

CONSUMER AFFAIRS VICTORIA

ENFORCEABLE UNDERTAKING

Pursuant to section 198 of the *Australian Consumer Law and Fair Trading Act 2012*

The commitments in this Undertaking are offered to the Director of Consumer Affairs Victoria by:

SUPERIOR REALTY PTY LTD trading as Barry Plant Glenroy

ACN 098 225 248

of 751 Pascoe Vale Road Glenroy Vic 3046

and

Evangelos Nestor

and

Fadi Khoder

The Director of Consumer Affairs Victoria

1. The Director of Consumer Affairs Victoria ("**the Director**") is a public official whose office is provided for under section 107 of the *Australian Consumer Law and Fair Trading Act 2012* ("**the ACLFTA**").
2. The holder of that office is responsible for the administration of the ACLFTA, together with Victoria's other consumer protection legislation, including the *Estate Agents Act 1980* ("**EAA**") and the Australian Consumer Law ("**the ACL**"), which has been enacted as a law of Victoria under Part 2.2 of the ACLFTA and known as the Australian Consumer Law (Victoria) ("**the ACL (Vic)**").

3. Schedule 1 of the ACLFTA provides that the EAA is a Consumer Act under the ACLFTA.
4. Under section 198 of the ACLFTA, the Director may accept a written Undertaking from a person in connection with:
 - (a) a matter in relation to which the Director has a power or function under the ACLFTA; or
 - (b) a matter relating to a contravention of any other Consumer Act.

Background

5. Superior Realty Pty Ltd trading as Barry Plant Glenroy ACN 098 225 248 ("**the Company**") is a licensed estate agent with licence number 066418L.
6. The Company's registered office and principal place of business is at 751 Pascoe Vale Road Glenroy Vic 3046.
7. Evangelos Nestor otherwise known as Angelo Nestor ("**Mr Nestor**") is a licensed estate agent under the EAA, with licence number 003152L, and, at all material times, the managing director of the Company, as well as the Officer in Effective Control ("OIEC").
8. Fadi Khoder is a licenced estate agent under the EAA licence number 70544, and is a director of the Company.
9. Raed Khoder (otherwise known as Ray) was employed as an Agent's Representative by the Company from 13 September 2010 until 8 June 2016, on which date he obtained a license as an estate agent under the EAA with the license number 78862L. Ray Khoder remains employed by Barry Plant Glenroy as a licensed estate agent.
10. Adel Bakdache was formerly employed as an agent's representative with the Company between the period 18 August 2014 to 4 May 2015.
11. Lina Parker has been employed as an agent's representative with the Company since 9 September 2011.
12. Ahmad Taleb has been employed as an agent's representative with the Company since 8 February 2010.

Legislation

13. On 1 January 2011, the ACL, set out in Schedule 2 to the *Competition and Consumer Act 2010* (C'th), came into effect. Part 2.2 of the ACLFTA applies the ACL as a law of Victoria, which is known as the ACL (Vic).
14. Section 18 of the ACL (Vic) provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
15. Section 30(1) of the ACL (Vic), inter alia provides that a person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:
- (c) make a false or misleading representation concerning the price payable for the land.
16. Section 47C (2) of the EAA prohibits the making of false representations to prospective buyers, whereby in making any statement while marketing the real estate, the agent or representative must not state as his or her estimate of the selling price of the real estate, a price that is less than the estimated selling price, or in the case of a price range, less than the lower limit of that range, stated in the engagement or appointment.

Consumer Affairs Victoria Investigation

17. On 7 October 2015, CAV Inspectors conducted a sales files inspection at the registered office of the Company. Inspectors examined five sales files and detected that two properties advertised on the website www.barryplant.com.au had been marketed for less than the Estimated Selling Range ("**ESR**") or the Estimated Selling Price ("**ESP**") and/or the vendors price as stated on the Exclusive Sales Authority ("**the Authority**").
18. Between October 2015 and December 2015, CAV Inspectors conducted further enquiries which identified the following:
- A total of six properties marketed for sale by the Company were advertised online on www.barryplant.com.au with a price that was likely to mislead potential purchasers, in that the Company caused to be displayed (and therefore advertised) within a lower price range than what was listed as the vendors' price on the Authority.

- A further two properties were advertised online on www.barryplant.com.au with a price less than the Estimated Selling Range (ESR) on the Exclusive Sale Authority ("the Authority").

