

# LEGAL NOTEBOOK



Recent cases, headline issues and new legislation by  
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## **DIRECTOR OF CONSUMER AFFAIRS V HOCKING STUART RICHMOND PTY LTD [2016] FCA 1184**

### **SNAPSHOT**

A recent decision of the Federal Court of Australia, *Director of Consumer Affairs v Hocking Stuart Richmond Pty Ltd* [2016] FCA 1184, identifies the relevant factors a Court will take into consideration when determining the imposition of pecuniary penalties for underquoting.

### **THE FACTS**

The Director of Consumer Affairs Victoria (Consumer Affairs) commenced proceedings against

Hocking Stuart Richmond (HSR), a licensed estate agent which operated a small franchise business in Victoria, for contraventions of the Australian Consumer Law (ACL). Consumer Affairs alleged HSR engaged in misleading or deceptive conduct in contravention of section 18 of the ACL, and conduct involving making false and misleading representations about the sale of land in contravention of section 30(1)(c) of the ACL.

The alleged conduct took place between 2014 and 2015 and involved the sale of 11 residential properties in Richmond and Kew in the State of Victoria. Consumer Affairs contended HSR had underquoted the prices in the marketing and advertising of the properties. HSR

admitted the allegations made by Consumer Affairs, and the parties filed an Agreed Statement of Facts with the Court.

## THE FINDINGS

Liability was not an issue in the case, given HSR admitted the allegations. The crux of the case was whether a pecuniary penalty should be imposed, and if so, what the appropriate penalty should be. The Court ultimately imposed a pecuniary penalty of \$330,000.

### Pecuniary penalty

The legislative basis which empowered the Court to impose a pecuniary penalty was section 224(1) of the ACL. The Court stressed the importance of deterrence as the principle object behind the penalty regime, and cited the earlier decision of *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134, wherein the Court noted:

*“The Court should not leave room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also of others who might be tempted to think that contravention would pay, and detention lead merely to a compliance program for the future”.*

Clearly the Court regards the imposition of a penalty as not only relevant to offending parties, but as a useful tool in sending a message to everyone that contravening conduct will not be tolerated.

Courts are required to impose penalties that are proportionate to the gravity of the contravening conduct. In determining the

appropriate penalty in this case, the Court adopted an “instinctive synthesis” approach which involved taking into account all relevant factors, balancing the many different and conflicting components of the case, and arriving at a single result.

As there is no prescribed methodology for determining an appropriate penalty, Courts consider all of the relevant factors and circumstances and come to a decision depending on the facts of each case. Some factors the Courts will consider include:

1. The nature and extent of the contravening conduct.
2. Any loss or damage suffered as a result of the contravening conduct.
3. The circumstances of the contravening conduct.
4. The size of the contravening company.
5. The deliberateness of the contravention and the period over which it extended.
6. Whether the contravention arose out of the conduct of senior management of the contravener or at a lower level.
7. Whether the contravener has a corporate culture conducive to compliance with the legislation as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.

of the applicable legislation in relation to the contravention.

9. Whether the contravener has engaged in similar conduct in the past.
10. The financial position of the contravener.
11. Whether the contravening conduct was systematic, deliberate, or covert.

This is however a non-exhaustive list, and as the Court said in this case, these factors “do not necessarily exhaust potentially relevant considerations nor do they regiment the discretionary function”.

### Considering the imposition of a penalty

In determining the amount of the penalty, the Court described HSR’s contraventions as serious. Consideration was given to the views of the regulator (Consumer Affairs), particularly in regard to the deterrent effect of a proposed penalty in a given market. The Court noted that “the regulator’s view as to the real concern in the marketplace about underquoting property values to potential purchasers is of particular significance”. In the context of residential property, the Court highlighted the importance of price as an essential piece of information which consumers rely on to make informed decisions. For most consumers, buying a residential property is the biggest and most

## THE COURT REGARDS THE IMPOSITION OF A PENALTY AS NOT ONLY RELEVANT TO OFFENDERS, BUT AS A USEFUL TOOL IN SENDING A MESSAGE

8. Whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement

significant purchase they will make in their lifetime. As such, the failure to provide correct information regarding price by engaging in

underquoting was held to be misleading.

