FEDERAL COURT OF AUSTRALIA

 Australian Competition and Consumer Commission v A Whistle & Co (1979) Pty Limited [2015] FCA 1447

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| Citation: | Australian Competition and Consumer Commission v A Whistle & Co (1979) Pty Limited [2015] FCA 1447 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v A WHISTLE & CO (1979) PTY LIMITED ACN 001 267 054** |
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| File number(s): | NSD 661 of 2014 |
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| Judge(s): | **YATES J** |
|  |  |
| Date of judgment: | 18 December 2015 |
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| Catchwords: | **CONSUMER LAW** – false or misleading representations about goods or services – where respondent published and attempted to induce and induced franchisees to publish fabricated testimonials in respect of the respondent’s cleaning services **CONSUMER LAW** – joint submissions on final relief – determination of the appropriate pecuniary penalty – whether declaratory and injunctive relief should be granted – whether publication of a corrective notice should be ordered |
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| Legislation: | *Australian Consumer Law* (Cth) ss 29, 224, 232, 246*Competition and Consumer Act 2010* (Cth) Sch 2*Evidence Act 1995* (Cth) s 191*Trade Practices Act 1974* (Cth) ss 76, 76E |
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| Cases cited: | *Australian Competition and Consumer Commission v Bruhn* [2012] FCA 959*Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2001] ATPR ¶41-811; [2001] FCA 299*Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329; [2004] FCA 693*Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378; [2012] FCAFC 378*Australian Competition and Consumer Commission v P & N Pty Ltd* [2014] FCA 6*Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570*Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855*Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238; [2010] FCA 790*Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] ATPR ¶42-140; [2006] FCA 1730*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54*Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6*J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532; [2000] FCA 365*Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1; [2003] FCAFC 289*Minister for Environment, Heritage and the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10; [2010] FCA 58*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285*Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53; [2003] HCA 75 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20*Trade Practices Commission v CSR Limited* [1991] ATPR ¶41-076*Trade Practices Commission v Mobile Oil Australia Ltd* (1984) 4 FCR 296 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 3 June 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 61 |
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| Counsel for the Applicant: | Ms KC Morgan |
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| Solicitor for the Applicant: | Corrs Chambers Westgarth |
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| Solicitor for the Respondent: | Mr Peter Moon of Cooper Mills Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 661 of 2014 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | A WHISTLE & CO (1979) PTY LIMITED ACN 001 267 054Respondent |

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| JUDGE: | YATES J |
| DATE OF ORDER: | 18 DECEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT DECLARES THAT:

1. In the period February 2012 to June 2012 (**the relevant period**), the respondent,
A Whistle & Co (1979) Pty Limited (**the respondent**), in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, made false or misleading representations that purported to be testimonials by persons relating to goods or services, in contravention of s 29(1)(e) of the Australian Consumer Law (**the ACL**), being Sch 2 of the *Competition and Consumer Act 2012* (Cth) (**the Act**), by publishing on the Internet six fabricated testimonials in respect of the provision of carpet and tile cleaning services that purported to be genuine testimonials from customers of the business known as **Electrodry Carpet Cleaning**.
2. In the relevant period, the respondent attempted to induce its franchisees to contravene s 29(1)(e) of the ACL by requesting the franchisees to publish, or suggesting that the franchisees should publish, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, on one or more of the following websites:
	1. www.yelp.com.au;
	2. www.google.com.au;
	3. www.truelocal.com.au; and
	4. www.womo.com.au,

fabricated testimonials that purported to be genuine testimonials from customers of Electrodry Carpet Cleaning in respect of the provision of carpet, upholstery, tile and mattress cleaning services.

1. The respondent induced its franchisee, Tanya DeLorenzo, to make a false or misleading representation that purported to be a testimonial by a person relating to goods or services, in contravention of s 29(1)(e) of the ACL, by inducing her to publish on the Internet, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, in February 2012, a fabricated testimonial that purported to be a genuine testimonial in relation to the provision of carpet and upholstery cleaning services provided by Electrodry Carpet Cleaning in Canberra.
2. The respondent induced its franchisee, Lee Turnbull, by his agent, Lisa Turnbull, to make false or misleading representations that purported to be testimonials by persons relating to goods or services, in contravention of s 29(1)(e) of the ACL, by inducing him to publish on the Internet, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, in February and April 2012, three fabricated testimonials that purported to be genuine testimonials in relation to the provision of carpet and upholstery cleaning services provided by Electrodry Carpet Cleaning in Launceston.

