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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD2072/2019  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
OSCAR WYLEE PTY LTD ACN 154 936 526  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 12/12/2019 3:08:42 PM AEDT

Registrar

### Important Information

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## CONCISE STATEMENT

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**NO NSD**

**OF 2019**

### **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**

Applicant

**OSCAR WYLEE PTY LTD  
ACN 154 936 526**

Respondent

#### **A. INTRODUCTION**

1. These proceedings concern false and misleading representations made to consumers by the Respondent (**Oscar Wylee**), an optometry and eyewear retailer, in the promotion of its products and business.
2. The Applicant (**ACCC**) alleges that, between at least 13 January 2014 to 31 December 2018, Oscar Wylee engaged in misleading conduct, and made false or misleading representations by marketing itself to consumers as a company that made philanthropic donations each time a consumer bought a pair of glasses from it, when it did not do so, and by falsely overstating the charitable affiliations it held.

#### **B. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

3. Oscar Wylee commenced operations in 2012. Until October 2015, Oscar Wylee operated as an online retailer only, and marketed to consumers via its website and social media platforms, including Facebook, Instagram and email newsletters. From October 2015 onwards, Oscar Wylee operated both as an online retailer, and through physical stores.

##### ***Pair for a pair conduct***

4. Between at least 13 January 2014 and 31 December 2018, Oscar Wylee represented to consumers that, when a consumer purchased a pair of glasses from Oscar Wylee, it donated a pair of glasses to someone in need, and that it made such donations at or around the time of the consumer's purchase.

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Filed on behalf of the Applicant, ACCC

File ref: 19007686

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5. The representations were part of a core marketing strategy by Oscar Wylee, and a prominent feature of its website and its marketing to consumers. The effect of the marketing message was that Oscar Wylee's philanthropic works were a reason consumers should choose to purchase their glasses from Oscar Wylee, with a banner headline "I care for eyecare". The representations were made in numerous communications from Oscar Wylee to consumers via different media, including its website, marketing newsletters, its Facebook and Instagram pages, and sales material sent out to customers, as well as in-store material once Oscar Wylee established physical stores.
6. Oscar Wylee made a range of statements over these media, updating them regularly, including: "Buy a pair, give a pair"; "For every pair purchased, a pair is donated to someone in need"; "For every pair of glasses you buy from us, we send another pair to someone less fortunate"; "Buying a pair today? As soon as you do, we'll donate a pair to someone in need"; "Buy a pair, give a pair. We're helping you help someone in need"; "One for one. All the time. Forever. We donate a pair of glasses to those in need for every pair purchased"; "Donate a pair today by buying a pair from @oscarwylee. #givesight"; "At Oscar Wylee, we are helping those in need! And so can you! For every pair of glasses you buy at Oscar Wylee, we'll donate a pair to someone who can't afford, but needs better eyesight!"; "You buy a pair, we donate a pair". A table of the statements made, media employed, and timeframes, is at **Schedule 1**; samples of extracts from the website are at **Schedule 3**.
7. In fact, between 1 January 2014 to 31 December 2018, Oscar Wylee sold some 328,010 pairs of glasses, and donated only 3,181 pairs of glasses. The donated glasses were provided without prescription lenses. Those donations were made in an ad hoc way, and not on a level approaching the scale claimed in its marketing. Oscar Wylee only started donating significant numbers of glasses from early 2019, and most of these donations occurred after Oscar Wylee's marketing claims had been the subject of critical media articles in early 2019.

***Representations as to charitable affiliation***

8. From at least 1 January 2014 to 31 December 2018, Oscar Wylee represented to consumers that it was closely affiliated with a particular charity, Rose Charities. The representations were made via its website, on Facebook, via YouTube, and, from October 2017, via in-store marketing material. Oscar Wylee made various statements as to its "partnership" with Rose Charities, claiming that it had "partnered with Rose Charities which helps build sustainable eye care programs in Cambodia". It also represented that it was funding a particular Cambodian individual's studies to be an eye surgeon.
9. Prior to January 2014, Oscar Wylee had prepared a short video (**the "I Care" video**). The "I Care" video continued to be displayed by Oscar Wylee throughout the period from January 2014 to December 2018, variously on its website, on YouTube, and on Vimeo. The "I Care" video described significant work Oscar Wylee was ostensibly undertaking with charities, claiming that "Oscar Wylee helps out through a range of

different ways. From the performance of eye tests, distribution of glasses, performance of cataracts surgeries, and training of eye doctors”. The video showed footage of scenes of poverty in Cambodia, footage of Rose Charities’ eye clinic in Cambodia, and the text: “Every Oscar Wylee glasses purchase will help restore vision in developing regions”. The overwhelming impression from the “I Care” video is that Oscar Wylee was working closely with Rose Charities on an ongoing basis to assist with eye care for persons in need in Cambodia.

