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# Hang one, educate one thousand: Can regulatory prosecutions drive change?

# Overview

## Moderator

**Marlo Baragwanath**

Victorian Government Solicitor

## Case presentations by

**Simon Cohen**

Deputy Secretary Regulation, DJR & Director of Consumer Affairs Victoria

**Noel Cleaves**

Manager, Environmental Health Regulation & Compliance, DHHS

**Andrew Edwards**

Director, Operations, Fair Work Ombudsman

# Underquoting: and how Consumer Affairs Victoria has acted to stamp it out

Simon Cohen, Deputy Secretary,  
Regulation and Director,  
Consumer Affairs Victoria

Monday 9 April, 2018



# Underquoting explained

## UNDERQUOTING

IS WHEN AN AGENT LISTS A HOME AT A PRICE LESS THAN:

### 1. THE VENDOR'S RESERVE PRICE



IF A VENDOR DISCLOSES THEIR SELLING PRICE, THE AGENT CANNOT ADVERTISE BENEATH THAT



BUT THEY OFTEN DON'T KNOW UNTIL THE DAY OF AUCTION



SO INSTEAD THE AGENT CAN RELY ON A PRICE ESTIMATE

### 2. THE ESTIMATED SALE PRICE



WHEN SIGNING, AN AGENT MUST INCLUDE THEIR PRICE ESTIMATE

THIS MUST BE BASED ON RECENT SALES AND MARKET CONDITIONS AND UPDATED OFTEN



BE CAREFUL, IT IS AN OFFENCE TO MISREPRESENT THE MARKET



### 3. OFFERS REJECTED BY THE VENDOR



\$790,000?

A PROPERTY CANNOT BE ADVERTISED AT LESS THAN ANY REJECTED OFFERS



UNDERQUOTING MUST FULFILL THESE CONDITIONS AND IT'S

IF A HOUSE SELLS FOR MORE THAN ADVERTISED, IT DOESN'T

source: domian.com.au

**Underquoting:  
widespread & pernicious.**

# Taskforce Vesta

CONSUMER AFFAIRS VICTORIA ESTABLISHED TASKFORCE VESTA IN MID-2015 TO EXAMINE 200 PROPERTIES LISTED FOR SALE, AND MONITOR THEIR PROGRESS FROM FIRST LISTING UNTIL POST AUCTION.

## IN 2015 - 2016, TASKFORCE VESTA:

### MONITORED

**200**  
PROPERTIES  
FOR SALE



### INSPECTED

**34**  
SELLING AGENTS



### EXAMINED

**1,400**  
SALES FILES



### ISSUED

**20**  
WARNING  
LETTERS



### LAUNCHED OR CONTINUED

**13**  
INVESTIGATIONS



### AGENTS' ESTIMATED SELLING PRICE (ESP) OF MONITORED PROPERTIES

>\$1,000,000 → **35**



>\$560,000 → **93**



<\$560,000 → **72**



### FINAL SALES RESULTS\*

LESS THAN ESP **18**



WITHIN ESP **48**



0.1 - 10%  
ABOVE ESP **53**



10.1 - 19.9%  
ABOVE ESP **45**



20% OR MORE  
ABOVE ESP **12**



\* Out of the 200 properties, 179 sold and 24 did not sell within the monitoring period