The Court identified several ways in which the practice of underquoting can arise, including where a real estate agent:

1. Advertises or advises a prospective buyer that a property is available for sale at an amount that is less than the vendor's asking price or auction reserve price;
2. Advertises or advises a prospective buyer of a price that is less than the salesperson's current estimate of the likely selling price;
3. Advertises or continues to advertise a price that is less than a genuine offer or expression of interest by a prospective buyer that the vendor refused; and
4. Gives an inaccurate appraisal of the current market price of a property.

In this case, the Court found HSR's manipulation of the estimate of selling price for the properties created an "enticing (but illusory and misleading) marketing web". By engaging in underquoting, HSR created the "illusion of a bargain" which had serious implications for many people including:

- Buyers who would have been "significantly inconvenienced, disappointed and deceived" and may have missed the opportunity to buy elsewhere;
- Vendors who may have missed out on potential purchasers; and
- Real estate agents of other properties who were subject to unfair and improper competition.

In making its determination, the Court noted HSR was a small local real estate agency and not a large corporation. HSR had not engaged in similar conduct in the past and

had demonstrated cooperativeness by admitting liability, thereby saving the time and resources of the Court and Consumer Affairs. On the other hand, HSR did not produce evidence of any culture of compliance with or understanding of the obligations imposed by the ACL, and the contravening conduct involved senior levels of management, including its owner and director.

The Court also considered the implications of adverse publicity, which HSR submitted should be a relevant factor to the imposition of, or the amount of, any pecuniary penalty. The proceedings had been widely reported on national and State

television, and circulated in Victorian newspapers, and online on real estate websites and blogs. HSR submitted that the impact of the adverse publicity had and would continue to impact on the financial viability of HSR and place it in a precarious position in the marketplace.

Ultimately, the Court was not satisfied that the evidence in the proceedings supported any causal link between a decline in sales or profit and any adverse publicity. It was however an aspect which could be taken into account in the assessment of specific and general deterrence.

In the end, the Court determined an amount of \$30,000 per



contravention was the appropriate penalty. It also noted that, although this was a substantial penalty for a company the size of HSR, it was the necessary and appropriate penalty required to meet the needs of general deterrence. HSR was also ordered to pay Consumer Affairs' costs of proceedings.

## Court orders

In addition to the pecuniary penalty, the Court ordered HSR publish a Public Notice outlining the nature of the contravening conduct and the outcome of the proceedings in the Melbourne Times newspaper, the Domain lift-out section of The Age

weekend newspaper, on the realestate.com.au website, on its own websites, and also displayed "prominently, conspicuously and continuously" for a period of six months in the public area at each of their places of business.

HSR was also ordered to establish an extensive Compliance Program which provided for regular and practical training for all employees, specifically in regards to ACL obligations, and committed to the implementation of a policy statement and a complaints handling system, and the appointment of a Compliance Officer. The Court however did not consider the implementation of the Compliance Program as mitigating the need to impose a pecuniary penalty.

## CONCLUSION

It is vitally important for all members of real estate agencies to be aware of and knowledgeable about their consumer law responsibilities and the obligations under the ACL. This case serves as a useful reminder about that importance, and the need for

real estate agencies to incorporate compliance procedures, along with appropriate risk management policies, procedures and processes, into their business operations.

Victorian real estate agents should also be aware of new laws which have been specifically introduced to address the issue of underquoting. The *Estate Agents Amendment (Underquoting) Act 2016* (Vic) is expected to be in force from 1 July 2017, and its main purposes include to amend the *Estate Agents Act 1980* (Vic) to:

- Provide for how estate agents are to determine estimated selling prices for residential property they are engaged or appointed to sell;
- Provide for the revision of those estimates;
- Require estate agents to produce statements of information for residential property that they have been engaged or appointed to sell; and
- Create new offences in relation to (mis)stating selling prices in the marketing of residential property. ■



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