

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/04/2019 4:31:40 PM AWST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: WAD229/2019
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
QUANTUM HOUSING GROUP PTY LTD ACN 141 554 798 & ANOR
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 26/04/2019 10:40:33 AM AWST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

CONCISE STATEMENT



NO WAD

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: WESTERN AUSTRALIA
DIVISION: GENERAL

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

QUANTUM HOUSING GROUP PTY LTD

(ACN 141 554 798)

First Respondent

CHERYL ANN HOWE

Second Respondent

PART 1: IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This is a claim against the First Respondent (**QHG**) and the Second Respondent, its sole director (**Ms Howe**) for engaging in unconscionable conduct and misleading or deceptive conduct and making false or misleading representations concerning property managers and residential property investors (the **Investors**) participating in the Commonwealth’s National Rental Affordability Scheme (**NRAS**) who contracted with QHG.
- 2 QHG engaged in a system of conduct or pattern of behaviour which was deliberate and methodical, involving a series of actions which intensified the pressure on Investors to terminate their arrangements with their appointed property managers and to retain property managers recommended by QHG. In doing so, QHG threatened that an Investor would lose their NRAS incentive to unduly pressure the Investor into changing to QHG’s preferred property manager. QHG’s conduct included making various false or misleading representations to Investors as to the rights and obligations of QHG, Investors and property managers participating in NRAS.
- 3 At all material times, Ms Howe was the sole director of QHG. Ms Howe exercised all the powers of QHG and was responsible for the operation and management of QHG’s business.

QHG’s role in the National Rental Affordability Scheme

- 4 The NRAS offers financial incentives to people who rent dwellings to eligible low and moderate income households at a rate that is at least 20% below the market rate. The incentive is a contribution by the relevant State Government and the Federal Government for each NRAS property in each year. The value of the incentive changes over time, but it can be paid in cash or as a tax offset. In the financial year ending 30 June 2018, it was \$11,114.33 for each approved rental dwelling.

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Filed on behalf of
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- 5 QHG has been granted allocations pursuant to the NRAS which entitle it to receive an annual incentive for an approved rental dwelling if certain conditions are satisfied. To receive the incentive, QHG as the Approved Participant must lodge an annual Statement of Compliance with the Department of Social Services.
- 6 One way an individual investor may become involved in NRAS is to purchase a dwelling which is subject to an allocation of a NRAS incentive held by an Approved Participant (such as QHG). QHG enters into an agreement (**NRAS Agreement**) with each Investor who purchases a dwelling subject to one of its allocations pursuant to which QHG agrees to prepare and lodge a Statement of Compliance each year and to pass on to the Investor the incentive received in relation to the property. In return, in each year QHG is paid an annual compliance fee by the Investor, plus 3.5% of the rent received in relation to the property and 3.5% of any NRAS incentive.

QHG's NRAS Agreement with Investors

- 7 Under the NRAS Agreement the Investor is required to engage a licensed real estate agent to manage the property (**Property Manager**): cl 6.1(e)(iii). Before appointing the Property Manager, the Investor must obtain QHG's consent, which it can only withhold acting reasonably: cl 6.1(e)(iii)(A). QHG may withhold consent to the appointment of a Property Manager, or require the dismissal of a Property Manager and the appointment of another Property Manager, if QHG, acting reasonably, has concerns about the Property Manager's ability to comply with the NRAS and its general skill and ability to manage the dwelling: cl 6.1(f).
- 8 Once QHG has consented to the chosen Property Manager, the Investor and the Property Manager enter into a Property Management Agreement, to which QHG is not a party. The Property Manager's obligations include ensuring compliance with the NRAS and to otherwise manage the property. The Property Manager does not receive a portion of the NRAS incentive, but charges other fees such as a percentage of the rental income.
- 9 Although not obliged to do so under the NRAS Agreement, QHG and some Property Managers entered into an agreement governing the management of the property called a Portfolio Management Agreement.

Relevant conduct and representations by QHG

- 10 As detailed in paragraphs 11 to 13 from about early 2017, QHG commenced pressuring Investors to terminate their Property Management Agreements and engage one of QHG's 'approved property managers': Questus Realty Pty Ltd (**Questus**); Tebter Property Pty Ltd (**Tebter**); Ethan Residential Pty Ltd trading as Ethan Property (the former name of Tebter) (**Ethan**); Quantum Property Australia Pty Ltd (now merged with Tebter) (**Quantum Property**) (**Approved Property Managers**). All Approved Property Managers except for Questus had commercial relationships with QHG.

