PROPERTY AGENTS TRIBUNAL

In the matter of *the Property Agents and Land Transactions Act 2016* (the Act)

and

In the matter of CONOR JAMES CANNING (a Property Agent)

and

In the matter of JOEL CARLO SOLAK (a Property Agent)

PROPERTY AGENTS BOARD **Applicant**

CONOR JAMES CANNING **First Respondent**

JOEL SOLAK **Second Respondent**

DECISION AND REASONS FOR DECISION

Hearing Date:

By consent of the parties, the referral was heard and determined on the documents before the Tribunal without a formal hearing.

Tribunal:

Mr K A M Pitt QC, President
Ms P Corkhill, Member
Ms J Cranston, Member

Representation:

Applicant: Mr Craig Mackie of Dobson Mitchell Allport Lawyers
First Respondent: In person
Second Respondent: In person

BACKGROUND

1. The First Respondent was at all material times a property agent for the purposes of s.3 of the *Property Agents and Land Transactions Act* 2016 (the Act) and is currently a director and property representative of PRD Nationwide - Hobart (PRD).

2. The Second Respondent was at all material times a property agent for the purposes of s.3 of the Act and is also currently employed as a property representative with PRD.

3. The First Respondent was employed as a "property consultant" by Ant Farm Tasmania Pty Ltd t/as Ray White Hobart (Ray White Hobart) from 1 December 2014 until 1 December 2017.

4. The Second Respondent was employed as a personal assistant to the First Respondent by Ray White Hobart from 31 July 2017 until he resigned on 1 December 2017.

5. On or about 4 or 5 December 2017 both the First Respondent and the Second Respondent commenced employment at Veri (Tasmania) Pty Ltd t/as Harcourts Hobart (Harcourts Hobart) and both ceased their employment with Harcourts Hobart on 5 October 2018.

THE COMPLAINT AGAINST THE FIRST RESPONDENT - THE RAY WHITE HOBART COMPLAINT

6. Antony Manton (the Complainant) was at all material times the qualified director and managing real estate agent of Ray White Hobart.

7. The Complainant made a written complaint (the Ray White Hobart Complaint) to the Property Agents Board (the Board) on 6 April 2018 in which he alleged that on 15 November 2017 and again on 24 November 2017, without permission or authority to do so, the First Respondent accessed and copied the entire contents of a confidential Ray White Hobart computer database (the Ray White Hobart Database) which contained the names and contact details of approximately 16,000 people.

8. The Complainant further alleged that on 24 November 2017 the First Respondent used his Ray White Hobart email account to electronically transfer a copy of the Ray White Hobart Database to the Second Respondent's Ray White Hobart email account without the written consent of the persons listed in that database. The Complainant made a general allegation that the First Respondent's conduct was in breach of the Code of Conduct as referred to in the Act, which at that time was 2017 - Version 2 (Code of Conduct Version 2).

9. The Complainant further alleged that the First Respondent had used the Ray White Hobart Database to contact and attempt to solicit work from persons listed in that database without the consent of those persons and whilst the First Respondent was in the employ of Harcourts Hobart.

10. By letter dated 4 May 2018, the Board gave notice of the Ray White Hobart Complaint to the First Respondent and requested him to submit a response.

11. In response to the Ray White Hobart Complaint, the First Respondent provided written information and documents to the Board including in the form of written submissions, emails, and two statutory declarations.

12. A written submission dated 25 May 2018 made in response to the Board's letter dated 4 May 2018 was prepared by the Second Respondent and signed by the First Respondent and was received by the Board on 31 May 2018.

13. By letter dated 21 August 2018, the Board then gave the First Respondent notice it had appointed investigator Cheryl McCulloch (the Investigator) to further investigate the Ray White Hobart Complaint pursuant to s.96 of the Act.

14. The First Respondent was interviewed by the Investigator on 10 September 2018. At his request, the Second Respondent was also present and participated in the interview.

15. The First Respondent was further interviewed by the Investigator on 19 November 2018, this time not in the presence of the Second Respondent. The answers provided by the First Respondent to the Investigator on 28 November 2018 were formulated into a written statement which was signed by the First Respondent on 4 December 2018.