# Legislation

## Authorised Version

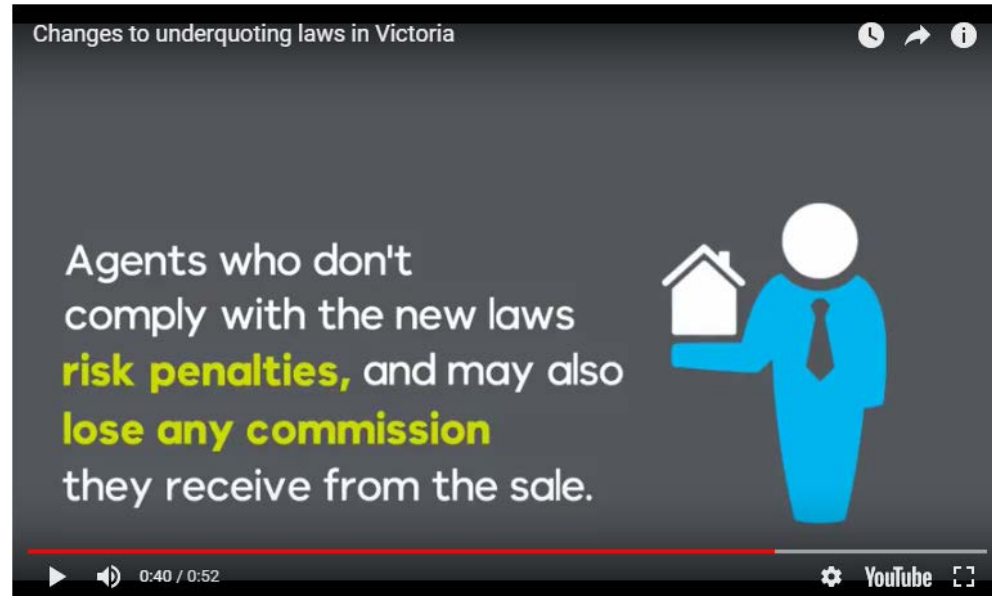
### Estate Agents Amendment (Underquoting) Act 2016

No. 58 of 2016

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# Educating and informing estate agents, vendors and buyers





# Director of Consumer Affairs Victoria v Hocking Stuart Richmond Pty Ltd

## FEDERAL COURT OF AUSTRALIA

Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd  
(No 2) [2016] FCA 1435

File number:	VID 946 of 2015
Judge:	MIDDLETON J
Date of judgment:	2 December 2016
Catchwords:	CONSUMER LAW – admitted contraventions – estate agents – underquoting of price to potential purchasers – pecuniary penalties – compliance program – publication order – declaratory relief – costs – form of orders – appropriateness of proposed instalment regime
Legislation:	<i>Australian Consumer Law and Fair Trading Act 2012</i> (Vic) <i>Competition and Consumer Act 2010</i> (Cth) <i>Estate Agents Act 1980</i> (Vic)
Cases cited:	<i>Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)</i> (2012) 206 FCR 160 <i>Australian Competition and Consumer Commission v High Adventure Pty Ltd</i> [2006] ATPR 42-091 <i>Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 2)</i> (2005) 215 ALR 281 <i>Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 7)</i> [2016] FCA 484 <i>Australian Competition and Consumer Commission v SIP Australia Pty Ltd</i> [2003] ATPR 41-937 <i>Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd</i> [2016] FCA 1184
Date of hearing:	Determined on the papers
Date of last submissions:	21 October 2016
Registry:	Victoria
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection

# Director of Consumer Affairs v Fletcher & Parker (Balwyn) Pty Ltd

## FEDERAL COURT OF AUSTRALIA

Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd

[2017] FCA 1521

File number: VID 1469 of 2016

Judge: MURPHY J

Date of judgment: 14 December 2017

Catchwords: **CONSUMER LAW** – admitted contraventions of Australian Consumer Law – misleading or deceptive conduct and false or misleading representations – real estate agents underquoting sale price estimates to potential property buyers – whether the proposed orders are appropriate in the circumstances – pecuniary penalty – declaratory relief – adverse publicity order – compliance program – costs

Legislation: *Competition and Consumer Act 2010* (Cth)  
*Australian Consumer Law and Fair Trading Act 2012* (Vic)  
*Estate Agents Act 1980* (Vic)

Cases cited: *Australian Competition and Consumer Commission v Acquire learning & Careers Pty Ltd* [2017] FCA 602  
*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540; [2015] FCA 330  
*Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730  
*Australian Competition and Consumer Commission v Econovite Pty Ltd* [2003] FCA 964  
*Australian Competition and Consumer Commission v Eurong Beach Resort Ltd* [2005] FCA 1134  
*Australian Competition and Consumer Commission v ITPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54  
*Commonwealth v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46  
*Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd* [2016] FCA 1184  
*Director of Consumer Affairs Victoria v Manningham*



A case study in  
underquoting:

2 Troy Court,  
Forest Hill

Advertised: \$690K

ESP: \$900K

Sold: \$1,059K

## Undervalued

Fletcher & Parker,  
Balwyn office



*'Underquoting is  
dishonest, misleading  
and against the law –  
and today's decision  
shows that if you do it,  
you'll pay the price.'*

CONSUMER AFFAIRS MINISTER  
MARLENE KAIROUZ

2 Troy Court, Forest Hill

Advertised: \$690,000



**Sold: \$1.059m**

# Fletcher & Parker (Balwyn)

Declarations, adverse  
publicity order,  
pecuniary penalties,  
compliance program,  
costs.

