Property, in which he offered to meet with Ms Chila to explain a method of selling houses.
83. On or about 16 February 2012, the Defendants met with the owners of the Calista Property at Ms Chila's house. During the meeting, the Defendants told Ms Chila and the other owners about their system, the effect of which was that a person would move into the Calista Property and pay rent which would go straight towards the loan repayments with the aim of reducing the loan enough that after several years the person could afford to purchase the Calista Property.
84. At that meeting, the Defendants and the owners of the Calista Property signed a document entitled 'Heads of Agreement Joint Venture' (**Bundle**, 323).
85. Clause 3 of that agreement provided that the First Defendant 'will contribute to the joint venture project their (sic) skill in selling the Property on behalf of the Joint Venture ...'

#### **FINANCIAL BENEFIT**

86. From 11 November 2010 to 31 August 2011, the First Defendant received \$29,680 from the prospective purchasers of the Huntingdale Property. In that same period, the First Defendant made payments totalling \$26,855 to, or to the benefit of, the

prospective vendors of the Huntingdale Property. This amount comprised: a deposit of \$5,000; home loan payments totalling \$17,417; credit card payments totalling \$2,673; local government rates for the property of \$1,200; and insurance premiums for the property of \$560. The First Defendant made an estimated operating profit of \$2,825.

87. From 4 August 2011 to 10 May 2012, the First Defendant received amounts totalling \$37,467.30 from the prospective purchasers of the Orelia Property. In that same period, the First Defendant made payments of \$19,791 to, or to the benefit of, the prospective vendors of the Orelia Property. The First Defendant made an estimated operating profit of \$17,676.

**CO-OPERATION WITH THE PLAINTIFF**

88. On 15 November 2011, during the course of the Plaintiff's investigation of the Defendants, an officer of the Plaintiff invited the First Defendant by letter to attend a voluntary interview in respect of allegations contraventions of the ACL and REBA Act.
89. On 17 November 2011, the First Defendant replied to that officer that she did not wish to attend a voluntary interview.
90. On 18 June 2012, again during the course of the Plaintiff's investigation of the Defendants, an officer of the Plaintiff invited each Defendant, separately, by letter to attend a voluntary interview in respect of allegations contraventions of the ACL and REBA Act.
91. The Plaintiff did not receive a response from either Defendant to the letters of 18 June 2012.

13 In the supplementary statement of agreed facts, the defendants admitted that:

1. At the time of publication of the Company Website Statements, the First Defendant knew:
  - 1.1 by reference to the terms of the Vendor Option, that by entering into a Vendor Option, she would not buy the freehold interest in a property;
  - 1.2 by reference to clause 3 of the Vendor Option, that the acquisition of freehold title to any property under an Option Rent to Buy Arrangement would not occur immediately or in the near future but would occur if and when the Vendor Option was exercised; and
  - 1.3 by reference to the terms of the Vendor Option and the Purchaser Option, specifically the consideration payable



under each agreement, that she would derive revenue from the Option Rent to Buy Arrangement.

2. At the time of publication of the First Orelia Advertisement, Second Orelia Advertisement, First Vines Advertisement and Second Vines Advertisement, the Defendants both knew:
  - 2.1 by reference to the terms of the Vendor Option agreement, that neither of them was the owner of the freehold interest in the advertised property;
  - 2.2 by reference to clause 3 of the Purchaser Option, that the acquisition of freehold title to the advertised properties by prospective buyers under the Option Rent to Buy Arrangement would not occur immediately or in the near future but would occur if and when the Vendor Option was exercised; and
  - 2.3 by reference to clause 2 of the Purchase Option, that the amount stated in the advertisement was not the full consideration that a person would have to pay to purchase the advertised properties under the Option Rent to Buy Arrangement, and that a prospective purchaser would have to pay other amounts such as an upfront option fee, which was negotiable, and the balance of the purchase price, which depended on the amount of the upfront option fee.

### **The admitted conduct and contraventions**

14 The following summary outlines matters admitted by the defendants. It is drawn from the Commissioner's helpful written submissions. Its accuracy was not in issue.

### **Company website statements**

15 Ms Susilo published the Company Website Statements.<sup>4</sup>

### **Company website - we buy houses representation**

- 16 (1) By publishing the Company Website Statements, Ms Susilo represented to potential vendors of houses that she, or the business she operates, buys houses (We Buy Houses Representation);<sup>5</sup>
- (2) contrary to the We Buy Houses Representation, the business did not buy houses but instead used Option Rent to Buy Arrangements or Joint Venture Rent to Buy Arrangements;<sup>6</sup> and

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<sup>4</sup> Defence [5]; Agreed Facts [57], [59].

<sup>5</sup> Defence [14]; Agreed Facts [60].

- (3) by making the We Buy Houses Representation, Ms Susilo engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18(1) of the *Australian Consumer Law* (WA) (ACL) and that was liable to mislead the public as to the nature or characteristics of the services provided, or proposed to be provided, by her, in contravention of s 34 of the ACL.<sup>7</sup>

**Company website - group of investors representation**

- 17 (1) By publishing the Company Website Statements, Ms Susilo represented to potential vendors of houses that she was part of a group of real estate investors who buy house and units (Group of Investors Representation);<sup>8</sup>
- (2) contrary to the Group of Investors Representation, she was not at any relevant time, part of a group of real estate investors who bought houses and units;<sup>9</sup> and
- (3) by making the Group of Investors Representation, she engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18(1) of the ACL.<sup>10</sup>

**Company website - we buy houses fast representation**

- 18 (1) By publishing the Company Website Statements, Ms Susilo represented to potential vendors of houses that she could buy their houses fast (Admitted We Buy Houses Fast Representation);<sup>11</sup>
- (2) contrary to the Admitted We Buy Houses Fast Representation any sale of a property as part of a Rent to Buy Arrangement would not be completed immediately or within a short period of time and she was not in a position to purchase a Property immediately or within a short period of time;<sup>12</sup> and
- (3) by making the Admitted We Buy Houses Fast Representation, she engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and that was liable to mislead the public as to the nature or

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<sup>6</sup> Defence [15]; Agreed Facts [61].

<sup>7</sup> Defence [16].

<sup>8</sup> Defence [17]; Agreed Facts [62].

<sup>9</sup> Defence [18]; Agreed Facts [63].

<sup>10</sup> Defence [19].

<sup>11</sup> Defence [20(a)]; Agreed Facts [64].