**THE COURT ORDERS THAT:**

1. Pursuant to s 232 of the ACL:
	1. for period of three years from the date of this order, the respondent, whether by itself, its servants, its agents or otherwise, be restrained in trade or commerce, in connection with the supply or possible supply or in connection with the promotion by any means of the supply, of carpet, tile, upholstery or mattress cleaning services, from making false or misleading statements that purport to be testimonials by publishing on the Internet any testimonial that purports to be a genuine testimonial from a consumer of such services which is, in fact, a fabricated testimonial.
	2. for a period of three years from the date of this order, the respondent, whether by itself, its servants, its agents, or otherwise, be restrained in trade or commerce, in connection with the supply or possible supply or in connection with the promotion by any means of the supply of carpet, tile, upholstery or mattress cleaning services, from inducing or attempting to induce franchisees of Electrodry Carpet Cleaning to make false or misleading representations that purport to be testimonials by publishing on the Internet any testimonial that purports to be a genuine testimonial from a consumer of such services which is, in fact, a fabricated testimonial.
2. Pursuant to s 224(1) of the ACL, the respondent pay to the Commonwealth of Australia, pecuniary penalties as follows:
	1. in relation to each of the six testimonials referred to in paragraph 1 hereof that was published, a pecuniary penalty of $10,000, amounting in total to $60,000;
	2. in relation to the attempted inducement referred to in paragraph 2 hereof, a pecuniary penalty of $75,000;
	3. in relation to the inducement referred to in paragraph 3 hereof, a pecuniary penalty of $20,000; and
	4. in relation to each of the three inducements referred to in paragraph 4 hereof, a pecuniary penalty of $20,000, amounting in total to $60,000.
3. Pursuant to s 246(1) of the ACL, within seven days of the date of this order, or within such further time as the applicant permits, the respondent make a confirmed booking to have a corrective notice in the form of Annexure A to these orders published or caused to be published in the next available bi-monthly edition of the *Business Franchise Australia and New Zealand Magazine* (http://www.businessfranchiseaustralia.com.au/) (**the magazine**), which notice is to occupy space which is no less than half a page of the magazine.
4. The respondent provide the applicant with a copy of the booking confirmation referred to in paragraph 7 hereof within seven days of receiving the confirmation from the publisher of the magazine.
5. At the time of the booking referred to in paragraph 7 hereof, the respondent request the publisher to place the notice within the first 20 pages of the magazine.
6. The respondent pay $10,000 by way of contribution to the applicant’s costs, such contribution to be paid within seven days of the date of this order or within such further time as the applicant permits.
7. The total amount of the pecuniary penalties referred to in paragraph 6 hereof, amounting to $215,000, may be paid by equal monthly instalments of $10,000 each (save for the last instalment of $5,000) provided the first instalment is paid on or before 1 February 2016 and each succeeding instalment is paid on or before the first business day of each succeeding month until payment is made in full.
8. In the event that the respondent defaults in making of any of the instalment payments referred to in paragraph 11 hereof, and that default is not remedied within 14 days after the due date for payment, the whole of the outstanding amount of the penalties will fall due for immediate payment.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**ANNEXURE A**

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 661 of 2014 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | A WHISTLE & CO (1979) PTY LIMITED ACN 001 267 054Respondent |

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| JUDGE: | YATES J |
| DATE: | 18 DECEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. This matter is before the Court on the question of relief, including the imposition of pecuniary penalties, in relation to conduct which the respondent, A Whistle & Co (1979) Pty Limited, admits was undertaken by it in contravention s 29(1)(e) of Schedule 2 (the Australian Consumer Law) (**the ACL**) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) or which constituted an inducement or attempted inducement by it of others to contravene s 29(1)(e). The conduct occurred in the period February 2012 to June 2012 (**the relevant period**).
2. Section 29(1)(e) of the ACL provides:

**29 False or misleading representations about goods or services**

1. A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

…

(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services;

…

1. Specifically, the respondent admits, for the purpose of this proceeding, that it:
	1. contravened s 29(1)(e) of the ACL by authorising its agent to publish on the Internet testimonials purporting to be genuine customer testimonials which were, in fact, fabricated testimonials;
	2. attempted to induce its franchisees to publish, on certain webpages, testimonials purporting to be genuine customer testimonials which, if published, would have constituted the making of false or misleading representations in contravention of s 29(1)(e) of the ACL because the testimonials would have been fabricated testimonials; and
	3. induced certain of its franchisees to contravene s 29(1)(e) of the ACL by publishing on the Internet testimonials purporting to be genuine customer testimonials which were, in fact, fabricated testimonials.
2. On 1 July 2014, the applicant commenced this proceeding against the respondent. However, since that time, the respondent has sought to cooperate with the applicant to resolve the proceeding as quickly and as cost efficiently as possible, including by meeting with the applicant and its representatives to seek to agree on admissions of contravention and to place before the Court an agreed statement of facts.
3. The Court has been provided with an agreed statement of facts including a bundle of documents (which I have marked as Exhibit A), joint submissions and draft orders. On 3 June 2015, the parties provided a supplementary agreed statement of facts (which I have marked as Exhibit B), joint supplementary submissions and amended draft orders, following a short hearing on 25 March 2015 when I raised certain matters for the parties’ further consideration.

# SUMMARY OF Agreed facts

1. The following summary is taken from the agreed statement of facts and supplementary agreed statement of facts.

## Background

1. The respondent is a trading corporation within the meaning of s 4 of the Act. Since September 1984, it has been the franchisor of a franchised business that provides carpet, drapery, tiles, upholstery and mattress cleaning services. It has had up to 64 franchisees, each of whom has been allotted a geographical territory in Australia (with the exception of Sydney) in which it conducts the franchised business under a name which incorporates the name “Electrodry”. It is convenient to refer to the franchised business, and the respondent’s own operations, as, collectively, **Electrodry Carpet Cleaning**.
2. The respondent operates Electrodry Carpet Cleaning from its registered office in Newcastle, New South Wales. In the relevant period, it employed 11 staff and three contractors.
3. One of its contractors is Microsourcing Inc (**Microsourcing**). Microsourcing is a Hong Kong company located in the Philippines. The respondent engaged Microsourcing to provide it with marketing services, call centre services, and the management of a Facebook page for Electrodry Carpet Cleaning.
4. The respondent engaged another contractor, Grant Burchell, as the Call Centre Manager for Electrodry Carpet Cleaning and, later, as its Operations Manager. The respondent authorised Mr Burchell to oversee and manage the work carried out by Microsourcing.