16. As a consequence of receiving the Ray White Hobart Complaint and reviewing the written information and material provided by the First Respondent and the Second Respondent, the Investigator conducted a review of records taken from Ray White Hobart's computer system and the Harcourts computer system for the relevant period. The Investigator discovered that the Harcourts computer system included a local email server (Harcourts Hobart email server) and an international email server (Harcourts International).

THE COMPLAINT AGAINST THE SECOND RESPONDENT-THE BOARD'S COMPLAINT

17. As a result of further investigating the Ray White Hobart Complaint, on 17 December 2018 the Board resolved to initiate a conduct complaint of its own volition in relation to the Second Respondent (the Board's Complaint) in accordance with s. 95(1) of the Act, on the basis that the Second Respondent appeared to have engaged in conduct that fell short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent.

18. In response to the Board's complaint, the Second Respondent provided the Board with written information and documents including in the form of written submissions, emails, and statutory declarations.

19. By letter dated 18 December 2018, the Board gave the Second Respondent notice it had resolved to investigate his conduct which was particularised in that letter pursuant to s.95 of the Act. The Second Respondent was requested to submit a response to the allegations contained in that letter.

20. A written submission dated 24 January 2018 from the Second Respondent was received by the Board on 30 January 2018. This submission partially responded to the Board's letter dated 18 December 2018. The Second Respondent claimed he was unable to fully respond to the allegations against him because of the confidential nature of a settlement agreement he had with the Complainant.

21. The Board issued a notice to the Second Respondent on 20 February 2019 pursuant to s.97 of the Act which required him to fully answer the allegations against him contained in the Board's letter dated 18 December 2018.

22. The Second Respondent ultimately provided further written information and documents to the Investigator.

THE INVESTIGATION FINDINGS

23. As a result of investigating the Ray White Hobart Complaint and the Board's Complaint, the Investigator identified breaches of the Act perpetrated by the First Respondent and/or the Second Respondent. The Investigator found that between 24 November 2017 and 28 November 2017, the First Respondent and/or Second Respondent accessed and copied 6 reports (Ray White Hobart My Desktop Reports) from the Ray White Hobart My Desktop system belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart. The Investigator further found that this act appeared to be in contravention of the First Respondent's contract of employment with Ray White Hobart and in contravention of the Second Respondent's contract of employment with Ray White Hobart, in that the Respondents used their employer's confidential Information without consent of their employer or persons named in Ray White Hobart My Desktop Reports.

24. The Investigator also discovered that the First Respondent and/or the Second Respondent took the Ray White Hobart Database belonging to Ray White Hobart, which was the Complainant's personal client contact list containing contact details for some 16,000 people, and exported it to the computer system of their new employer Harcourts Hobart.

25. The Investigator also found that some or all of the contents of the Ray White Hobart My Desktop Reports and the Ray White Hobart Database were improperly used by the First Respondent and/or the Second Respondent during the course of their employment at Harcourts Hobart.

26. During the course of her investigation, the Investigator was provided on numerous occasions with false or misleading information by the First Respondent and/or the Second Respondent.

THE COMPLAINT REFERRAL

27. This matter was referred by the Board to the Tribunal pursuant to section 104 of the Act for the hearing and determination of the conduct complaint in respect of the First Respondent Conor Canning, a Property Agent and the Second Respondent, Mr Joel Solak, a Property Agent.

28. The Board alleges that the conduct particularised in the complaints below was conduct by the First Respondent and/or the Second Respondent which was professional misconduct and/or unsatisfactory professional conduct for the purposes of the Act, and was also conduct in contravention of the relevant Code of Conduct.

29. The Respondents were each afforded an opportunity to contest the allegations made in the complaints, and to make submissions in respect of any action to be taken by the Tribunal if the allegations were found substantiated and they were found guilty. Each Respondent made submissions in respect of the action to be taken, but neither contested the allegations made against them. Each Respondent signed a document admitting each of the allegations made.