- 11 In early 2017, QHG created 'Guidelines for the Approval of Property Managers' (**Accreditation Guidelines**) which were issued to Investors with existing Property Managers. The Accreditation Guidelines contained the following key requirements:
- (a) Property Managers are to follow guidelines with respect to general compliance, training, tenant selection, property management, record keeping and reporting; and
 - (b) Property Managers are to pay to QHG a \$10,000 security deposit per NRAS dwelling (**Security Deposit**), purportedly to protect QHG from loss that it says it will suffer in the event that the Incentive is not paid, because QHG 'has in its various contractual arrangements with associated owners provided assurances that the Incentive will be received by those owners.'
- 12 QHG's conduct involved correspondence with Investors, some sent *en masse* without regard to the Investors' personal circumstances in which QHG made one or more of the following representations:
- (a) the existing Portfolio Management Agreements are coming to an end;
 - (b) a Property Manager must meet the requirements of the Accreditation Guidelines to manage QHG NRAS properties;
 - (c) the existing Property Managers will not be able to continue to manage the QHG NRAS properties and one of the Approved Property Managers should take their place;
 - (d) the Accreditation Guidelines protect the Investor against a loss of their incentive, and protect QHG if they have to indemnify the Investor for this loss;
 - (e) the Investor's Property Manager has decided not to, or was unable to, meet all of QHG's requirements for managing the property;
 - (f) the Investor must appoint a new Property Manager, and should use a QHG Approved Property Manager, because if they do so they will be protected financially;
 - (g) the Investor's Property Manager has failed to properly manage the property's NRAS compliance, and as a result the investor could lose their incentive;
 - (h) the Investor has failed to appoint an Approved Property Manager and as a result the Investor is in default of the NRAS Agreement;
 - (i) as a consequence of the Investor failing to appoint an Approved Property Manager, QHG had a right to and would terminate the NRAS Agreement.
- 13 In fact:
- (a) there was no legitimate reason why the existing Property Manager could not continue to manage the property;
 - (b) there was no requirement under the NRAS that an NRAS property be managed by a Property Manager at all;

- (c) there was no requirement for the Property Manager to comply with the Accreditation Guidelines in order to manage the Investor's property. QHG could only withhold consent to a Property Manager under the NRAS Agreement if QHG had reasonable concerns about the Property Manager's ability to comply with the NRAS and to manage the property;
- (d) Investors would not be protected financially by the Property Manager paying the Security Deposit. The Investor was not entitled to call on the Security Deposit if the Incentive was not paid;
- (e) the Security Deposit also did not protect QHG in the event that they had to indemnify an Investor for an unpaid incentive. Under the NRAS Agreement, the Investor indemnifies QHG if the Incentive is not paid. Even if QHG did not rely on that indemnity, QHG's total loss from a lost incentive in one year was less than \$400 (in the 2017/2018 financial year), being 3.5% of the incentive amount payable under the NRAS Agreement;
- (f) Investors were not told that Tebter, Ethan and Quantum Property had commercial associations with QHG;
- (g) despite the terms of the Accreditation Guidelines, no Security Deposit was ever received by QHG from any of its Approved Property Managers or at all. The only purported Security Deposit paid by an Approved Property Manager was to a third party on QHG's behalf to facilitate a management buyout; and
- (h) Investors using existing Property Managers were not at risk of losing their incentive.

PART 2: SUMMARY OF RELIEF SOUGHT FROM THE COURT

- 14 The ACCC seeks the relief sought in the accompanying application, which includes declarations, injunctions, pecuniary penalties, disqualification orders and non-punitive orders (including disclosure orders).

PART 3: PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 15 By engaging in the conduct in paragraphs 10 to 13 in trade or commerce and in connection with the supply of services to Investors, QHG engaged in a system of conduct, alternatively a pattern of behaviour, that was, in all the circumstances, unconscionable in contravention of section 21 of the ACL.
- 16 The circumstances of QHG's unconscionable treatment of Investors to whom it sent correspondence between February 2017 and July 2018 included:
- (a) after Investors had entered into a NRAS Agreement with QHG, taking advantage of its superior bargaining position relative to the Investors as a result of the Investors' reliance on QHG to receive the NRAS incentive;
 - (b) unilaterally imposing additional conditions and requirements in relation to the management of the property by issuing Accreditation Guidelines after Investors had entered into a NRAS Agreement with QHG, requiring that non Approved Property Managers pay a Security

Deposit that was not required to cover QHG's risk and that would be a disincentive to other Property Managers looking to manage properties in QHG's portfolio due to the size of the Security Deposit;

- (c) making the false, misleading or deceptive representations and conduct described in paragraphs 12 and 13;
- (d) sending a co-ordinated series of letters to Investors containing the false, misleading or deceptive representations described in paragraphs 12 and 13 designed to unduly pressure Investors so that they would terminate their contract with their existing Property Manager and change to an Approved Property Manager.

17 By engaging in the conduct in paragraphs in trade and commerce, QHG engaged in:


- (a) conduct which was misleading or deceptive or likely to mislead or deceive in contravention of section 18 of the ACL;
- (b) made false or misleading representations in connection with the supply of services to Investors regarding the need for services and of the existence, exclusion or effect of any condition or right, in contravention of sections 29(l) and (m) of the ACL.

18 Ms Howe engaged in the conduct in paragraphs 10 - 13 and by doing so contravened any or all of sections 18, 29(1)(l), 29(1)(m) and 21 of the ACL or, in the alternative, was directly or indirectly knowingly concerned in, or party to, the contraventions of QHG.

PART 4: ALLEGED HARM SUFFERED

19 The course of conduct adopted by QHG resulted in Investors losing the opportunity to select a Property Manager of their choice and Property Managers suffered a loss of business from Investors who moved to a QHG approved Property Manager.:

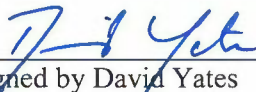
Date: 24 APRIL 2019


 Signed by David Yates
 Corrs Chambers Westgarth
 Lawyer for the Applicant

This concise statement was prepared by David Yates of Corrs Chambers Westgarth and settled by Raelene Webb QC and Alexander Mossop of counsel.

I, David Yates, 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 it.

Date: 24 APRIL 2019


 Signed by David Yates
 Lawyer for the Applicant