10. A table of the statements made in relation to Rose Charities, media employed, and timeframes, is at **Schedule 2**; a sample extract from the website is at **Schedule 3**.
11. In fact, the extent of Oscar Wylee’s charitable association with Rose Charities throughout the period from 1 January 2014 to 31 December 2018 was confined to one donation totalling \$2,000, which it made on 4 February 2014, and the donation of 100 glasses frames, which it made during 2014. It had previously made two donations totalling \$2,000 in April and July 2013.

#### **C. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

12. The ACCC seeks the relief set out in the accompanying Originating Application, comprising declarations under s 21 of the *Federal Court Act 1976* (Cth), orders for pecuniary penalties under s 224 of the ACL, injunctions pursuant to s 232 of the ACL, corrective publication orders and orders requiring Oscar Wylee to implement a compliance program under s 246 of the ACL, and costs.

#### **D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

13. Oscar Wylee engaged in the conduct in trade or commerce, and in connection with the supply or possible supply or the promotion of the supply of its optometry and eyewear goods and services.

##### ***Pair for a pair conduct***

14. By making the pair for a pair representations throughout the period from at least 13 January 2014 to 31 December 2018 in the circumstances outlined at paragraphs 4 to 7 above, Oscar Wylee:
  - 14.1. engaged in conduct that was misleading and deceptive or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law (ACL)*;
  - 14.2. made false or misleading representations as to the benefits of its optometry and eyewear goods or services, in contravention of s 29(1)(g) of the ACL;
  - 14.3. engaged in conduct that was liable to mislead the public as to the quantity of goods, namely one pair for the customer and one pair to be donated, in contravention of s 33 of the ACL.

15. While the number of representations, and therefore contraventions, cannot be calculated with precision, the details in **Schedules 1, 2 and 4** indicate the scale of the contravening conduct.
16. To the extent that the representations were with respect to future matters, the ACCC relies upon s 4 of the ACL and contends that Oscar Wylee did not have reasonable grounds for making the representations.

***Representations as to charitable affiliation***

17. By representing it was closely affiliated with Rose Charities throughout the period from 2014 to 2018 in the circumstances outlined at paragraphs 8 to 11 above, Oscar Wylee has made numerous false or misleading representations to consumers that it had a particular level of affiliation with Rose Charities, in contravention of s 18 and s 29(1)(h) of the ACL.

**E. ALLEGED HARM**

18. The contravening representations presented Oscar Wylee as an entity engaged in charitable activities on a significant scale. It is to be inferred that this was intended by Oscar Wylee to be a point of differentiation from its competitors, with a view to attracting consumers to purchase from Oscar Wylee rather than alternative suppliers. The alleged conduct is particularly harmful as it involved a form of representation which it was not readily possible for consumers to check or monitor.
19. The conduct exploited consumers' desire to support charitable ends, and potentially drew customers away from other competitors who were not engaging in such conduct. The conduct further has the capacity to diminish consumer confidence in supporting organisations that genuinely engage in philanthropic conduct.

Date: 12 December 2019



Katrina Close  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

*This statement was prepared by AGS lawyers Katrina Close and Teresa Jobberns, and settled by Robert Yezerski of counsel.*

**CERTIFICATE OF LAWYER**

I Katrina Close certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 12 December 2019