30. Notwithstanding that the Respondents did not contest the allegations made, the Tribunal has considered the (again uncontested) affidavit evidence in support of each allegation, and found each allegation substantiated by that affidavit evidence. A summary is set out in the following paragraphs.

Allegation 1 - misappropriation of information in a confidential computer database

31. On 24 November 2017, the First Respondent and/or Second Respondent accessed and copied the contents of a confidential computer database belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart described as the Ray White Hobart Database without authority or permission to do so, and this conduct constitutes professional misconduct or unsatisfactory professional conduct as defined in s.83 of Act and is a breach of paragraphs 15, 17(d) and 17(e) of the relevant Code of Conduct.

32. The following facts were undisputed:

    32.1 In or about October or November 2017, the First Respondent and the Second Respondent agreed that they would access and copy the entire contents of a confidential Ray White Hobart computer database (the Ray White Hobart Database) which contained the names and contact details of approximately 16,000 people.

    32.2 On or before 24 November 2017, without permission or authority to do so, the Second Respondent accessed and copied the entire contents of the Ray White Hobart Database; these actions were done with the knowledge and agreement of the First Respondent.

    32.3 The Second Respondent did this by initiating a request using the First Respondent's email address conor.canning@raywhite.com (ID 135656) to iRealty to provide a report which contained the Ray White Hobart Database. The Ray White Hobart Database was then emailed to conor.canning@raywhite.com on 24 November 2017 at 12:26am.

    32.4 The Second Respondent then made a copy of the Ray White Hobart Database with the knowledge and agreement of the First Respondent.

33. The Tribunal finds the facts in paragraph 32. Consequently, the Tribunal finds that each respondent is guilty of the conduct in this allegation.

Allegation 2 - exportation of confidential information

34. That on 27 February 2018, without authority or permission to do so, the First Respondent and/or Second Respondent exported confidential information being four (4) Ray White Hobart My Desktop Reports belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart by attaching the reports to an email from the Harcourts International email account of the Second Respondent and sending it to the Harcourts International email account of the First Respondent without authority or permission to do so, and this conduct constitutes professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Act and is a breach of paragraphs 15, 17(d) and 17(e) of the relevant Code of Conduct.

35. The following facts were undisputed:

35.1 On or before 27 February 2018, the Second Respondent had in his possession a quantity of confidential proprietary reports from Ant Farm (Tasmania) Pty Ltd known as the Ray White Hobart My Desktop Client Reports that he had improperly and without consent retained after leaving the employ of Ant Farm (Tasmania) Pty Ltd.

35.2 On 27 February 2018 (at 11:31), the Second Respondent, without consent or authority to do so sent (4) of those proprietary reports from his Harcourts International email address joel.solak@harcourts.com.au to the First Respondent's Harcourt International address conor.canning@harcourts.com.au

35.3 The actions of the Second Respondent were done at the request of and with the knowledge of the First Respondent.

36. The Tribunal finds in accordance with the facts in paragraphs 35.1 – 35.3 inclusive. Consequently, the Tribunal finds that each respondent is guilty of the conduct in this allegation.

Allegation 3 - exportation of confidential information

37. That on 20 March 2018, without authority or permission to do so, the First Respondent and/or Second Respondent exported confidential information being six (6) Ray White Hobart My Desktop Reports (including a report called My Desktop Clients) belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart by attaching it to an email from the Harcourts International email account of the Second Respondent and sending it to the Harcourts International email account of the First Respondent, without authority or permission to do so, and this conduct constitutes professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Act and is a breach of paragraphs 15, 17(d) and 17(e) of the relevant Code of Conduct.

38. The following facts were undisputed:

38.1. On or before 27 February 2018, the Second Respondent had in his possession a quantity of confidential proprietary reports from Ant Farm (Tasmania) Pty Ltd known as the Ray White Hobart My Desktop Client Reports that he had improperly and without consent retained after leaving the employ of Ant Farm (Tasmania) Pty Ltd.