<sup>12</sup> Defence [24]; Agreed Facts [65].

characteristics of the services provided, or proposed to be provided, by her in contravention of s 34 of the ACL.<sup>13</sup>

**Company website – no commissions or fees representation**

- 19 (1) By publishing the Company Website Statements, Ms Susilo represented to potential vendors of houses that she would not charge any commissions or fees to buy a Property;<sup>14</sup>
- (2) contrary to the No Commissions or Fees Representation, she would derive fees from both an Option Rent to Buy Arrangement and a Joint Venture Rent to Buy Arrangement;<sup>15</sup> and
- (3) by making the No Commissions or Fees Representation, she engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18(1) of the ACL and made a false or misleading representation with respect to the price of goods or services, in contravention of s 29(i) of the ACL.<sup>16</sup>

**Statements in advertising material**

20 Mr Susilo published the First Orelia Advertisement, Second Orelia Advertisement, First Vines Advertisement and Second Vines Advertisement (together the Advertisements).<sup>17</sup>

21 Ms Susilo was knowingly concerned in the publication of the Advertisements.<sup>18</sup>

**Advertising material - my home representations**

- 22 (1) In publishing and being knowingly concerned in the publication of the Advertisements, the defendants represented to potential purchasers of properties that they were, either solely or jointly, the owners of the freehold title of the Orelia Property or the Vines property (My Home Representations);<sup>19</sup> and

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<sup>13</sup> Defence [25].

<sup>14</sup> Defence [26]; Agreed Facts [66].

<sup>15</sup> Defence [28]; Agreed Facts [68].

<sup>16</sup> Defence [30].

<sup>17</sup> Defence [31(a)]; Agreed Facts [24] - [28], [32] - [35].

<sup>18</sup> Defence [31(b)]; Agreed Facts [28], [36].

<sup>19</sup> Defence [35]; Agreed Facts [37] - [40].

(2) contrary to the My Home Representations they were not, at any time, the owners, whether solely or jointly, of the freehold title to the Orelia Property or the Vines Property.<sup>20</sup>

23 By making the My Home Representations, Mr Susilo engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and made false or misleading representations connection with the sale or grant of an interest in land concerning the nature of an interest in land, in contravention of s 30(1)(b) of the ACL.<sup>21</sup>

24 By being knowingly concerned in the making of the My Home Representations Ms Susilo was knowingly concerned in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and in making false or misleading representations connection with the sale or grant of an interest in land concerning the nature of an interest in land, in contravention of s 30(1)(b) of the ACL.<sup>22</sup>

#### **Advertising material - no bank loan representations**

25 (1) In publishing and being knowingly concerned in the publication of the Advertisements, the defendants represented to potential purchasers of properties that those purchasers could purchase the advertised property without obtaining a bank loan (No Bank Loan Representations);<sup>23</sup> and

(2) contrary to the No Bank Loan Representations they did not have reasonable grounds for making the No Bank Loan Representations, because they had never promoted or participated in any Rent to Buy Arrangement that involved purchase of the freehold title without a bank loan and there was a significant risk that a potential purchaser would not be able to buy the freehold interest in the property without arranging finance from a bank or similar institution.<sup>24</sup>

26 By making the No Bank Loan Representations Mr Susilo engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL.<sup>25</sup>

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<sup>20</sup> Defence [36]; Agreed Facts [41].

<sup>21</sup> Defence [37(a)], [37(c)].

<sup>22</sup> Defence [37(b)], [37(d)].

<sup>23</sup> Defence [39]; Agreed Facts [42].

<sup>24</sup> Defence [43], [45]; Agreed Facts [43] - [44].

<sup>25</sup> Defence [46(a)].

27 By being knowingly concerned in making the No Bank Loan Representations Ms Susilo was knowingly concerned in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL.<sup>26</sup>

**Advertising material - own my home representations**

- 28 (1) In publishing and being knowingly concerned in the publication of the Advertisements, the defendants represented to potential purchasers of properties that the freehold interest in the Orelia Property or the Vines Property was offered for immediate sale (Own My Home Representations);<sup>27</sup> and
- (2) contrary to the Own My Home Representations, at the time of publishing each of the Advertisements, they were not the owners of the freehold interest, whether solely or jointly, in the Orelia or Vines Properties and were not offering the freehold interest for immediate sale.<sup>28</sup>

29 By making the Own My Home Representations, Mr Susilo engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and made false or misleading representations in connection with the sale or grant of an interest in land concerning the nature of an interest in land in contravention of s 30(1)(b) of the ACL.<sup>29</sup>

30 By being knowingly concerned in making the Own My Home Representations, Ms Susilo was knowingly concerned in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and in making false or misleading representations in connection with the sale or grant of an interest in land concerning the nature of an interest in land in contravention of s 30(1)(b) of the ACL.<sup>30</sup>

**Advertising material – price representations**

- 31 (1) In publishing and being knowingly concerned in the publication of the Advertisements, in particular the stated sum which appeared in each Advertisement, the defendants represented to potential purchasers of that property that they could purchase the Orelia

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<sup>26</sup> Defence [46(b)].

<sup>27</sup> Defence [48]; Agreed Facts [45] - [48].

<sup>28</sup> Defence [50]; Agreed Facts [49].

<sup>29</sup> Defence [51(a)], [51(c)].

<sup>30</sup> Defence [51(b)], [51(d)].

Property or the Vines Property for the stated sum per week (Price Representations);<sup>31</sup> and

- (2) contrary to the Price Representations a person could not purchase or occupy the advertised property only by the payment of the stated sum per week but could only purchase or occupy either property if they entered into a Rent to Buy Arrangement.<sup>32</sup>

32 By making the Price Representations, Mr Susilo engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and made false or misleading representations in contravention of s 30(1)(c) of the ACL.<sup>33</sup>

33 By being knowingly concerned in making the Price Representations, Ms Susilo was knowingly concerned in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18(1) of the ACL and in making false or misleading representations in contravention of s 30(1)(c) of the ACL.<sup>34</sup>

### Statement in signs at Orelia Property

34 In or about July 2011, the defendants placed two signs at the front of the Orelia Property that contained the written statements 'Own This Home: No Banks Needed' and 'Home 4 Sale'.<sup>35</sup> In placing the signs they made the No Bank Loan Representations and the Own My Home Representations and thereby contravened or were knowingly concerned in the contraventions of the ACL referred to in the preceding four paragraphs.<sup>36</sup>

### REBA Act contraventions

35 In carrying on her business and in promoting and facilitating Rent to Buy Transactions, Ms Susilo acted as an agent for monetary consideration in respect of those real estate transactions, in accordance with the meaning of those terms in s 4 of the *Real Estate and Business Agents Act 1978* (WA) (REBA Act) in that she was engaged by, or was acting on behalf of, the owners of the properties the subject of the transaction to locate a

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<sup>31</sup> Defence [53]; Agreed Facts [50] - [53].

<sup>32</sup> Defence [56]; Agreed Facts [54].

<sup>33</sup> Defence [57(a)], [57(c)].

<sup>34</sup> Defence [57(b)], [57(d)].

<sup>35</sup> Defence [38(b)], [47(b)]; Agreed Facts [29] - [31].