Katrina Close  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant


## SCHEDULE 1

Statement by Oscar Wylee	Duration statement was made	Media used
a. Buy a pair, give a pair	Between at least 15 January 2014 and 29 April 2015	Website (Homepage – <a href="http://www.oscarwylee.com.au">www.oscarwylee.com.au</a> )
b. I Care for Eyecare For every pair of frames purchased, we distribute a pair to someone in need.	Between at least 19 February 2016 and 5 May 2016	Website (Homepage – <a href="http://www.oscarwylee.com.au">www.oscarwylee.com.au</a> )
c. I Care for Eyecare For every pair purchased, a pair is donated to someone in need	Between at least 2 November 2016 and 24 September 2018	Website (Homepage – <a href="http://www.oscarwylee.com.au">www.oscarwylee.com.au</a> )
d. I Care for Eyecare ... buy a pair, give a pair. ...	Between at least 28 January 2014 and 8 August 2015	Website (I Care page – <a href="http://www.oscarwylee.com.au/about/icare">www.oscarwylee.com.au/about/icare</a> )
e. I Care for Eyecare ... Buy 1 Pair, Give 1 Pair ...	Between at least 14 February 2016 – 24 September 2018	Website (I Care page – <a href="http://www.oscarwylee.com.au/about/icare">www.oscarwylee.com.au/about/icare</a> and <a href="http://www.oscarwylee.com.au/i-care.html">www.oscarwylee.com.au/i-care.html</a> )
f. For every pair of glasses you buy from us, we send another pair to someone less fortunate	Between at least 13 January 2014 and 24 September 2018	Website (Our Story webpage - <a href="http://www.oscarwylee.com.au/our-story">www.oscarwylee.com.au/our-story</a> and <a href="http://www.oscarwylee.com.au/our-story.html">www.oscarwylee.com.au/our-story.html</a> )
g. I Care for Eyecare For every pair of glasses you purchase from us, we'll donate a pair to someone in need	Between at least 2 March 2014 and 1 September 2018	Website (Product sale page 'Leo' – <a href="http://www.oscarwylee.com.au/women/optical/leo18">www.oscarwylee.com.au/women/optical/leo18</a> and <a href="http://www.oscarwylee.com.au/leo-optical.html">www.oscarwylee.com.au/leo-optical.html</a> )
h. For every pair of frames you purchase from us, a pair is donated to someone in need	Between at least 6 December 2016 and 25 March 2019	Instagram
i. For every pair of frames purchased, we distribute a pair to someone in need	On at least 83 occasions between March 2013 and May 2018	Marketing newsletters emailed approximately monthly to a database of potential customers
j. With every pair of glasses you buy at Oscar Wylee, we donate a pair to someone who really needs them	Between at least 20 March 2015 and 25 March 2019	Facebook page
k. Buying a pair today? As soon as you do, we'll donate a pair to someone in need.	Between 22 March 2015 and at least 25 March 2019	Facebook page

<b>Statement by Oscar Wylee</b>	<b>Duration statement was made</b>	<b>Media used</b>
l. Buy a pair, give a pair. We're helping you help someone in need.	Between 26 March 2015 and at least 25 March 2019	Facebook page
m. One for one. All the time. Forever. We donate a pair of glasses to those in need for every pair purchased.	Between 22 April 2015 and at least 25 March 2019	Facebook page
n. Give care today by purchasing an Oscar Wylee pair of glasses. For every pair, we'll donate a pair to those in need.	Between 24 April 2015 and at least 25 March 2019	Facebook page
o. Buy a pair, we'll donate a pair. #OneForOne	Between 4 May 2015 and at least 25 March 2019	Facebook page
p. Donate a pair today by buying a pair from @oscarwylee. #givesight	Between 7 May 2015 and at least 25 March 2019	Facebook page
q. One for one All the time. Forever. And ever. We donate a pair of glasses to those in need for every pair purchased.	Between 15 June 2015 and at least 25 March 2019	Facebook page
r. And for every pair you buy, we'll donate a pair to someone in need! #OneForOne	Between 6 July 2015 and at least 25 March 2019	Facebook page
s. At Oscar Wylee, we are helping those in need! And so can you! For every pair of glasses you buy at Oscar Wylee, we'll donate a pair to someone who can't afford, but needs better eyesight!	Between 23 July 2015 and at least 25 March 2019	Facebook page
t. For every pair of frames purchased, we donate a pair to someone in need	Between 5 November 2015 and at least 25 March 2019	Facebook page
u. For every pair you buy, we donate a pair to someone in need	Between November 2016 and March 2019	Order confirmation emails
v. For every pair of frames purchased, we distribute a pair to someone in need	Between February 2016 and December 2018	Business cards
w. For every pair purchased, a pair is distributed to someone in need.	Between October 2015 and October 2017	In store booklets