## The alternative advertising initiative

1. By mid-2011, the respondent recognised that social media and online review sites were becoming increasingly mainstream as marketing channels. It developed a range of strategies—collectively, **the alternative advertising initiative**—to increase the number of customer testimonials on the Internet in relation to Electrodry Carpet Cleaning. The aim was to get customers to register their satisfaction on a variety of websites.
2. As part of the alternative advertising initiative, the respondent offered various incentives to customers, technicians and franchisees. For example, the respondent offered $20 movie ticket give-aways to customers who contacted Electrodry Carpet Cleaning and expressed their satisfaction with the services that had been provided. Each customer was encouraged to take the extra step of expressing his or her opinion in a testimonial. The respondent offered $20 bonuses to technicians who received favourable comments from customers and who encouraged these customers to express their views in an online testimonial in which the relevant technician’s name was mentioned. The respondent also instituted an “Operator of the Month” award for its franchisees. The award consisted of Woolworths vouchers of up to $200. The award was conceived as a way of encouraging franchisees to get satisfied customers to provide testimonials in relation to Electrodry Carpet Cleaning. Whilst the overarching purpose for the “Operator of the Month” award was to encourage legitimate testimonials from actual customers, the respondent admits that some of its email communications to franchisees constituted requests by the respondent, and attempts to induce franchisees, to post fabricated testimonials online. The respondent also instituted an “Operator of the Year” award for franchisees. As events transpired, the award was never given.

# The Contraventions

## Introduction

1. In about March 2012, Mr Burchell instructed Microsourcing to prepare manuals on how to post reviews/testimonials on various websites in relation to Electrodry Carpet Cleaning. One manual was directed to franchisees (**the Franchisee Manual**). It existed in at least two versions. The other was directed to customers (**the Customer Brochure**).
2. Whilst the initial and primary purpose of the instructions in the manuals was to educate franchisees and customers on how to post testimonials, the respondent admits that the instructions necessarily involved the posting by Microsourcing, as its agent, of fabricated testimonials. For the purpose of the franchisee manual, the respondent instructed Microsourcing to post fabricated testimonials on the Internet and to include those testimonials within the body of the instructions to franchisees as examples of how to post testimonials.

## Primary contravention

1. Further to these instructions, on six occasions during the relevant period, Microsourcing posted testimonials which purported to be genuine customer testimonials but which were, in fact, fabricated testimonials. Whilst the purpose behind instructing Microsourcing to post testimonials on the Internet was to provide examples to the franchisees of a step-by-step method for posting testimonials, the respondent admits that the testimonials were fabricated and that, in posting them, it made false or misleading representations in contravention of
s 29(1)(e) of the ACL. The respondent admits that Microsourcing was acting as its agent and on its behalf. Each testimonial is described in greater detail in Schedule A to these reasons, including the respects in which it was false or misleading.

## Attempted inducement

1. Whilst the overarching purpose of the alternative advertising initiative was to increase the online presence of Electrodry Carpet Cleaning by publishing legitimate testimonials from customers, the respondent admits that, in the relevant period, it attempted to induce its franchisees to post on various webpages fabricated testimonials relating to the franchisees’ own services.
2. In this connection, though a series of emails and communications with its franchisees, the respondent intended that the franchisees would post online testimonials in respect of services provided by them, where the franchisee who posted the testimonial purported to be someone who had used that franchisee’s services.
3. On 7 February 2012, Mr Burchell sent an email to franchisees:

(a) stating that it would be good for Electrodry Carpet Cleaning in Canberra if more reviews of the business were posted on the Google webpage;

(b) requesting that franchisees or their employees use their mobile telephones to place reviews of Electrodry Carpet Cleaning in Canberra on the Google webpage so that the reviews came from different IP addresses;

(c) requesting that franchisees place a review of Electrodry Carpet Cleaning generally on the following sites: www.yelp.com.au, www.womo.com.au and www.truelocal.com.au;

(d) noting that by placing reviews on the websites referred to in (c) above, franchisees may propagate further online reviews by reason of the reviews being cross-referenced between websites, thereby increasing the relevance and ranking of such reviews; and

(e) providing sample reviews that had been drafted by the respondent that could be used by franchisees as a guide for posting online reviews that purported to be genuine reviews by consumers.