<sup>36</sup> Defence [46], [51].

prospective lessor or purchaser of the property and she received monetary reward for locating a purchaser.<sup>37</sup>

36 Ms Susilo performed the usual functions of a real estate agent in marketing the sale of properties, dealing with enquiries regarding the purchase of the properties, showing properties to prospective purchasers and receiving deposits for the purchase of properties.<sup>38</sup>

37 Ms Susilo carried on business as a real estate agent in Western Australia whilst not the holder of a real estate agent's licence and current triennial certificate granted under the REBA Act and was thereby in contravention of s 26(1) of the REBA Act.<sup>39</sup>

38 Mr Susilo was involved in Ms Susilo's business as a real estate agent in that he published the Advertisements and attended and participated in meeting between Ms Susilo and prospective vendors and purchasers of properties.<sup>40</sup>

39 I turn to the remedies to be granted.

40 I begin with the Commissioner's claim for declarations.

### **Declarations**

41 A declaration can only be made if there was a proper contradictor in the proceedings.<sup>41</sup> The defendants were proper contradictors in these proceedings, notwithstanding that, just before the trial of the action, they have admitted their contraventions. At the time the proceedings were instituted, there was a real controversy between the parties, and the defendants were parties with an interest to oppose the declaratory relief sought. The subsequent admission by the defendants of the contraventions, and the tendering of a statement of agreed facts, does not mean that the claims for declarations fail for want of a contradictor.<sup>42</sup>

42 The lack of a contest may bear upon whether there is utility in the making of a declaration. A declaration should only be made if it has a

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<sup>37</sup> Defence [58].

<sup>38</sup> Defence [58]; Agreed Facts [71] - [85].

<sup>39</sup> Defence [58].

<sup>40</sup> Defence [59]; Agreed Facts [71] - [85].

<sup>41</sup> *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 - 438.

<sup>42</sup> *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378.

utility beyond simply 'recording in a summary form, conclusions reached by the court in reasons for judgment'.<sup>43</sup>

43 That utility may be found in the setting out of the basis of the liability found and the penalties or injunctions imposed.<sup>44</sup> Declarations may also be appropriate because they may:

- (a) be an appropriate vehicle to record the court's disapproval of the contravening conduct;
- (b) serve to vindicate the regulator's claim that the defendant contravened legislation;
- (c) be of assistance to the regulator in carrying out its duties;
- (d) inform consumers of the dangers arising from the defendant's contravening conduct; and
- (e) deter others from contravening the legislation.<sup>45</sup>

44 In my view, those considerations support the making of declarations in this matter.

45 Declarations should contain appropriate and adequate particulars of how and why the conduct in question breaches the legislation.<sup>46</sup>

46 Initially, the parties put competing forms of declarations and injunctions. However, in the end, the Commissioner supported the adoption of the form of order that had been proposed by the defendants. To my mind, that was an appropriate concession in that the defendants' proposed orders were preferable: they were appropriately confined to and consonant with the case pleaded by the Commissioner and admitted by the defendants.

47 For these reasons, I grant declarations in the form ultimately proposed by the Commissioner, set out in the defendants' minute of proposed orders, and attached as annexure A.

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<sup>43</sup> *Warramunda Village Inc v Pryde* [2001] FCA 61; (2001) 105 FCR 437 [8]; *ACCC v MSY Technology* [35].

<sup>44</sup> *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 [95]; *ACCC v MSY Technology* [35].

<sup>45</sup> *Australian Competition and Consumer Commission v Marksun Australia Pty Ltd* [2011] FCA 695 [49]; *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730 [6]. See also *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1 [69].

<sup>46</sup> *Rural Press* [89]; *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167 [35].



**Injunctions**

48 The Commissioner seeks injunctions in relation to both the ACL  
contraventions and the REBA Act contraventions.

49 The defendants do not oppose the grant of injunctions.

50 In relation to the REBA contraventions, the Commissioner seeks  
injunctions pursuant to s 100 and s 101 of the *Fair Trading Act 2010*  
(WA). In relation to the ACL contraventions, the Commissioner seeks  
injunctions pursuant to s 232 and s 233 of the ACL.

51 Under both legislative regimes, the court has power to grant an  
injunction in any terms the court considers appropriate if the court is  
satisfied that a person has engaged or is proposing to engage in conduct  
that constitutes a contravention of relevant legislation, including the  
REBA Act and the ACL provisions contravened in this case. Thus, the  
power of the court to grant an injunction is not in doubt.

52 The terms of the injunction are specific. They do not simply  
reproduce the statutory prohibition.

53 I am satisfied that injunctions in the terms ultimately sought by the  
Commissioner, attached as annexure A, are appropriate.

**Pecuniary penalties: general principles**

54 The court has power to order a person who has contravened, or been  
knowingly concerned in a contravention of, a provision of pt 3-1 of the  
ACL to pay to the State such pecuniary penalty as the court determines to  
be appropriate.<sup>47</sup>

55 The maximum penalty for each act or omission that relates to a  
contravention of pt 3-1 is, in the case of an individual, \$220,000.<sup>48</sup> Where  
conduct contravenes two or more provisions of the ACL, the court cannot  
impose more than one penalty in respect of the same conduct.<sup>49</sup>

56 In determining the appropriate penalty, the court must have regard to  
all relevant matters including:

- (a) the nature and extent of the act or omission and of any loss or  
damage suffered as a result of the act or omission; and

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<sup>47</sup> Section 224(1) ACL.

<sup>48</sup> Section 224(3).

<sup>49</sup> Section 224(4).

- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by a court in proceedings under ch 4 or this part to have engaged in any similar conduct.<sup>50</sup>

57 The primary object of the pecuniary penalty is deterrence, both general and specific.<sup>51</sup> The penalty must be 'fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business ... [T]hose engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention'.<sup>52</sup>

58 In addition to the factors referred to in s 224(2), the following have been identified in the cases as factors relevant to the assessment of an appropriate penalty:

- (a) the deliberateness of the contraventions;
- (b) the period over which they extended;
- (c) the size or scale of the operations of the contravening company;
- (d) whether the contraventions arose out of the conduct of senior management or those in a lower level;
- (e) whether the company has a culture of compliance;
- (f) whether the individuals have shown a disposition to cooperate with the authority responsible for the enforcement of the act;
- (g) whether the conduct was systematic, deliberate or covert;
- (h) the financial position of the defendant; and
- (i) whether the defendant has engaged in similar conduct in the past.<sup>53</sup>

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<sup>50</sup> Section 224(2).

<sup>51</sup> *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 [65]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513 [60].

<sup>52</sup> *ACCC v TPG* [66], quoting *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 [62] - [63].

<sup>53</sup> *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076; *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* [1996] ATPR 41-515; *Singtel Optus* [37]; *Global One Mobile Entertainment Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 134 [119] - [124].