## SCHEDULE 2

Statement by Oscar Wylee	Duration statement was made	Media used
a. We have partnered with Rose Charities which helps build sustainable eye care programs in Cambodia.	Between at least 15 January 2014 and 29 April 2015	Website (Homepage – <a href="http://www.oscarwylee.com.au">www.oscarwylee.com.au</a> )
b. ...we're funding Lim studying to be an eye surgeon so he can keep taking solutions into his own hands. It doesn't stop there though, he needs better equipment in the clinics, more training for volunteers and more glasses. We're doing what we can to support him, and so are you because with the I Care initiative, a pair of glasses is donated to someone in need – maybe even to one of Lim's patients.	Between at least 28 January 2014 and 24 September 2018	Website (I Care page – <a href="http://www.oscarewylee.com.au/about/icare">www.oscarewylee.com.au/about/icare</a> and <a href="http://www.oscarwylee.com.au/i-care.html">www.oscarwylee.com.au/i-care.html</a> )
c. Oscar Wylee Eyewear works with established partners in developing nations around the world who are committed to making the biggest impact possible with the support we provide. Currently we have partnered with Rose Charities which helps build sustainable eye care programs in Cambodia. See more at <a href="http://www.oscarwylee.com.au">http://www.oscarwylee.com.au</a>	Between June 2013 and January 2019	Youtube
d. In partnership with 	Between October 2017 and February 2019	Store signage
e. Oscar Wylee helps out by working with smaller, dedicated and transparent charities in which we're able to see where exactly the funds are going and how we're affecting the lives of people.	Between at least July 2013 and February 2019 on the Oscar Wylee I Care website. Between June 2013 and January 2019 on the Oscar Wylee Youtube Channel. Between at least 1 January 2015 and 25 September 2019 on Vimeo.	Spoken words in "I care" video, on website, YouTube and Vimeo
f. Oscar Wylee helps out through a range of different ways. From the performance of eye tests, distribution of glasses, performance of cataracts surgeries, and training of eye doctors.	Between at least July 2013 and February 2019 on the Oscar Wylee I Care website. Between June 2013 and January 2019 on the Oscar Wylee Youtube Channel. Between at least 1 January 2015 and 25 September 2019 on Vimeo.	Spoken words in "I care" video, on website, YouTube and Vimeo

Statement by Oscar Wylee	Duration statement was made	Media used
g. Every Oscar Wylee glasses purchase will help restore vision in developing regions	<p>Between at least July 2013 and February 2019 on the Oscar Wylee I Care website.</p> <p>Between June 2013 and January 2019 on the Oscar Wylee Youtube Channel.</p> <p>Between at least 1 January 2015 and 25 September 2019 on Vimeo.</p>	<p>Text in "I care" video, on website, YouTube and Vimeo</p> <p>Embedded on Website (I Care page – <a href="http://www.oscarewylee.com.au/about/icare">www.oscarewylee.com.au/about/icare</a> and <a href="http://www.oscarwylee.com.au/i-care.html">www.oscarwylee.com.au/i-care.html</a>).</p>
h. ... he just needs some glasses so we, with a bit of help from Rose Cambodia, have made sure he has them	Between 20 March 2015 and at least 25 March 2019.	Facebook

### SCHEDULE 3

Image 1:



Image 2:

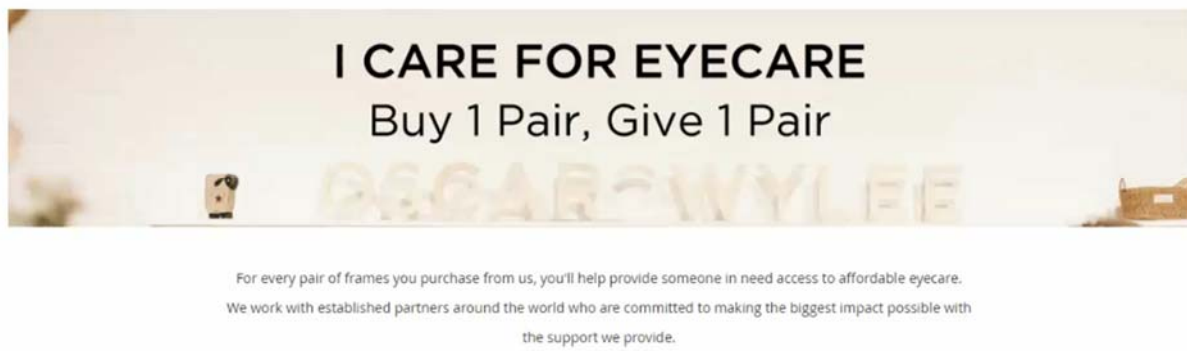


Image 3:



#### SCHEDULE 4

	2014	2015	2016	2017	2018
a. Number of pairs of glasses sold by Oscar Wylee	16,144	11,772	16,002	67,050	217,042
b. Number of Oscar Wylee Facebook friends	Unknown	Unknown	Unknown	25,092	47,493
c. Number of Oscar Wylee Instagram followers	Unknown	Unknown	Unknown	46,195	78,754
d. Number of Oscar Wylee Newsletter subscribers	22,457 <sup>1</sup>	Unknown	25,080 <sup>2</sup>	29,418 <sup>3</sup>	97,498 <sup>4</sup>

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<sup>1</sup> As at 2 December 2014.

<sup>2</sup> As at 8 January 2016.

<sup>3</sup> As at 6 January 2017.

<sup>4</sup> As at 6 January 2018.