1. On 13 February 2012, Michael Handa, the respondent’s General Manager, sent an email to franchisees:
	1. announcing the launch of the “Operator of the Month” and “Operator of the Year” competitions;
	2. offering prizes in relation to those competitions;
	3. stating that the winner of each competition would be determined by reference to the number of online reviews obtained by the franchisee or a technician employed by the franchisee;
	4. explaining the respondent’s view as to the importance of online reviews (including in respect of positioning and rankings on webpages);
	5. stating that, if a bank of online reviews could be built, then the franchisees’ advertising budgets could be reduced; and
	6. requesting franchisees to place purported reviews of their services online, utilising certain key words and the names of the franchisee’s employees.
2. On 15 February 2012, Mr Handa sent an email to franchisees:
	1. proving information on how reviews posted on the Google website should be drafted in order to optimise the search ranking obtained by a franchisee in a particular geographic area;
	2. noting that, in the case of the Brisbane area, it would take approximately 20 reviews to obtain the top ranking on a Google search for services of the type provided by franchisees;
	3. noting that if franchisees or their technicians placed purported reviews based on customer feedback on Google, then the franchisees would be “half-way” towards obtaining the top ranking on a Google search list;
	4. informing franchisees that they would have to ensure that reviews contained varied content, came from different Google accounts, and were entered over a period of time; and
	5. attaching the first version of the Franchisee Manual, which included an instruction that “Electrodry should only get a 5 star rating” and containing screen shots in draft and posted form of the Adelaide Testimonial referred to in Schedule A to these reasons.
3. On 12 March 2012, Mr Handa sent an email to franchisees:
	1. announcing the winners of the “Operator of the Month” competition; and
	2. noting that the respondent had adopted a long-term strategy of seeking to optimise the online presence of Electrodry Carpet Cleaning through the use of online reviews in order to try to reduce reliance on additional advertising.
4. On 29 March 2012, Mr Handa sent an email to franchisees which contained a copy of the second version of the Franchisee Manual, which incorporated a guide as to how to post reviews/testimonials in relation to Electrodry Carpet Cleaning. The manual requested that franchisees “post 5 reviews for different sites before posting a review for Electrodry Brisbane” and stated that “[o]ne of the most important things we need to do is to post reviews for other sites. The more reviews you post, the more credible your reviews would be.”
5. On 16 April 2012, Mr Handa sent an email to franchisees:
	1. reiterating the benefits of online reviews;
	2. announcing the winners of the “Operator of the Month” award; and
	3. noting that, as at 16 April 2012, there had only been four reviews online that were attributable to franchisees and that it was in respect of those four reviews that the “Operator of the Month” competition had been awarded.
6. On 25 June 2012, Mr Handa sent an email to franchisees suggesting that the franchisees generate their own online reviews of Electrodry Carpet Cleaning, or a review of another service, to familiarise themselves with the mechanics of posting online reviews before requesting customers to post a review of that franchisee’s services.

## Inducement

1. On four occasions in the relevant period, two of the respondent’s franchisees contravened s 29(1)(e) by posting fabricated testimonials. Each testimonial is described in greater detail in Schedule B to these reasons, including the respects in which it is false or misleading. The respondent admits that, in each case, it induced the franchisee to engage in the contravening conduct.

## Conclusion

1. I am satisfied on the evidence before me, including the matters stated in the agreed statement of facts and the supplementary agreed statement of facts, and the respondent’s admissions, that the alleged contraventions have been established.

# The relief sought

## Introduction

1. The parties have proposed the following relief:
	1. declarations;
	2. pecuniary penalties;
	3. injunctions;
	4. publication of a corrective notice; and
	5. a contribution by the respondent to the applicant’s costs of and incidental to the proceeding.
2. The parties acknowledge that it is for the Court to make its own assessment of, and to determine, the appropriate relief that should be granted.
3. For the reasons which follow, I am satisfied that it is appropriate to grant the proposed relief.

## Declaratory relief

1. I am persuaded that there is utility in granting declaratory relief. This case has been brought to promote fair trading and to protect the public from dishonest practices. Such relief will have utility by describing the contravening conduct with sufficient detail so that the public will know that the conduct has occurred and understand the basis on which other relief has been granted:  *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53; [2003] HCA 75 at [95]; *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329; [2004] FCA 693 (***Midland Brick***) at [21]. Declaratory relief will also serve to convey the Court’s disapproval of the respondent’s conduct and to assist in deterring others from engaging in similar conduct: *Midland Brick* at [22]; *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] ATPR ¶42-140; [2006] FCA 1730 at [6].
2. The respondent is a proper contradictor, despite its willingness to co-operate and admit the contraventions: *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378; [2012] FCAFC 378.
3. The agreed statement of facts and the supplementary agreed statement of facts have been advanced in reliance on s 191 of the *Evidence Act 1995* (Cth) and provide a sufficient basis for granting declaratory relief: *Minister for Environment, Heritage and the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10; [2010] FCA 58 at [24]-[38].
4. I will grant declarations in the form that I consider to be appropriate, based on the draft declarations submitted by the parties.

## Pecuniary penalties

1. The present case is one in which pecuniary penalties should be imposed. In determining the appropriate penalty, the Court is required to have regard to “all relevant matters” which include the nature and extent of the relevant act or omission and of any loss or damage suffered as a result of the act or omission; the circumstances in which the act or omission took place; and whether the person has previously been found by a court in relevant proceedings to have engaged in similar conduct: s 224(2) of the ACL.
2. Separately from the requirements imposed by s 224(2) and its predecessor (s 76E of the *Trade Practices Act 1974* (Cth); see also s 76), the Court has identified a number of factors that should be taken into account when making the evaluative judgment required to arrive at an appropriate penalty: *Trade Practices Commission v CSR Limited* [1991] ATPR ¶41-076; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532; [2000] FCA 365. Some of these factors may not be relevant in every case; some overlap the specific matters required to be taken into account by s 224(2). The parties have made submissions referable to these factors.
3. In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20 (***Singtel***) at [62], the Full Court stressed that, in relation to offences of calculation by a corporation where the punishment is a fine, the fine must be fixed so that it is not seen by the offender or others as an acceptable cost of doing business. The Full Court said (at [63]):