59 In the context of pecuniary penalties for breach of the resale price maintenance provisions of the *Trade Practices Act 1974* (Cth), the Full Federal Court has observed that there is little to be gained in detailed comparative analysis of a number of decided cases because the constellation of circumstances, essential character of the conduct and the factors to be weighed by the court are inevitably sufficiently different in each case that previous determinations ultimately provide little utility in informing the appropriate pecuniary penalty to be imposed in any particular contravention.<sup>54</sup> Penalties imposed in cases of similar contraventions may provide 'a high level broad range' within which an appropriate pecuniary penalty may be imposed.<sup>55</sup>

60 Neither party referred to any case of a pecuniary penalty in relation to misleading conduct of a character and in a setting that provides any assistance in determining the appropriate penalty in this case.

61 Where there have been a number of contraventions, in the end, the total penalty should not exceed that which is a proper reflection of the entirety of the contravening conduct, taking into account all of its circumstances and the circumstances of the contravener.<sup>56</sup>

62 In many cases, courts have assessed penalties by analysing a number of contraventions into courses of conduct that reflect the substance of the contraventions.<sup>57</sup>

**The courses of conduct in this case**

63 The Commissioner submits, and the defendants accept, that the defendants' conduct and involvement is appropriately categorised into three courses of conduct for the purpose of assessing penalties, as follows:

- (1) Ms Susilo's publication of the Company Website, which conveyed the following representations:
  - (a) the We Buy Houses Representation;<sup>58</sup>
  - (b) the Admitted We Buy Houses Fast Representation;<sup>59</sup> and

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<sup>54</sup> *ACCC v Dataline.Net.Au* [67].

<sup>55</sup> *ACCC v Dataline.Net.Au* [68].

<sup>56</sup> *Trade Practices Commission v TNT Australia Pty Ltd* [1995] ATPR 41-375, 40,169; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [No 2]* [2002] FCA 559; (2002) 190 ALR 169 [39] - [40].

<sup>57</sup> See, for example, *Singtel Optus* and *ACCC v TPG*.

<sup>58</sup> Contravention of s 34 of the ACL.

<sup>59</sup> Contravention of s 34 of the ACL.

(c) the No Commissions or Fees Representation;<sup>60</sup>

(Company Website Conduct).

(2) The defendants' representations made to potential purchasers of the Orelia Property, including by publication of the First and Second Orelia Advertisements, each of which conveyed the following representations:

(a) the My Home Representation;<sup>61</sup>

(b) the Own My Home Representation;<sup>62</sup>

(c) the Price Representation;<sup>63</sup>

(Orelia Conduct).

(3) The defendants' representations made to potential purchasers of the Vines Property, including by publication of the First and Second Vines Advertisements, each of which conveyed the following representations:

(a) the My Home Representation;<sup>64</sup>

(b) the Own My Home Representation;<sup>65</sup>

(c) the Price Representation;<sup>66</sup>

(Vines Conduct).

64 Consequently, the parties are agreed that the maximum penalty is \$660,000 for Ms Susilo and \$440,000 for Mr Susilo. The parties are also agreed that a single global penalty should be imposed for each defendant, as often occurs in the cases. I am content to proceed on that basis.

65 I turn to consider the various factors relevant to the determination of the appropriate penalty.

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<sup>60</sup> Contravention of s 29(i) of the ACL.

<sup>61</sup> Contravention of s 30(1)(b) of the ACL.

<sup>62</sup> Contravention of s 30(1)(b) of the ACL.

<sup>63</sup> Contravention of s 30(1)(c) of the ACL.

<sup>64</sup> Contravention of s 30(1)(b) of the ACL.

<sup>65</sup> Contravention of s 30(1)(b) of the ACL.

<sup>66</sup> Contravention of s 30(1)(c) of the ACL.

## Consideration of penalty factors

### The nature and extent of the Company Website Conduct

66 The three representations (We Buy Houses, We Buy Houses Fast, and No Commissions or Fees) were made on the website that advertised Ms Susilo's business. The We Buy Houses Representation represented that she, or the business she operated, bought houses. That directly misrepresented the nature of the business that was being operated, and the services being offered by Ms Susilo. The No Commission or Fees Representation misrepresented the price of Ms Susilo's services.

67 The evident object of the Company Website Statements is to get owners of houses who may be interested in selling to contact the defendants. Thus, the statements may be described, as Tamberlin J has expressed it, as calculated to entice the misled vendor into the marketing web of the contravener.<sup>67</sup> Many decisions have made this point, in rejecting an argument that an incorrect statement does not endure to the point of contracting and thus has so transitory an effect that the statement should not be characterised as misleading.<sup>68</sup> Nevertheless, the scope and duration of an erroneous impression created by the misleading conduct is relevant to an assessment of the gravity and seriousness of the contravening conduct.

68 The Commission submits that:

- (a) loss is not an element of misleading conduct;
- (b) the presence or absence of loss is a factor under s 224(2); and
- (c) the court should not 'apply the same consideration twice by applying a discount for "transitory effect" '.<sup>69</sup>

69 I accept the first two propositions, but not the third. I do not think it is a question of 'applying a discount'. Rather, the contravening conduct must be properly characterised so that its seriousness can be assessed. In the course of that process, it is relevant to assess, so far as may be possible, the likely scope and duration of the erroneous impression(s) created by the misleading statements.

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<sup>67</sup> *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326, 340; cited with approval in *ACCC v TPG Internet Pty Ltd* [50]; see also *Commissioner for Consumer Protection v Standley* [2014] WASC 45 [36].

<sup>68</sup> See the cases in the preceding footnote, and the cases referred to by Perram J in *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177 [16] - [18].

<sup>69</sup> Plaintiff's further submissions [7].

70 That assessment will, of necessity, involve a consideration of the circumstances of the particular case. There are many cases where a clear impression created by misleading advertising is thought unlikely to be dispelled, at least not for substantially all consumers, by voluminous disclaimers and 'small-print' type information at the point of sale. To my mind, the circumstances of this case are quite different. In this case, I think it can safely be inferred that by the time a person entered a rent to buy arrangement, the general character of the arrangement would have become apparent through the documents to be signed by the parties.

71 There is no evidence as to the extent of people who saw, much less were influenced by, the representations made on the company website.

72 The target of the business is people who are under financial stress and need to sell their homes quickly. That makes those people vulnerable in at least two ways. Their circumstances may impede good decision-making. Further, the risks inherent in the transaction, if realised, are likely to be most harmful to those in financial stress.

### **Nature and extent of the Orelia and Vines Conduct**

73 The Orelia Conduct consisted of representations in two advertisements on internet websites and signs outside the Orelia Property. The Vines Conduct consisted of representations made in two advertisements on internet websites. Thus, the conduct was relatively limited in its scope, relating only to two specific properties.