## IMPORTANT PUBLIC NOTICE

In legal proceedings taken by the Director of Consumer Affairs Victoria, the Federal Court of Australia has declared that **FLETCHER & PARKER (BALWYN) PTY LTD** has contravened the misleading or deceptive conduct and the false or misleading representations about the price of land provisions of the Australian Consumer Law.

**FLETCHER & PARKER (BALWYN)** breached the law by making false or misleading price representations in advertisements and in e-mail responses to queries from potential buyers or other interested persons. The price representations were in the form of a price range and also specific \$ amounts with the word “plus” or the symbol “+”. Fletcher & Parker (Balwyn) thereby represented to potential buyers of the residential property that:

- The vendors had instructed Fletcher & Parker (Balwyn) to sell the property for the specified price or within the advertised price range, or not substantially more, when Fletcher & Parker (Balwyn) did not have any, or any reasonable, grounds for believing that the vendors of the properties would sell them for the specified price;
- Fletcher & Parker (Balwyn) had reasonable grounds for believing and holding the opinion that the property would be sold at the specified price or within the advertised price range, or not substantially more when it did not have such reasonable grounds for believing and holding such opinion; and
- The likely selling price for the properties was within the advertised price range, or the specified price, or not substantially more, when Fletcher & Parker (Balwyn) believed or held the opinion that the likely selling price of the properties was not the specified price nor within the advertised price range, and was substantially more.

The Federal Court of Australia has ordered **FLETCHER & PARKER (BALWYN)**:

- Pay pecuniary penalties totalling \$880,000 for the false or misleading representations, about the price of property provisions, of the Australian Consumer Law (Victoria);
- Implement a compliance program designed to ensure future compliance with the law;
- Publish the details of the order of the Court.

This Notice is published and paid for by **FLETCHER & PARKER (BALWYN)** in accordance with the Order of the Federal Court of Australia made on [insert date] in the legal proceedings taken by the Director of Consumer Affairs Victoria



# Fletcher & Parker (Balwyn)

## Media coverage

## Underquoting: Real estate agency Fletcher and Parker to fight 'off the rails' case

KAREN MICHAEL 🐦 DOMAIN WRITER | FEB 10, 2017



A real estate agency accused of extensive underquoting by Consumer Affairs Victoria has told a judge it will fight the case.



Fletcher and Parker (Balwyn) Pty Ltd, accused of misleading conduct on 25 properties, complained the case was "off the rails" at the Federal Court on Friday morning.



Barrister Daniel Star said the regulator had filed the case as "a Christmas present" and was "asking everything in the world", with a "truckload of affidavits".



Fletcher's lawyers have vowed to fight the case. Photo: Gary Medlicott

"We're not lying down. We need to see the material, then form a view – are we to contest the 25 cases, 13, or one?" Mr Star said.

"We want to know the fighting ground – why it is that those representations are false or misleading?"

**CFMEU  
v  
Director, Fair  
Work Building  
Industry  
Inspectorate**

**HIGH COURT OF AUSTRALIA**

FRENCH CJ,  
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

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**Matter No B36/2015**

COMMONWEALTH OF AUSTRALIA APPELLANT

AND

DIRECTOR, FAIR WORK BUILDING INDUSTRY  
INSPECTORATE & ORS RESPONDENTS

**Matter No B45/2015**

CONSTRUCTION, FORESTRY, MINING AND  
ENERGY UNION & ANOR APPELLANTS

AND

DIRECTOR, FAIR WORK BUILDING INDUSTRY  
INSPECTORATE & ANOR RESPONDENTS

*Commonwealth of Australia v Director, Fair Work Building Industry  
Inspectorate  
Construction, Forestry, Mining and Energy Union v Director, Fair Work  
Building Industry Inspectorate  
[2015] HCA 46  
9 December 2015  
B36/2015 & B45/2015*