[63] Generally speaking, those 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…

1. The Full Court’s observations in *Singtel* were noted with approval French CJ, Crennan, Bell and Keane JJ in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [66]. Their Honours said that general and specific deterrence must play a primary role in assessing the appropriate penalty in cases of calculated contravention of legislation where commercial profit is the driver of the contravening conduct.
2. Section 224(1) of the ACL recognises that the Court may order the contravener to pay to the Commonwealth a pecuniary penalty in respect of each act or omission, as the Court determines to be appropriate. Even so, the Court must have regard to the “totality principle” to ensure that the penalties imposed are just and appropriate. In *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238; [2010] FCA 790 at [229]-[230], Middleton J said:

[229] Application of the totality principle requires the Court to review the entirety of the conduct and to determine whether the proposed penalty is appropriate “as a whole”. The purpose of the exercise is to ascertain whether the proposed penalty is just and appropriate for the entirety of the contravening conduct, looking at the degree of misconduct involved.

[230] The rationale underlying the totality principle is to ensure that the proposed penalty is not out of proportion with the conduct giving rise to the contraventions when viewed collectively, and to ensure the penalty is accordingly just and appropriate from the perspective of that collective assessment.

1. The applicant submits that the respondent engaged in two separate and distinct courses of conduct. The first course of conduct was the six occasions in the relevant period when Microsourcing, at the direction and with the authority of the respondent, posted the fabricated testimonials on the Internet. The second course of conduct was attempting to induce and inducing franchisees to contravene s 29(1)(e) of the ACL by posting fabricated testimonials.
2. The applicant submits that the first course of conduct was less serious than the second course of conduct, for two reasons. First, the purpose behind the instructions given to Microsourcing was to provide examples to franchisees of a step-by-step method of posting a testimonial. Secondly, the second course of conduct had the potential to lead to a much larger number of contraventions of the ACL. In this connection, the respondent had, as I have noted, up to 64 franchisees and its inducements were directed to all franchisees. The conduct was deliberate.
3. I would accept that, overall, the second course of conduct was more serious in relation to its potential to adversely affect a large number of consumers. It was also attended by an obviously dishonest purpose. I accept that the instructions given by the respondent to Microsourcing do not appear to be attended with the same dishonest purpose. With respect to the second course of conduct, I refer, in particular, to the email from Mr Burchell on 7 February 2012 (see [18] above) which requested franchisees to deliberately engage in covert practices to ensure that the fabricated reviews came from different IP addresses. Further, the examples given in Mr Burchell’s email encouraged franchisees to compare Electrodry Carpet Cleaning’s services favourably against the services of other providers, thereby seeking to gain a dishonest advantage over other traders. Further, one example also spoke, falsely, of the fact that “the customer” had derived a health benefit from the services allegedly provided by Electrodry Carpet Cleaning.
4. Nevertheless, even though the second course of conduct occurred in more aggravating circumstances, the fabricated testimonials posted by Microsourcing, once posted and searchable, were no less false than the fabricated testimonials posted by the two franchisees, and had an equal capacity to mislead or deceive consumers.
5. All the testimonials were posted on online review websites and were easily accessible to Australian consumers of the kinds of services provided by Electrodry Carpet Cleaning. The authors of the testimonials were not consumers of Electrodry Carpet Cleaning’s services, had not been provided with such services and had not, as consumers, formed the favourable opinions that the testimonials represented. The testimonials were intended to convey, and no doubt did convey, that they stood as an independent and critical assessment of Electrodry Carpet Cleaning’s services. They were, of course, nothing of the sort. Just as with other forms of false or misleading advertising, the fabricated testimonials had the potential to mislead a large number of consumers, divert customers from law-abiding competitors, and generate a positive perception of Electrodry Carpet Cleaning that was based on falsehoods: *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570 at [27] (***Pepe’s Ducks***).
6. There is a real possibility that consumers were misled or deceived by these testimonials. However, the extent to which they were, and the extent to which the respondent benefited as a result, are not known. Similarly, the extent to which, as a result of the conduct, the respondent gained an unfair advantage over its trade rivals, is not known. It does not follow, however, that I should proceed on the footing that the respondent did not gain a benefit or that consumers were not misled or deceived, or that trade rivals were not injured.
7. The Electrodry Carpet Cleaning franchised business is an established one. The respondent’s total sales for the 2013 and 2014 financial years were in excess of $20.7 million. The respondent’s estimated gross profit (revenue from sales less costs of goods sold) for the same period was in excess of $18.1 million. In the 2012 financial year, the respondent’s net operating profit was $304,306. In the 2013 financial year, it was $126,042. In the 2014 financial year, the respondent incurred a net operating loss of $1,073,120.
8. The respondent’s conduct was deliberate, systematic, covert and extended over a five month period. The conduct involved senior management (whether employed or contracted) of the respondent. I refer in particular to the involvement of Mr Handa and Mr Burchell.
9. The respondent did not have in place any policy, program or training to address compliance with competition and consumer laws.
10. Further, in November 2001, the applicant obtained by consent a declaration that the respondent had contravened the *Trade Practices Act 1974* (Cth) by distributing brochures with GST-exclusive prices. However, this resulted from a voluntary disclosure by the respondent of the conduct, of which the applicant had not otherwise been aware.
11. On the other side of the scale, the respondent has co-operated with the applicant in attempting to resolve the proceeding, including, as I have said, by meeting with the applicant and its representatives to seek to agree on admissions of contravention. By doing so, the respondent has avoided putting the applicant to the additional costs of preparing the case for hearing and conducting a trial. The respondent recognises the fact that contraventions have occurred and has demonstrated an acceptance of responsibility and a willingness to facilitate the course of justice: *Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6 at [11]. In the circumstances, a substantial discount for co-operation is warranted. However, I wish to make clear that, but for that co-operation, I would have imposed significantly greater pecuniary penalties than the ones that I will impose.
12. Although, in some cases, a single penalty has been assessed for a given course of conduct (see, for example, *Pepe’s Ducks* at [39]; *Australian Competition and Consumer Commission v P & N Pty Ltd* [2014] FCA 6 at [54]), I have come to the view that separate penalties should be imposed for the separate contraventions. In doing so, it will of course be necessary to take into account the totality principle. In this connection, I accept that the contravening conduct reflects the two broad courses of conduct which the applicant has identified. As I have noted, I also accept that the second course of conduct exhibits a higher degree of seriousness than the first course of conduct.
13. In relation to the first course of conduct, the respondent will be ordered to pay a pecuniary penalty of $10,000 in respect of the publication of each of the six fabricated testimonials, resulting in an aggregate penalty of $60,000 for this course of conduct.
14. In relation to the second course of conduct, the respondent will be ordered to pay:
	1. a pecuniary penalty of $20,000 in respect of the publication of each of the four fabricated testimonials it induced the two franchisees to publish; and
	2. a pecuniary penalty of $75,000 in respect of the respondent’s attempts to induce other franchisees to post fabricated testimonials,