74 The representations conveyed were the My Home Representation, the Own My Home Representation, and the Price Representation. In essence, the My Home Representation represented that the advertiser owned the property being advertised. The Own My Home Representation represented to potential purchasers that the freehold interest in the property was offered for sale. These representations directly contradicted the admitted truth in that the advertiser did not own the home and its freehold was not being offered for sale. Again, these representations were liable to draw a reader into the marketing web of the business. It is unlikely that the effect of any such representation would have endured through to the signing by a party of relevant contracts. The documentation made clear that what was being acquired was an option, coupled with a right to occupy, on payment.

75 The Price Representation misrepresented the sum needed to be paid in order to purchase or occupy the advertised property. Thus, as the Commissioner submits, the representations concerned most of the

important elements of the defendants' services, namely the capacity of the vendor and what she had to offer, the nature of the interest offered and the price to be paid.

**Loss or damage from the conduct?**

76 The Commissioner submits, and I accept, that there is no evidence that anyone was actually misled by the Company Website Conduct, or that anyone was misled into entering into a rent to buy arrangement by the Orelia Conduct or the Vines Conduct.

**Previous contraventions?**

77 It is common ground that the defendants have not previously engaged in similar (or any) contravening conduct.

**The circumstances in which the conduct occurred**

78 Both defendants are young. This business was the first experience, for both of them, in any business. Mr Susilo was still at school when they started the business.

79 In 2009, both defendants attended a promotional seminar about ways of becoming wealthy. The topic of one session of the seminar was rent to buy schemes. Being impressed by what they heard, the defendants later attended a course that began with five days in Sydney. The defendants' parents paid more than \$20,000 for them to attend the course. The course provided details on many matters including promotion, sales methods, and documentation. A lawyer spoke at one of the sessions.

80 The defendants' evidence is that they followed what they were taught at the courses, including in the advertising of their business and the sales the subject of these proceedings. This evidence was not challenged, and I accept it.

81 In 2012, the defendants paid the presenter of the rent to buy course about \$1,000 per month for ongoing mentoring and support. That reflects the faith that the defendants had in those promoting the rent to buy scheme.

82 Based on what they were told at the course, the defendants believed that in substance the business involved buying houses on extended terms, although they knew that the business did not involve becoming a registered proprietor of property.

BEECH J

83 The defendants' business operates in the residential real estate sector. Particularly given the profile of the target market for the business, it involved individuals dealing with what was very likely their most valuable asset.

**Size of the defendants' business**

84 Ms Susilo's business is very small. The only people involved in it were the defendants. The evidence before the court reveals transactions involving only four properties.

85 Ms Susilo received \$29,675 from the prospective purchasers of the Huntingdale Property and made payments of \$26,850 to the prospective vendors, producing an estimated profit of \$2,825. In relation to Orelia, she received \$37,467 and paid \$19,791, producing an estimated profit of \$17,676.

86 When the expenses of conducting the business are taken into account, the level of profit made by the business was very low.

87 The Commissioner highlights that the upfront option fee earned or to be earned by Ms Susilo was of the order of \$10,000 in each transaction.

**Deliberateness**

88 The Commissioner accepts, and I find, that the defendants did not engage in conduct that they knew to be misleading.

89 The Company Website Conduct was deliberate in that Ms Susilo knew that her business did not buy houses and knew that she derived fees and commissions. However, she believed, based on the course she had done, that the business did buy houses in a broader, non-technical sense of the word.

90 Similarly, the Orelia and Vines conduct was deliberate in that Mr Susilo knew that the defendants were not the registered proprietors of the two properties and were not offering the freehold of those properties for immediate sale, but were instead proposing a rent to buy arrangement. Mr Susilo believed that he was selling the properties in a broader, non-legal sense of the word because the prospective buyer obtained many of the advantages of a person who became the registered proprietor of a house.

91 I accept that those beliefs of the defendants were genuine but, in my view, the beliefs were not objectively reasonable. The defendants knew



the essential facts which sustain the characterisation of the conduct as misleading. Objectively, those facts are substantially and directly inconsistent with the defendants' contravening conduct.<sup>70</sup>

92           Nevertheless, given the defendants' age and inexperience, and what they had been told at seminars, their beliefs might be said to be understandable.

93           The defendants accept that they knew at the relevant time that a potential buyer could not buy the Orelia or Vines properties for the amounts stated in their advertisements.

### **Cooperation**

94           The defendants declined to attend voluntary interviews when contacted by an officer of the Commissioner, and did not respond to correspondence during the investigation. They took that approach because they sought and obtained advice from a lawyer who had presented at the courses about the rent to buy scheme. The taking of that approach does not aggravate the defendants' conduct in any way. Of course, the defendants do not receive the mitigatory benefit that a person who cooperated with the investigation and made appropriate admissions could reasonably expect to receive.

95           The defendants defended the proceedings, based on advice that they had a good defence, until late 2013. Up to then, the promoter of rent to buy schemes had paid the defendants' legal fees. That arrangement came to an end in about November 2013, and the defendants became unrepresented.

96           In December 2013, Mr Edwards agreed to act as pro bono counsel for the defendants, who by then were without legal representation. The court expresses its appreciation to Mr Edwards for his willingness to assist the defendants and the administration of justice in this way.

97           Late in the proceedings, in about January 2014, the defendants made substantial admissions in their amended defence, and then by way of a statement of agreed facts. Notwithstanding the timing of those admissions, I think the defendants are entitled to some credit for their admissions in the proceedings.

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<sup>70</sup> See the facts admitted in the Supplementary Statement of Agreed Facts set out at [13] above.

### **The relative involvement of the defendants**

98 Ms Susilo was the sole director of the company. She was responsible for making the Company Website Representations.

99 She was knowingly concerned in the Vines advertisements and the Orelia advertisements. Mr Susilo was primarily responsible for the advertisements. Both are responsible for the signs at the Orelia Property.

100 Mr Susilo only turned 18 on 21 February 2012.

101 As was common ground, Ms Susilo's involvement in the additional course of conduct, and Mr Susilo's youth means that the penalties for each should be markedly different.

### **The defendants' financial position**

102 Ms Susilo substantially ceased involvement with the business from January 2013. She works as a credit assessor at a bank, earning about \$1,900 net per fortnight.

103 She has savings of a little under \$10,000. She has a HELP debt under what was the HECS scheme, in respect of the fees for her university degree of about \$24,000.

104 Mr Susilo does not have any assets. His income comes from the business and is very modest. It is not enough for him to live on. Mr Susilo relies on assistance from his parents for his living and other expenses.

105 The defendants' financial position does not in itself control the exercise of the discretion to fix the pecuniary penalty. The appropriate penalty is not necessarily limited to what the contravener can afford to pay. One illustration of that is that the imposition of a substantial penalty may be appropriate notwithstanding that the defendant is a company in liquidation<sup>71</sup> or a bankrupt individual.<sup>72</sup> More generally, as Gordon J recently observed, 'capacity to pay is a relevant factor, but one of "less importance when balanced against the necessity of imposing a penalty that satisfies the objective of general deterrence"'.<sup>73</sup>

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<sup>71</sup> *ACCC v Dataline.Net.Au* [19], [21].