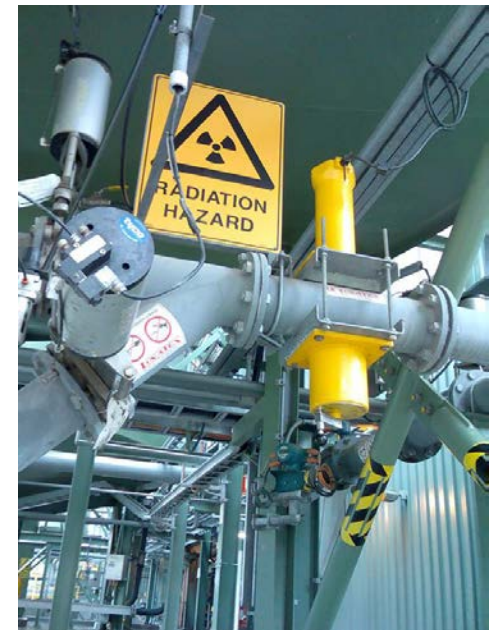
**ORDER**

1. *In each matter, appeal allowed.*
2. *Set aside paragraph 1 of the order of the Full Court of the Federal Court of Australia made on 1 May 2015.*
3. *Remit the proceedings to the Federal Court for determination according to law.*

**Underquoting:**  
**change is happening.**

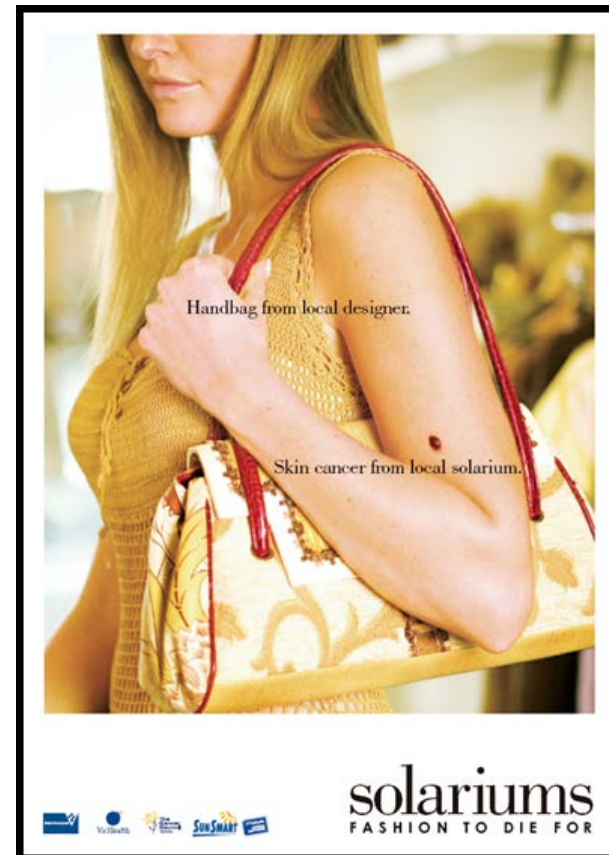


# Radiation regulation – *Radiation Act 2005*



# Solariums .....a long journey

- 1991-2006: Multiple surveys of beauty sector testing awareness of an Australian standard for solaria with fairly poor results
- 2005 - 'Fashion to die for'



It's been a long journey....

- 8/2007: **Clare Oliver's** story becomes known
- 22/8/2007: Min for Health announces regulation to occur by end of year via new radiation laws during interview with Neil Mitchell
- 1/2/2008: Regulation commences
- 13/12/2012: Vic Gov't launched the *Skin Cancer Prevention Framework* which featured a commitment to **ban** commercial tanning practices from end of 2014
- **1/1/2015: Ban commences**