resulting in an aggregate penalty of $155,000 for this course of conduct.

1. The respondent requests that the penalties be paid by way of a payment schedule. The applicant supports an appropriate order being made.

## Injunctions

1. The power to grant an injunction is contained in s 232 of the ACL. The power may be exercised whether or not it appears to the Court that the person against whom the order is made intends to engage again in the contravening conduct: see s 232(4) of the ACL. An injunction may also be warranted in the public interest and marks the Court’s disapproval of the conduct: see *Australian Competition and Consumer Commission v Bruhn* [2012] FCA 959 at [33]; *Trade Practices Commission v Mobile Oil Australia Ltd* (1984) 4 FCR 296 at 300; *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [2001] ATPR ¶41-811; [2001] FCA 299 at [32].
2. The present case is one in which injunctions should be imposed. Even though there is no apparent threat that the respondent will repeat the same kind of behaviour, the granting of appropriate injunctive relief will bring to bear on the respondent the seriousness of its misconduct, which is not to be tolerated and which, if repeated, is likely to attract significantly more severe punishment.
3. Nevertheless, I accept that, in the circumstances of this case, it is appropriate to impose the injunctions for a limited period of time. The appropriate period is three years.
4. I will impose injunctions in the form that I consider to be appropriate, based on the draft injunctions submitted by the parties.

## Corrective notice

1. The power to order the publication of a corrective notice is contained in s 246(2)(d) of the ACL. The present case is one in which such a notice should be published. This will serve the purpose of protecting the public interest in dispelling incorrect or false impressions created by the respondent’s conduct, alerting consumers to the fact that there has been misleading or deceptive conduct, and aiding enforcement of the other orders that I will make: *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855 at [128]; *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1; [2003] FCAFC 289 at [49]-[52].
2. The parties have placed before the Court the form of a corrective advertisement which they consider to be appropriate. I am satisfied that the advertisement is appropriate, save that it should refer to the respondent being required to pay “pecuniary penalties in the total amount of $215,000” in lieu of the present reference to the pecuniary penalty contained therein, and that certain other minor amendments should be made as reflected in Annexure A to the orders I will make.

## Costs

1. The respondent has indicated its willingness to submit to an order that it pay a contribution of $10,000 towards the applicant’s costs of and incidental to the proceeding. The applicant accepts that this is an appropriate contribution. Given that joint position, I will make an order accordingly.

# DISPOSITION

1. Orders will be made accordingly.

|  |
| --- |
| I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates. |

Associate:

Dated: 18 December 2015

# Schedule A

***Contravention 1: Adelaide Testimonial***

(1) On 14 February 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Adelaide (**the** **Adelaide Testimonial**).

(2) The Adelaide Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services and stated:

***Loved it***

*Nathan from Electrodry came out yesterday to clean the carpet in my house and I'm very impressed with the result. My mother in law recommended we use Electrodry and I must thank her for the recommendation. I've had a few other carpet cleaners do the carpet in the last couple of years and none of them did this good a job. Best carpet cleaning job I've had in Adelaide.*

(3) The representations made in the Adelaide Testimonial were false or misleading in that:

(a) the author of the Adelaide Testimonial was not a person who had received a recommendation to use Electrodry Carpet Cleaning’s services in Adelaide by that person’s mother in law nor had that person used Electrodry Carpet Cleaning’s services in Adelaide;

(b) the Adelaide Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Adelaide to the author; and

(c) the author of the Adelaide Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Adelaide to that person:

* + 1. that the services, when compared to services from other carpet cleaners in Adelaide, were the best services that had been provided to the author from carpet cleaners in Adelaide; or
		2. that the services that had been provided ought to be rated as “5 star” services.