<sup>72</sup> *Australian Competition and Consumer Commission v Halkalia Pty Ltd (No 2)* [2012] FCA 535.

<sup>73</sup> *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2011] FCA 372 [54].

**The appropriate penalty**

106 I take into account all of what I have said in assessing the appropriate penalty. Among the features of the case that call for a penalty towards the lower end are:

- (a) the limited extent of the publication of the contravening conduct;
- (b) the limited likely duration of the misleading effect of the contravening conduct;
- (c) the absence of any loss or damage;
- (d) that the defendants have not previously engaged in similar contravening behaviour;
- (e) the youth and inexperience of the defendants;
- (f) the fact that their business was of a very small scale;
- (g) the defendants' financial positions; and
- (h) the fact that they had made admissions, albeit at a late stage in the proceedings.

107 On the other hand, the defendants' misleading conduct was directed to a vulnerable audience and related to a dealing in what is likely their main asset. The conduct of the defendants was, in several respects, seriously misleading on topics of central importance to the target audience. The misleading conduct was calculated to induce consumers to negotiate with the defendants toward entering a rent to buy transaction. Further, the defendants knew the essential facts that made their statements misleading.

108 It is open to infer from the defendants' evidence that there is, or is likely to be, an active rent to buy industry. Some of the participants may have attended the same seminars and may be liable to engage in marketing and promotions strategies that raise questions of misleading conduct under the ACL. That engages the need for general deterrence. In any event, the object of general deterrence applies more widely.

109 The need for general deterrence is of primary importance in the fixing of an appropriate penalty.

110 In some of the cases, defendants in difficult financial positions have been given substantial time to pay the pecuniary penalties imposed. The

Commissioner indicated that it would not oppose such an approach in this case.

111 In all the circumstances, I would impose the following penalties:

- (1) Ms Susilo - \$17,500;
- (2) Mr Susilo - \$12,000.

112 In each case, I would be inclined to order that half of the penalty be paid in a short time, with the other half to be paid in 12 months. However, I will hear from the parties on the question of time to pay.

### **Barbaro v The Queen**

113 Before the hearing, the Commissioner filed submissions which set out a specific range within which it was submitted the penalties for each of the defendants should be.<sup>74</sup>

114 A week before the hearing of this case, the High Court published its reasons in *Barbaro v The Queen*.<sup>75</sup> In that case the plurality held that a sentencing judge was neither required nor permitted to receive submissions from the prosecution as to the available range within which the sentence in that case must fall. That decision invites the question of whether the submissions of the Commissioner, referred to in the preceding paragraph, should be received and considered.

115 In this case, counsel for the Commissioner emphasised that her submission was not intended to state an available range, or to be a statement that bounds. Rather, it represented the view or submission of a specialist regulator as to the outcome of the application of the various penalty factors to determine the penalty for this case.

116 There are questions as to whether the High Court's reasoning in *Barbaro*:

- (a) applies outside the criminal sphere, to fixing a pecuniary penalty in civil penalty proceedings; and
- (b) applies to a submission as to a range that is not couched in terms of a statement of the bounds of the available range.

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<sup>74</sup> Commissioner's submissions 6 February 2014 [136].

<sup>75</sup> *Barbaro v The Queen* [2014] HCA 2.

117 As to the first, the Commissioner submits<sup>76</sup> that the role of the Commissioner as plaintiff in civil enforcement proceedings is relevantly different from the role of the prosecution in a criminal prosecution. One such difference is the requirement under O 20 r 2 of the *Rules of the Supreme Court 1971* (WA) to specify the relief or remedy claimed. The Commissioner submits that that difference (and possibly others) may justify or explain the appropriateness of a submission by the Commissioner as to the range in which the Commissioner invites the court to fix the penalty. Further, the Commissioner points to substantial authority in the Federal Court supporting the receipt by the court of submissions as to the appropriate penalty or as to the range within which the penalty should fall.

118 Understandably, counsel for the defendants did not make submissions on these questions.

119 It is unnecessary to determine these questions. That is because the Commissioner's submission as to the range within which I should fix the penalty in this case does not influence my decision in any way - it is not a matter to which I give any weight in fixing the penalty. Thus a decision as to whether *Barbaro* precludes receipt and consideration of that submission of the Commissioner makes no difference to my reasoning or to the outcome.

120 Questions as to the scope of what was decided in *Barbaro*, including in particular whether the reasoning and result in that case applies to the process of fixing a pecuniary penalty in civil enforcement proceedings, have potentially far-reaching consequences. For example, the answer to that question would seem to affect the legal framework in which such cases may be settled by the parties, although there is, anyway, some doubt in that respect, arising from conflicting intermediate appellate decisions.<sup>77</sup> In my view, these questions should only be determined in a case in which it is necessary to do so, and in which competing submissions have been received from both parties. For these reasons, I do not propose to state my views on these questions, interesting though they may be.

## Conclusion

121 For these reasons, I would make declarations and grant injunctions in the terms proposed by the Commissioner, and impose penalties of \$17,500 on Ms Susilo and \$12,000 on Mr Susilo.

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<sup>76</sup> In submissions dated 21 February 2014 filed by leave.

<sup>77</sup> *ASIC v Ingleby*; compare *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*.

**Annexure A**

IN THE SUPREME COURT OF WESTERN AUSTRALIA  
COMMERCIAL AND MANAGED CASES LIST

CIV 2633 of 2012

IN THE MATTER OF AN APPLICATION FOR  
INJUNCTIONS AND PECUNIARY PENALTIES  
PURSUANT TO THE FAIR TRADING ACT 2010 AND  
THE AUSTRALIAN CONSUMER LAW 2010 (WA)

BETWEEN

**COMMISSIONER FOR CONSUMER PROTECTION**

Plaintiff

and

**PATRICIA MIRAWATI SUSILO**

First Defendant

and

**BRYAN ARTAWIJAYA SUSILO**

Second Defendant

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**DEFENDANTS' MINUTE OF PROPOSED ORDERS**

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Date of document: 18 February 2014

Filed on behalf of: The Defendants

Date of filing: 18 February 2014

Definitions

1 In these orders:

- a) **(Defendants)** means both of the Defendants or either one of them unless the context otherwise requires.
- b) **(Option Rent to Buy Arrangement)** means the following arrangement:
  - i) the Defendants publish their interest in acquiring houses or apartments from potential vendors;
  - ii) the Defendants offer to buy from a potential vendor:
    - (1) a call option to buy the potential vendor's property within a fixed period of time for a fixed price (**Vendor Option**);
    - (2) the right to occupy the property under a residential tenancy agreement (**Vendor Tenancy**);
  - iii) if the potential vendor enters into the Vendor Option, the express terms of that agreement provide in effect that:
    - (1) the potential vendor grants the Defendants an option to purchase the potential vendor's property for a specified purchase price in consideration of an option fee;
    - (2) the option fee comprises an upfront payment and ongoing instalments, which will be credited against the purchase price on exercise of the option;
    - (3) the option expires on a specified date but may be renewed or extended at the request of the Defendants; and
    - (4) if the option expires or is terminated before the expiry date, the Defendants forfeit any option fees paid to the vendor;