Contraventions of the Act

Section 18 & 30 of the ACL (Vic)

- **35 Pinnaroo Circuit Meadow Heights**

19. An Authority was signed on 15 June 2015 between the vendor and Roy Khoder of the Company. The vendor's reserve price was nominated at \$500,000 and the ESR was stated as between \$460,000 to \$500,000. The property was subsequently advertised for \$450,000+ on www.barryplant.com.au.

- **8/14-18 Holberry Street Broadmeadows**

20. An Authority was signed on 16 June 2015 between the vendor and Roy Khoder of the Company. The vendor's reserve price was nominated at \$340,000 and the ESR was stated as between \$310,000 and \$350,000. The property was subsequently advertised for \$300,000+ on www.barryplant.com.au.

- **2/6 Howard Street Glenroy**

21. An Authority was signed on 13 July 2013 between the vendor and Ahmed Taleb of the Company. The vendor's reserve price was nominated at \$360,000 and the ESR was stated as between \$300,000 to \$360,000. The property was subsequently advertised for \$340,000 to \$360,000 on www.barryplant.com.au.

- **2/7 Benalla Street Dallas**

22. An Authority was signed on 29 April 2014 between the vendor and Ahmed Taleb of the Company. The vendor's reserve price was nominated at \$365,000 and the ESR was stated as between \$356,000 and \$365,000. The property was subsequently advertised for \$349,000 - \$359, 000 on www.barryplant.com.au.

- **4/85-87 View Street Glenroy**

23. An Authority was signed on 8 May 2015 between the vendor and Roy Khoder of the Company. The vendor's reserve price was nominated at \$380,000 and the ESR was

stated as between \$350,000 and \$380,000. The property was subsequently advertised for \$350,000 to \$380,000 on www.barryplant.com.au.

- **1/176 Daley Street Glenroy**

24. An Authority was signed on 24 August 2015 between the vendor and Roy Khoder of the Company. The vendor's reserve price was nominated at \$409,000 and the ESP was stated as between \$390,000 and \$420,000. The property was subsequently advertised for "offers over \$390,000" on www.barryplant.com.au.

25. Whereas in fact, at the time of the advertisements referred to at paragraphs 19-24 were made, Mr Roy Khoder and Mr Ahmed Taleb knew that the vendors of the property were not prepared to sell for the price set out in the advertisements above, and did not have reasonable grounds to make the representations of the advertised price.

26. By reason of the matters set out in paragraphs 19 to 25 above, the Director considers that the Company has, in trade or commerce, engaged in conduct that was misleading and deceptive or likely to mislead or deceive contrary to section 18 of the ACL (Vic).

27. Further the Director considers the Company, through the representations outlined in paragraphs 19 to 24 above has in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land made false or misleading representations concerning the price payable for the land, in contravention of section 30 (1) of the ACL (Vic).

Contraventions of the Estate Agents Act 1980

Section 47C (2) of the EAA

28. CAV identified that the Company had, in relation to properties it had been engaged to sell as listed below, expressed a price range for the sale of the real estate published in online advertisements which was less than the ESR on the sale authorities held by the Company in respect of those properties.

- **29 Fuchsia Place Meadow Heights**

29. The Authority was signed on 20 July 2015 between the vendor and Lina Parker of the Company. The vendor's price was nominated at \$320,000 and the ESR was stated by Lina Parker at \$300,000 to \$320,000. The property was advertised for \$290,000 to \$320,000 on www.barryplant.com.au on 6 October 2015.

- **4/6-8 Stamford Crt Broadmeadows**

30. The Authority was signed on 20 January 2015 between the vendor and Adel Bakdache of the Company. The vendor's price was nominated at \$320,000 and the ESR was stated as between \$300,000 and \$320,000. The property was advertised for \$280,000 to \$310,000 on www.barryplant.com.au on 28 October 2015.

Acknowledgment of the Contraventions

31. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, acknowledge that, by engaging in the conduct referred to in paragraphs 19 to 25 above, the Company contravened sections 18 and 30 (1) of the ACL (Vic).
32. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, acknowledge that, by engaging in the conduct referred to in paragraphs 28 to 30 above, the Company contravened section 47C (2) of the EAA.
33. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, seek to address these contraventions by offering this Enforceable Undertaking to the Director.

The Enforceable Undertakings

Compliance program

34. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, hereby undertake to the Director, pursuant to section 198 of the ACLFTA, that it will, at its own expense, establish within three (3) months of the date of the execution of the undertaking, a compliance program which meets the requirements in **Annexure "A"** and maintain the compliance program for three (3) years from the date on which it is established.
35. The Company provide to the Director, within three months of signing this undertaking, a signed affidavit from Mr Nestor as OIEC, verifying that the Company has implemented the compliance program.