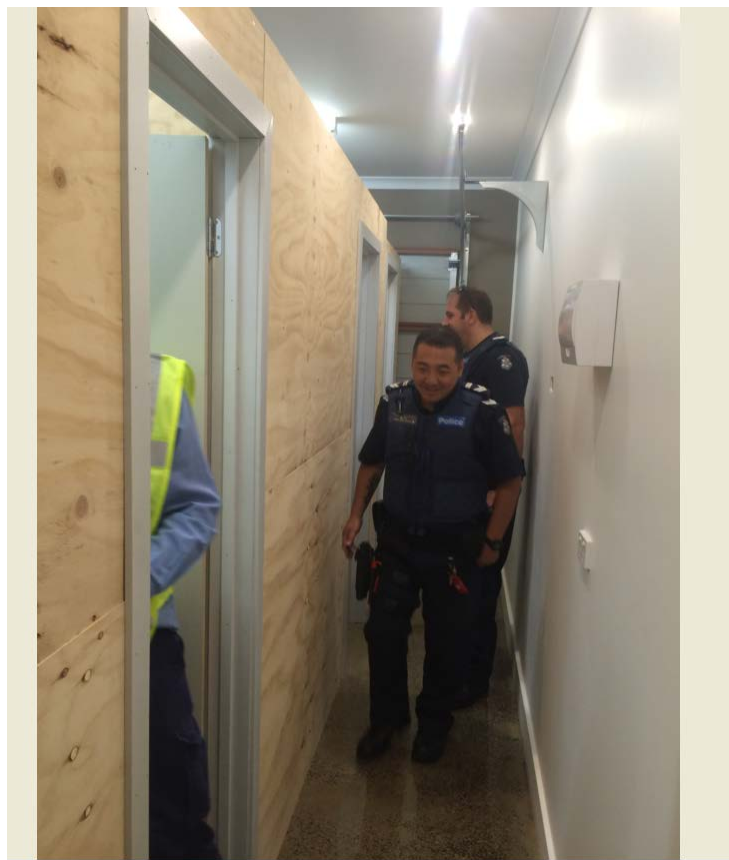
# Investigations commenced

- Early 2015: DHHS inspects all previously licensed sites. Enforcement action included sealing units to prevent use
- 2<sup>nd</sup> half of 2015: allegations of commercial operations started to be received
- Started monitoring internet posts
- Commenced investigation of several sites
- 11/8/15: Channel 7 ran story on illegal solariums
- 13/8/15: Our first search warrant executed of a Bundoora property confirmed 4 units; cash register, PC booking system. Several items were seized and tanning units sealed

## What happened next?

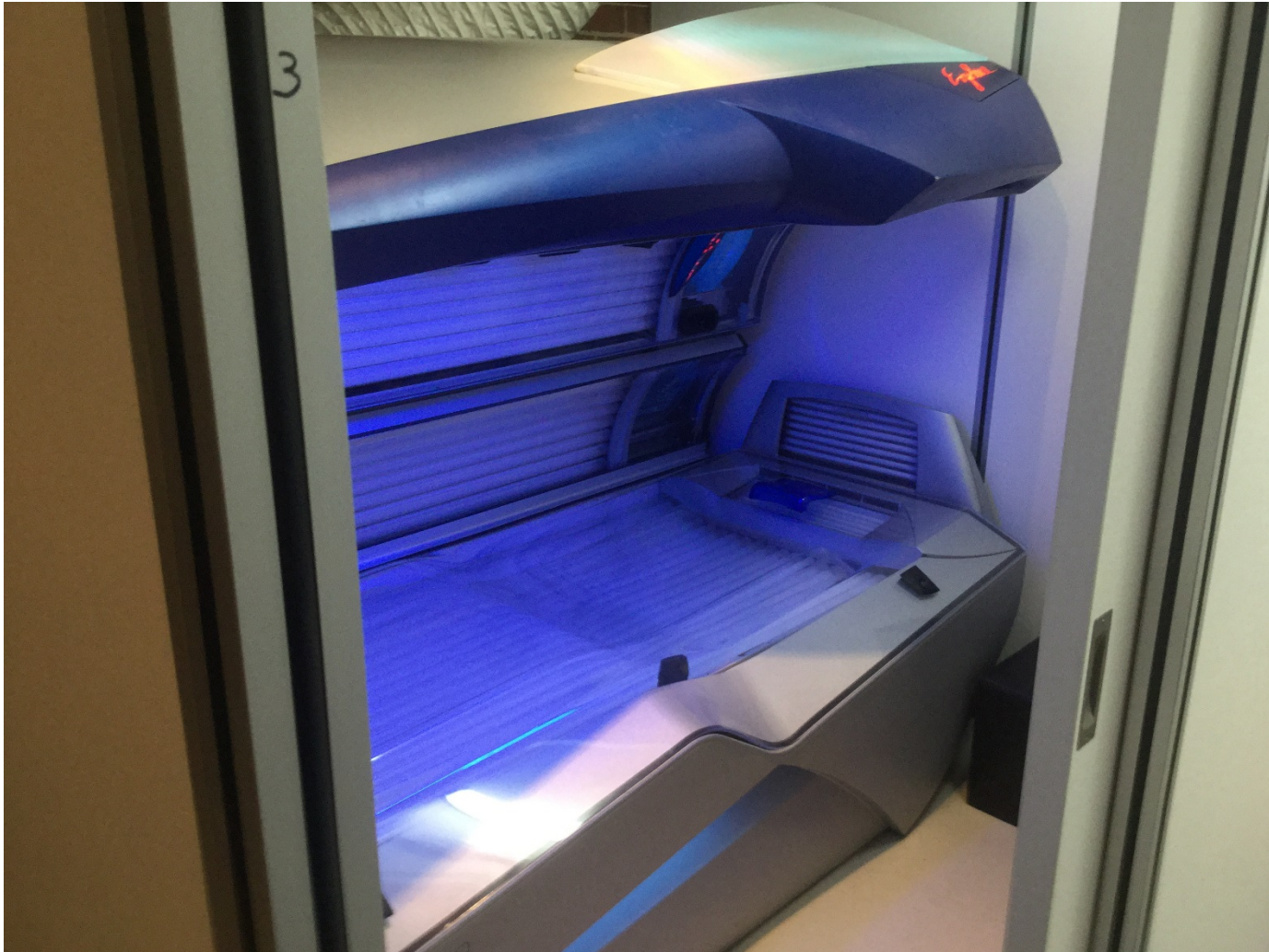
- Subsequent searches were carried out in August 2015 of 3 more residential properties across Melbourne. All found evidence supporting the allegations. No tanning units seized.
- 8-10/15: Team getting increasingly overwhelmed with evidence and the task ahead of getting the first case to court whilst still dealing with radioactive material, medical practices, mining etc
- Late 2015 DHHS recruited ex-Police Prosecutor/Detective to lead investigations
- Policy shift to seize any tanning units where the evidence obtained during the search supported the view that a commercial tanning practice was being conducted