- iv) if the potential vendor is willing to enter into the Vendor Option and Vendor Tenancy, the Defendants market the property for sale to potential purchasers;
- v) the Defendants offer to sell to potential purchasers:
  - (1) a call option to buy the property within a fixed period of time for a fixed price (**Purchaser Option**); and
  - (2) the right to occupy the property under a residential tenancy agreement (**Purchaser Tenancy**);
- vi) if a potential purchaser enters into the Purchaser Option, the express terms of that agreement provide in effect that:
  - (1) the Defendants grant a potential purchaser an option to purchase the property for a specified purchase price in consideration of an option fee;
  - (2) the option fee comprises an upfront payment and ongoing instalments, which will be credited against the purchase price on the exercise of the option;
  - (3) the option expires on a specified date but might be renewed or extended at the request of the potential purchaser; and
  - (4) if the option expires or is terminated before the expiry date, the purchaser forfeits any option fees paid to the Defendants;
- vii) If a potential purchaser enters into the Purchaser Tenancy, the express terms of that agreement provide in effect that the Defendants, purporting to be the owner of the property the subject of the Vendor Option, grant the potential purchaser either: a tenancy for a fixed period; or a periodic tenancy, in respect of the property.



- viii) The Defendants derive revenue from the difference between:
  - (1) the payments made by the potential purchaser to the Defendants under the Purchaser Option and Purchaser Tenancy; and
  - (2) the payments made by the Defendants to the potential vendor under the Vendor Option and Vendor Tenancy.
  
- c) **(Joint Venture Rent to Buy Arrangement)** means the following arrangement:
  - i) the Defendants and a potential vendor of a property enter into a 'joint venture' agreement the express terms of which provide, in effect, that:
    - (1) the potential vendor agrees to contribute their property to the 'joint venture';
    - (2) the Defendants do not contribute any money to the 'joint venture';
    - (3) the Defendants agree to market and sell the property on behalf of the 'joint venture' under an Instalment Contract as described in paragraph 1(c)(iii) below;
    - (4) the Defendants are entitled to be paid amounts derived from money paid by the potential purchaser under the Instalment Contract;
  
  - ii) the Defendants market the property on behalf of the potential vendor;
  
  - iii) once a potential purchaser is located, the potential vendor and potential purchaser enter into a contract (**Instalment Contract**) the express terms of which provide, in effect, that:
    - (1) the potential purchaser agrees to purchase the property;

- (2) the purchase price is paid by way of a deposit and instalment payments, together with interest;
  - (3) the potential purchaser is entitled to possession of the property while it performs its obligations under the Instalment Contract;
  - (4) in the event of a default in the instalment payments and a termination of the Instalment Contract, the potential vendor is entitled to retain the deposit and any instalment payments already made;
  - (5) the potential purchaser does not become the registered proprietor of the property until the settlement date;
  - (6) the settlement date is not fixed but is defined as the date when the purchase price is paid.
- d) **(Rent to Buy Arrangement)** means an Option Rent to Buy Arrangement, a Joint Venture Rent to Buy Arrangement or both.

## Declarations

- 2 From November 2010 to May 2013 the First Defendant, by promoting and facilitating real estate transactions in the form of Rent to Buy Arrangements, carried on business as a real estate agent without a real estate agent's licence in contravention of section 26 of the *Real Estate and Business Agent's Act 1978 (WA)* (**REBA Act**).
- 3 Since at least 25 June 2012, the First Defendant engaged in conduct:
  - a) that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the *Australian Consumer Law (WA)* (**ACL**); and
  - b) that was liable to mislead the public as to the nature or characteristics of the services provided, or proposed to be provided, by the First Defendant, in contravention of section 34 of the **ACL**;

by representing on the website [www.sellhouseseasy.com.au](http://www.sellhouseseasy.com.au) (**Sell Houses Easy Website**) to potential vendors of houses that she, or the business she operates, buys houses (**We Buy Houses Representation**), when in fact:

- (c) the Defendants' business promoted and facilitated Rent to Buy Arrangements; and
- d) under the Rent to Buy Arrangements:
  - i) the First Defendant would either acquire an option to purchase a property or enter into a contract to supply sales services to the owner of a property; and
  - ii) a property would not be sold to a buyer until the First Defendant could locate a third party who would pay the full purchase price for the property.

4 Since at least 25 June 2012, the First Defendant engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18 of the ACL by representing on the Sell Houses Easy Website to potential vendors of houses that she was part of a group of real estate investors who buy house and units (**Group of Investors Representation**), when in fact the First Defendant was not at any relevant time, part of a group of real estate investors who buy houses and units.

5 Since at least 25 June 2012, the First Defendant engaged in conduct:

- a) that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL; and
- b) that was liable to mislead the public as to the nature or characteristics of the services provided, or proposed to be provided, by the First Defendant, in contravention of section 34 of the ACL;

by representing on the Sell Houses Easy Website to potential vendors of houses that she, or the business she operates, could buy their houses fast (**We Buy Houses Fast Representation**), when in fact:

- c) the Defendants' business promoted and facilitated Rent to Buy Arrangements; and
- d) under the Rent to Buy Arrangements:
  - i) the First Defendant would either acquire an option to purchase a property or enter into a contract to supply sales services to the owner of a property; and
  - ii) a property would not be sold to a buyer until the First Defendant could locate a third party who would pay the full purchase price for the property; and
  - iii) any sale of a property would not be completed immediately or within a short period of time; and
  - iv) a buyer would not purchase a property immediately or in a short period of time.

6 Since at least 25 June 2012, the First Defendant:

- a) engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL; and
- b) made a false or misleading representation with respect to the price of goods or services, in contravention of section 29(i) of the ACL;

by representing on the Sell Houses Easy Website to potential vendors of houses that she, or the business she operates, would not charge any fees or commissions to buy a Property (**No Commissions or Fees Representation**), when in fact:

- c) the Defendants' business promoted and facilitated Rent to Buy Arrangements; and
- d) under those Rent to Buy Arrangements, the First Defendant would derive revenue.

7 From in or about July 2011 to in or about August 2011, the Second Defendant:

- a) engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL; and
- b) made false or misleading representations connection with the sale or grant of an interest in land concerning the nature of an interest in land, in contravention of section 30(1)(b) of the ACL;

by representing to potential purchasers in relation to properties at 3 Paul Way Orelia (**Orelia Property**) and 3 Banchory Way, the Vines (**Vines Property**), that he was the owner, either solely or jointly, of the freehold title of those properties, when in fact he was not the owner, either solely or jointly, of the freehold title of those properties (**My Home Representations**).