Publication of Notice

36. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, undertake to the Director, pursuant to section 198 of the ACLFTA, that the Company will, within 14 days

of the commencement of this Undertaking, cause to be displayed prominently and conspicuously for a continuous period of 3 months on and at or near each the reception desk in each of its existing or new premises from which it carries on real estate services, a Notice in the form of **Annexure "B"** below to this Undertaking. Each such Notice:

- (i) be a minimum size of 30 cm x 42 cm (A3 size);
- (ii) use a minimum type size of 12 point Times New Roman or equivalent; and
- (iii) be in full colour.

37. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, undertake to the Director, pursuant to section 198 of the ACLFTA, that the Company will retain and continue to operate the website accessible via uniform resource locator at the web address (URL) <http://www.barryplant.com.au/glenroy/> and within 14 days of commencement of this Undertaking, cause to be published, the Notice in the form of **Annexure B** below, to be published on the website (or if any such URL is replaced or change, the Internet home page of the corresponding website), for a period of 3 months from the date of this Undertaking and to use its best endeavours to ensure that:

- I. the Notice is viewable by clicking through a "click-through" icon located on the website or any replacement website and;
- II. the "click-through" icon referred to in the previous paragraph is located in a central position on the page first accessed when the user opens to the home page of the website or any replacement website.

Contribution to the Victorian Consumer Law Fund

29. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, undertake to the Director that within 30 days of the commencement of this undertaking, the Company will pay the sum of **\$45,000** to the Victorian Consumer Law Fund, created under section 134 of the ACLFTA, within 90 days of the date of the Director accepting this undertaking.

Commencement and Duration of the Undertaking

38. The Enforceable Undertaking commences when:

- (a) It is executed by Mr Nestor and Mr Khoder personally and on behalf of the Company; and
- (b) It is accepted and executed by the Director; and
- (c) Notice is given, in writing, by the Director's staff to **SUPERIOR REALTY PTY LTD** or their legal representative, Mills Oakley, of the happening of the matters contained in paragraph 38(b).

39. The term of the Enforceable Undertaking shall be for a period of 3 years from the date the Enforceable Undertaking is accepted by the Director.

Public Nature of Undertaking

40. Mr Nestor and Mr Khoder, personally, and on behalf of the Company, acknowledge that:

- (a) the Director will register this Enforceable Undertaking in the Register of Undertakings and make this Enforceable Undertaking available for public inspection pursuant to section 200 of the ALCFTA;
- (b) the Director and/or the Minister for Consumer Affairs Victoria may, from time to time, publicly refer to this Enforceable Undertaking;
- (c) this Enforceable Undertaking in no way derogates from the rights and remedies available to the Director arising from any conduct described in this Enforceable Undertaking that arises from conduct outside the relevant period or from future conduct (including the right to pursue compensation for or in the name of any consumer);
- (d) this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person or entity (including any other regulatory agency) arising from any conduct described in this Enforceable Undertaking that arises from conduct outside the relevant period or from future conduct; and
- (e) this Enforceable Undertaking in no way derogates from the obligation of the Company, its officers, employees, and agents to fully comply with the provisions of the Act and associated regulations.

EXECUTION

SUPERIOR REALTY PTY LTD trading as Barry Plant Glenroy ACN 098 225 248

Signed by:

(PRINT NAME)

EVANGELLOS NESTOR.

Mr Evangellos Nestor personally and in his capacity as OIEC and Director of Superior Realty Pty Ltd

In the presence of:

Witness:

(PRINT NAME)

Elisha Romano.

Signed by:

(PRINT NAME)

FADI KHODER

Mr Fadi Khoder personally and in his capacity as Director of Superior Realty Pty Ltd

In the presence of:

Witness:

(PRINT NAME)

Elisha Romano.

Accepted by:

The Director of Consumer Affairs Victoria, pursuant to section 198 of the ACLFTA.