***Contravention 2: First Canberra Testimonial***

(4) In about March 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Canberra (**the First Canberra Testimonial**).

(5) The First Canberra Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services and stated:

*A company with a dedicated group of professional cleaners. Thank you Budoh and Craig. Really experts in carpet and tile cleaning.*

(6) The representations made in the First Canberra Testimonial were false or misleading in that:

(a) the author of the First Canberra Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Canberra;

(b) the First Canberra Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Canberra to the author; and

(c) the author of the First Canberra Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Canberra to that person:

(i) that the services had been provided by persons who were dedicated professional cleaners;

(ii) that the services had been provided by persons who were experts in carpet and tile cleaning; or

(iii) that the services that had been provided ought to be rated as “5 star” services.

***Contravention 3: Brisbane Testimonial***

(7) In about March 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Brisbane (**the Brisbane Testimonial**).

(8) The Brisbane Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services in Brisbane and stated:

*Smooth & easy from making the booking to getting the carpets done even if I was not there. Moved out of a unit a week ago and made a booking with Electrodry to clean my carpets. Electrodry picked up and returned my keys to my real estate and I was able to go home to the Philippines without hassle.*

(9) The representations made in the Brisbane Testimonial were false or misleading in that:

(a) the author of the Brisbane Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Brisbane;

(b) the Brisbane Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Brisbane to the author; and

(c) the author of the Brisbane Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Brisbane to that person:

(i) that the services had been provided in a manner that was smooth and easy;

(ii) that the services had been provided in an efficient manner because Electrodry Carpet Cleaning personnel were willing to pick up and return keys to the author’s property to an agent; or

(iii) that the services that had been provided ought to be rated as “5 star” services.

***Contravention 4: Second Canberra Testimonial***

(10) In about March 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Canberra (**the** **Second Canberra Testimonial**).

(11) The Second Canberra Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services in Canberra but provided no further comment.

(12) The representations made in the Second Canberra Testimonial were false or misleading in that:

(a) the author of the Second Canberra Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Canberra;

(b) the Second Canberra Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Canberra to the author; and

(c) the author of the Second Canberra Testimonial had not, as a result of the provision of Electrodry Carpet Cleaning’s services in Canberra to that person, rated those services as “5 star” services.

***Contravention 5: Newcastle Testimonial***

(13) In about March 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Newcastle (**the** **Newcastle Testimonial**).

(14) The Newcastle Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services in Newcastle but provided no further comment.

(15) The representations in the Newcastle Testimonial were false or misleading in that:

(a) the author of the Newcastle Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Newcastle;

(b) the Newcastle Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Newcastle to the author; and

(c) the author had not, as a result of the provision to that person of Electrodry Carpet Cleaning’s services in Newcastle, rated those services as “5 star” services.

***Contravention 6: Melbourne Testimonial***

(16) In about March 2012, Microsourcing posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Melbourne (**the** **Melbourne Testimonial**).

(17) The Melbourne Testimonial gave a “5 star” rating in respect of Electrodry Carpet Cleaning’s services in Melbourne but provided no further comment.

(18) The representations in the Melbourne Testimonial were false or misleading in that:

(a) the author of the Melbourne Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Melbourne;

(b) the Melbourne Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Melbourne to the author; and

(c) the author of the Melbourne Testimonial had not, as a result of the provision to that person of Electrodry Carpet Cleaning’s services in Melbourne, rated those services as “5 star” services.

# Schedule B

***Contravention 1: Third Canberra Testimonial***

(1) On or about 21 February 2012, Tanya DeLorenzo, a franchisee of Electrodry Carpet Cleaning in Canberra, posted a review on the website www.google.com.au that purported to be a testimonial from a consumer of Electrodry Carpet Cleaning’s services in Canberra (**the** **Third Canberra Testimonial**).

(2) The Third Canberra Testimonial gave a “5 star” rating and stated:

*Fantastic result and great experience. Thank you Electrodry for the amazing job on my carpets and upholstery. I can’t believe the difference it made! I get my carpets cleaned every year but this year, i [sic] thought i [sic] would give Electrodry a try and i [sic] am so glad i [sic] did, I can’t believe how much better they look with Electrodry. It’s not just the great result but the overall service, friendly and helpful staff. Salvo & Dylan were a great team, very professional and hard working. I will definitely use Electrodry again and recommend to all my friends. thank [sic] you again Electrodry for a great job.*

(3) Tanya DeLorenzo was induced by the conduct outlined in [18]-[19] of the reasons for judgment.

(4) The representations contained in the Third Canberra Testimonial were false or misleading in that:

(a) the author of the Third Canberra Testimonial was not a person who had used Electrodry Carpet Cleaning’s services in Canberra;

(b) the Third Canberra Testimonial did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Canberra to the author of the testimonial; and

(c) the author of the Third Canberra Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’ services in Canberra to that person:

(i) that the services had been provided by persons who were dedicated professional cleaners;

(ii) that the services provided by Electrodry Carpet Cleaning were better than other carpet cleaning services; or

(iii) that the services that had been provided ought to be rated as “5 star” services.