8 From in or about July 2011 to in or about August 2011, the First Defendant was knowingly concerned in the Second Defendant's contraventions of the ACL in making the My Home Representations.

9 From in or about July 2011 to in or about August 2011, the Second Defendant engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL by representing to potential purchasers in relation to the Orelia Property and The Vines Property, that that those prospective purchasers could purchase those properties without obtaining a bank loan (**No Bank Loan Representations**), when in fact:

- a) the Defendants' business promoted and facilitated Option Rent to Buy Arrangements in relation to those properties;
- b) under those Option Rent to Buy Arrangements, a prospective purchaser of a property would:
  - i) acquire an option to purchase the property;
  - ii) not become the registered proprietor of the property until they exercised the option and paid the full purchase price for the property; and

iii) it was unlikely that a prospective purchaser of a property would be able to exercise the option and pay the full purchase price for the property without arranging finance from a bank or similar financial institution.

10 From in or about July 2011 to in or about August 2011, the First Defendant was knowingly concerned in the Second Defendant's contraventions of the ACL in making the No Bank Loan Representations.

11 From in or about July 2011 to in or about August 2011, the Second Defendant:

- a) engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL; and
- b) made false or misleading representations in connection with the sale or grant of an interest in land concerning the nature of an interest in land, in contravention of section 30(1)(b) of the ACL;

by representing to potential purchasers in relation to the Orelia Property and the Vines Property, that he was offering for immediate sale the freehold interest in the property (**Own My Home Representations**), when in fact:

- c) the Defendants' business promoted and facilitated Option Rent to Buy Arrangements in relation to those properties;
- d) under those Option Rent to Buy Arrangements, a prospective purchaser of a property would:
  - i) acquire an option to purchase the property;
  - ii) not become the registered proprietor of the property until they exercised the option and paid the full purchase price for the property.

12 From in or about July 2011 to in or about August 2011, the First Defendant was knowingly concerned in the Second Defendant's contraventions of the ACL in making the Own My Home Representations.

- 13 From in or about July 2011 to in or about August 2011, the Second Defendant:
- a) engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18(1) of the ACL; and
  - b) made false or misleading representations concerning the price payable for land in contravention of section 30(1)(c) of the ACL;
- by representing to potential purchasers in relation to the Orelia Property and the Vines Property, that the prospective purchasers could purchase and occupy the property being promoted for a stated sum per week (**Price Representations**), when in fact:
- c) the Defendants' business promoted and facilitated Option Rent to Buy Arrangements in relation to those properties; and
  - d) under those Option Rent to Buy Arrangements, a prospective purchaser of a property would have to pay more than the stated sum per week to purchase and occupy the property.
- 14 From in or about July 2011 to in or about August 2011, the First Defendant was knowingly concerned in the Second Defendant's contraventions of the ACL in making the Price Representations.

## Injunctions

### AND IT IS ORDERED THAT

- 15 Pursuant to sections 100 and 101 of the *Fair Trading Act 2010* (WA) (**FT Act**) the First Defendant is restrained for a period of 3 years from promoting or facilitating, or being involved in the promotion or facilitation of, real estate transactions in the form of Rent to Buy Arrangements in which the First Defendant acts as an agent for monetary consideration, unless and until she, or her employer has a real estate agent's licence pursuant to the provisions of the REBA Act.
- 16 Pursuant to sections 100 and 101 of the FT Act the Second Defendant is restrained for a period of 3 years from promoting or facilitating, or being involved in the promotion or facilitation of,

real estate transactions in the form of Rent to Buy Arrangements in which the Second Defendant acts as an agent for monetary consideration, unless and until he or his employer has a real estate agent's licence pursuant to the provisions of the REBA Act.

- 17 Pursuant to sections 232 and 233 of the ACL the First Defendant is restrained for a period of 3 years from representing, in trade or commerce, to potential vendors of houses that she or the business she operates buys houses unless she or that business carries on a business that involves the First Defendant or her business acquiring the freehold title to houses.
- 18 Pursuant to sections 232 and 234 of the ACL, the First Defendant is restrained for a period of 3 years from representing, in trade or commerce, to potential purchasers that she is the owner, either solely or jointly, of a property, unless she is the owner, either solely or jointly, of the freehold title of that property.
- 19 Pursuant to sections 232 and 234 of the ACL the Second Defendant is restrained for a period of 3 years from representing, in trade or commerce, to potential purchasers that he is the owner, either solely or jointly, of a property, unless he is the owner, either solely or jointly, of the freehold title of that property.
- 20 Pursuant to sections 232 and 234 of the ACL the First Defendant is restrained for a period of 3 years from representing, in trade or commerce, to potential purchasers of properties that they can buy the property without obtaining a bank loan unless there are reasonable grounds, such as the financial circumstances of any such potential purchaser, for making that representation.
- 21 Pursuant to sections 232 and 234 of the ACL an injunction is granted, for a period of 3 years, requiring that when the First Defendant advertises a property for purchase pursuant to any Rent to Buy Arrangement, she must include an accurate and complete statement of all amounts (including rent and any other fees) that will be payable by the prospective purchaser under the proposed arrangement.
- 22 Pursuant to sections 232 and 234 of the ACL an injunction is granted, for a period of 3 years, requiring that when the Second Defendant advertises a property for purchase pursuant to any Rent to Buy Arrangement, he must include an accurate and complete statement of all amounts (including rent and any other fees) that



will be payable by the prospective purchaser under the arrangement.

23 Pursuant to sections 232 and 234 of the ACL an injunction is granted, for a period of 3 years, requiring that when the First Defendant promotes or participates in any arrangement for the sale or purchase of property pursuant to any Rent to Buy Arrangement she must disclose:

- a) that what is proposed is a Rent to Buy Arrangement and not an immediate sale of the freehold of the property;
- b) whether she proposes to derive revenue from the difference between any amounts paid to them by prospective purchasers of a property and any amounts paid by them to the owners of the property; and
- c) if known, the amount of the revenue she proposes to derive from the arrangement.

24 Pursuant to sections 232 and 234 of the ACL an injunction is granted, for a period of 3 years, requiring that when the Second Defendant promotes or participates in any arrangement for the sale or purchase of property pursuant to any Rent to Buy Arrangement, he must disclose:

- a) that what is proposed is a Rent to Buy Arrangement and not an immediate sale of the freehold of the property;
- b) whether he proposes to derive revenue from the difference between any amounts paid to them by prospective purchasers of a property and any amounts paid by them to the owners of the property; and
- c) if known, the amount of the revenue he proposes to derive from the arrangement.

### **Costs**

25 The Defendants pay the Plaintiff's costs fixed in the sum of \$8,000.