Dated: ^{30th} ~~10th~~ MAY 2017

Simon Cohen

Director of Consumer Affairs Victoria

Annexure “A”

COMPLIANCE PROGRAM

The Company will establishes a Compliance Program that complies with each of the following requirements:

Appointments

1. The Company will:

- a. appoint a Director or a Senior Manager with suitable qualifications or experience in corporate compliance as **Compliance Officer** with responsibility for ensuring the **Compliance Program** is effectively designed, implemented and maintained;
- b. appoint a qualified, internal or external, compliance professional with expertise in the Australian Consumer Law (Victoria) (**the Compliance Advisor**). The Company shall instruct the Compliance Advisor to conduct a risk assessment in accordance with (i) to (iii) to below:
 - i. Identify the areas where the Company is at risk of breaching:
 - a. section 18 of Part 2-1 (Misleading or deceptive conduct) and section 30 of Part 3-1, Division 1 (False or misleading representations) of the ACL (Vic);
 - b. sections 47A- 47D of the EAA
 - ii. identify where there may be gaps in the Company's existing procedures for managing these risks; and
 - iii. provide recommendations for action having regard to the assessment.

2. The Company will issue a policy statement outlining the Company's commitment to trade practices compliance (Compliance Policy). The Compliance Policy is:

- (a) is written in plain language;
- (b) contains a statement of commitment to compliance with the ACLFTA (including the ACL (Vic) and EAA;
- (c) contains a strategic outline of how commitment to compliance will be realized within the Company;
- (d) contains a requirement for all staff to report any Compliance Program related issues concerns to the Compliance officer;

- (e) contains a guarantee that whistle-blowers will not be prosecuted or disadvantaged in any way for making a genuine report and that their reports will be kept confidential and secure; and
- (f) contains a clear statement that the Company will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the applicable legislation administered by Consumer Affairs Victoria (including the ALC (Vic) and EAA) and will not indemnify them.

Complaints Handling System

3. The Company will ensure that the Compliance Program includes a complaints handling system. The Company shall use its best endeavours to ensure this system is consistent with AS/ISO 1002:2006 **Customer satisfaction- Guidelines for complaints handling in organizations**, though tailored to the Company's circumstances. The Company will ensure that staff and customers are made aware of the complaints handling system.
4. The Company will ensure that the Compliance Program provides for regular (at least once a year) and practical training for all directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct that may contravene:
 - i. section 18 of Part 2-1 (Misleading or deceptive conduct); and
 - ii. section 30 of Part 3-1, Division 1 (False or misleading representations) of the ACL (Vic); and
 - iii. sections 47A – 47D of the EAA.
5. The Company must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in the ACL (Vic) and the EAA and is updated regularly to address any legislative amendments.
6. The Company will ensure that the Compliance Program includes a requirement that awareness of ACL(Vic) and EAA compliance issues forms part of the induction of all new directors, officers, representatives and agents, whose duties could result in them being concerned with conduct that may contravene:
 - i. section 18 of Part 2-1 (Misleading or deceptive conduct); and

ii. section 30 of Part 3-1, Division 1 (False or misleading representations) of the ACL (Vic); and

iii. sections 47A – 47D of the EAA.

7. The Company shall, at its own expense, within 3 months of the date of the execution of this Undertaking, cause to be produced and provided to the Director copies of each of the documents constituting the Compliance Program and implement promptly and with due diligence any recommendations that the Applicant may make that are reasonably necessary to ensure that the Company maintains and continues to implement the Compliance Program in accordance with the requirements of the undertaking.

Annexure "B"
(Notice to be displayed)

IMPORTANT PUBLIC NOTICE

Superior Realty Pty Ltd trading as Barry Plant Glenroy ACN 098 225 248 acknowledges that it has contravened the misleading and deceptive conduct and the false or misleading representations concerning price of land provisions of the Australian Consumer Law (Vic) and the underquoting provisions of *the Estate Agents Act 1980*.

Superior Realty Pty Ltd t/as Barry Plant Glenroy admits to contravening the law by:

- Making representations to prospective purchasers about the sale price of real estate when Superior Realty Pty Ltd knew that the vendors would not sell for the advertised price or within the advertised price range.
- Expressing a price range for the sale of the real estate published in online advertisements which was less than the Estimated Selling Price on the sale authorities held by the Company in respect of those properties.

Superior Realty Pty Ltd t/as Barry Plant Glenroy has agreed to implement a compliance program designed to ensure no further contraventions of these provisions of the of the Australian Consumer Law (Victoria) and *Estate Agents Act 1980* occur; and to make a contribution of **\$45,000** to the Victorian Property Fund.

This Notice is published and paid for by **Superior Realty Pty Ltd t/as Barry Plant Glenroy** in accordance with an Enforceable Undertaking accepted by the Director of Consumer Affairs Victoria on X date.