***Contraventions 2, 3 and 4: Launceston Testimonials***

(5) Lisa Turnbull, an agent of the franchisee of Electrodry Carpet Cleaning in Launceston, Lee Turnbull, posted online the following three reviews that purported to be testimonials from consumers of Electrodry Carpet Cleaning’s services in Launceston (**the Launceston** **Testimonials**):

(a) On 14 February 2012, Lisa Turnbull posted a review on the websites www.productreview.com.au and www.google.com.au (**the** **First Launceston Testimonial**). The review gave a “5 star” rating and stated:

***You have to see it, to believe it. Carpet given new life:***

*We were going to rip up our carpet, as we thought it would never be able to be cleaned. The Electrodry technicians convinced me to get the carpet duel [sic] cleaned, as there was a lot of deep down dirt. The duel [sic] process involved steam cleaning and dry cleaning. We were sceptical about steam cleaning as we had experienced this process before and the carpet was wet for days. After cleaning, I was amazed at the difference, I will be able to spend the money I was going to spend on new carpet, on a holiday. Best of all, the carpet was only slightly damp and I was told it would only take a couple of hours before it was dry. I could walk on it straight away and the technicians placed back the furniture, placing alfoil under anything with wooden legs. I will recommend Electrodry to anyone.*

*+ Duel [sic] clean worth the extra cost. The result far exceeded my expectations.*

*- I wish I had done this sooner as now I am not embarrassed by my carpet.*

(b) On 14 February 2012, Lisa Turnbull posted two reviews (being the same testimonial) on the website www.truelocal.com.au (**the** **Second Launceston Testimonial**). The reviews gave a “5 star” rating and stated:

*Husband & wife team who are professional and friendly and make you feel at ease right from the start. Our 5 piece suite was steam cleaned and looks better than it has done for years. The carpet was about to be ripped up, but we were convinced to try and [sic] dual clean which is a steam clean followed by a dry clean. It cost a bit more but the result was absolutely amazing. Stains which I thought would never be removed had gone and we were shown the water after the steam clean and it was a black sludge. The carpet also smelt fresh and we were told that they use a chemical called Health Guard which also kills bacteria. The whole experience was a pleasure and we will definitely call upon this team again in the future. We recommend Electrodry Launceston to everyone looking for a professional, friendly carpet & upholstery cleaning experience.*

(c) On 30 April 2012, Lisa Turnbull posted a review on the websites www.productreview.com.au and www.google.com.au (**the** **Third Launceston Testimonial**). The review gave a “5 star” rating and stated:

***The best carpet cleaners in Tasmania:***

*Prompt, friendly, professional couple who really know what they are doing.*

*I have had my carpets cleaned by other companies but after having had [names removed], I wont [sic] be going anywhere else.*

*My carpets were starting to look worse for wear and I expected that I would receive a mediocre result at best. [names removed] convinced me that I needed a dual clean in order to remove deep down dirt, after all I haven't had my carpets cleaned for over 5 years. The cost was a little more but the result far exceeded my expectations. I am no longer embarrassed to have people in my home and the carpets smell clean and fresh. I recommend this couple to anyone wanting a great job done.*

*+ A married couple who really know how to make you feel confident that the job will be done right.*

(6) Lee Turnbull, by his agent Lisa Turnbull, was induced by the respondent’s conduct outlined in [18]-[22] of the reasons for judgment.

(7) Each of the representations contained in the Launceston Testimonials were false or misleading in that:

(a) the author of the Launceston Testimonials was not a person who had used Electrodry Carpet Cleaning’s services in Launceston;

(b) the Launceston Testimonials did not genuinely relate to the provision of Electrodry Carpet Cleaning’s services in Launceston to the author; and

(c) the author had not formed the view that, as a result of the provision of Electrodry Carpet Cleaning’s services in Launceston, the services that had been provided ought to be rated as “5 star” services.

(8) In addition:

(a) the First Launceston Testimonial was false or misleading in that the author of the First Launceston Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Launceston to that person:

(i) that the initial scepticism of the author as to the ability of the Electrodry Carpet Cleaning personnel to clean the author’s carpet was not warranted; or

(ii) that there was an amazing difference between the services provided by Electrodry Carpet Cleaning and services that had been provided by competitors of Electrodry Carpet Cleaning to the author of the testimonial.

(b) The Second Launceston Testimonial was false or misleading in that the author of the Second Launceston Testimonial had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Launceston to that person:

(i) that the services had been provided by persons who were professional and friendly and made the author feel at ease;

(ii) that stains which the author thought would never be removed had gone as a result of the provision of Electrodry Carpet Cleaning’s services; or

(iii) that the author’s 5 piece suite looked better than it had looked for years.

(c) The Third Launceston Testimonial was false or misleading in that the author had not formed the view, as a result of the provision of Electrodry Carpet Cleaning’s services in Launceston to that person:

(i) that the services had been provided by persons who were prompt, friendly and professional; or

(ii) that the services provided by Electrodry Carpet Cleaning were superior to services that had been provided by competitors of Electrodry Carpet Cleaning to the author.