## 2<sup>nd</sup> search of Bundoora property: 27/10/15





# Bundoora search



10 April 2018



# Bundoora search - logistics



## Bundoora prosecution

- Around 11 months after search.....
- 21/9/16: Heidelberg Magistrates Court: Individuals and company pled guilty to multiple charges relating to commercial tanning, breaking seals on tanning beds and hindering an authorised officer and were fined a total of **\$68,500 + \$10,000 costs**

## And there's more.....

- Greenvale: Fined \$4,000 & \$3,000 costs
- MacLeod: 12 months good behaviour bond plus \$5,000 costs
- Castlemaine: Fined \$2,000 with \$1,000 costs and no conviction
- Officer: Fined aggregate of \$20,000 with \$5,500 costs
- 2 more matters due in Magistrates' Court in coming months
- 9 matters at brief preparation stage
- 15 matters at investigation stage



And there's more...



10 April 2018

# Key lessons and issues

- Public interest/value test
- Ministerial support vital but comes with high expectations!
- Working with media – ‘can the camera crew come inside during the search?’
- **Specialist experienced investigators** make a huge difference to a technical team (search warrants, retention orders, forfeiture notices, telephone data requests; forensic analysis of PCs and mobiles; surveillance)
- Trialling ways to keep costs down
- Still learning.....informers; evidence?
- Media interest declining?

# Andrew Edwards

Director, Operations  
Fair Work Ombudsman

# Check out the National Regulators Community of Practice page on the ANZSOG website.

## Regulators Community of Practice

[View Regulator resources >](#)

[Home](#) > [Communities](#)

### Communities

Regulators



About the community



Register

Resources

Alumni



Learning and  
Development



### Welcome to the ANZSOG/National regulators community of practice.

The community of practice began as an informal network of Victorian regulators inspired by Harvard Professor Malcolm Sparrow's ANZSOG workshops.

Buoyed by the strong interest from around Australia, the community of practice has now partnered with ANZSOG and gone national!!

We are a genuine community of practice:

- A community of people from across economic, social and environmental regulation, brought together by our common interest in learning from the best, sharing knowledge and experience and helping each other solve common problems
- A community run by and for practitioners, so for people working directly as regulators, with an interest in regulatory policy, or committed to supporting better regulation

[anzsog.edu.au/communities/regulators](https://anzsog.edu.au/communities/regulators)