38.2. On 20 March 2018 (at 15:58), the Second Respondent, without consent or authority to do so, sent 6 of these proprietary reports from his Harcourts International email address joel.solak@harcourts.com.au to the First Respondent's Harcourt International email address conor.canning@harcourts.com.au.

38.3. The actions of the Second Respondent were done at the request of and with the knowledge of the First Respondent.

39. The Tribunal finds in accordance with the facts in paragraphs 38.1 – 38.3. Consequently, the Tribunal finds that each respondent is guilty of the conduct in this allegation.

Allegation 4 - exportation of confidential information

40. That on 24 November 2017, without authority or permission to do so, the First Respondent and/or Second Respondent exported a confidential database belonging to Ant Farm Tasmanian Pty Ltd t/as Ray White Hobart known as the Ray White Hobart Database by attaching it to an email from the Ray White Hobart email account of the First Respondent and sending it to the Ray White Hobart email account of the Second Respondent without authority or permission and this conduct constitutes professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Act and is a breach of paragraphs 15, 17(d) and 17(e) of the relevant Code of Conduct.

41. The following facts were undisputed:

    41.1 On 24 November 2017 (at 13:51), without permission or authority to do so, the Second Respondent forwarded the entire contents of the Ray White Hobart Database from the First Respondent's email address conor.canning@raywhite.com to his own email address joel.solak@raywhite.com and these actions were done with knowledge and agreement of the First Respondent.

42. The Tribunal finds in accordance with the facts in paragraph 41.1. Consequently, the Tribunal finds that each Respondent is guilty of the conduct in this allegation.

Allegation 5 - misuse of confidential information

43. That the First Respondent and/or Second Respondent engaged in professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Act and in breach of paragraphs 9(a), 15, 17(d) and 17(e) of the relevant Code of Conduct in that they provided information relating to persons listed on a confidential database (the Ray White Hobart Database) belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart to third persons without authority or permission to do so, the particulars of which are:

    5.1 On or about 24 November 2017, the First Respondent and/or the Second Respondent caused the Ray White Hobart database to be exported to the First Respondent's Ray White Hobart email account *(not pursued as subsumed in complaint 1);*

    5.2 On 30 November 2017, the First Respondent and/or the Second Respondent caused Harcourts Hobart branded marketing material to be sent to an existing client of Ray White Hobart whilst the First Respondent and Second Respondent were still employees of Ant Farm Pty Ltd t/as Ray White Hobart;

    5.3 On 7 December 2017, the First Respondent and/or the Second Respondent caused Harcourts Hobart branded marketing material to be emailed to persons listed on the Ray White Hobart Database from the First Respondent's Harcourts International email account;

    5.4 On 27 February 2018 (at 2.43pm), the My Desktop Clients report was emailed by the First Respondent and/or the Second Respondent from the Second Respondent's Harcourts International email account to First Respondent's Harcourts International email account; and

5.5 On 27 February 2018 (at 2.47pm), the My Desktop Clients report was emailed by the First Respondent and/or the Second Respondent from the First Respondent's Harcourts International email account to Emmanuel Marios, a Mortgage Broker at Derwent Finance, with the message " *The golden list my man. This is highly confidential but I trust you xo".*

44. Allegation 5.1 is in effect a duplication of Allegation 1 and the Board did not pursue the prosecution of allegation 5.1. The Tribunal will accordingly dismiss allegation 5.1.

45. The following facts were undisputed:

45.1 In relation to allegation 5.2, on 30 November 2017 (at 16:37) the First Respondent and the Second Respondent caused Harcourts Hobart branded marketing material to be emailed from the Second Respondent's Ray White Hobart email joel.solak@raywhite.com to an existing client of Ray White Hobart, being "Maria" at maria@purplecip.com.au whilst the First Respondent and Second Respondent were still employees of Ant Farm Pty Ltd t/as Ray White Hobart.

45.2 In relation to allegation 5.3, on 7 December 2017 the First Respondent and the Second Respondent caused Harcourts Hobart branded marketing material to be emailed to a contact list from the First Respondent's Harcourts International email account, knowing that the contact list was the Ray White Hobart Database.

45.3 In relation to allegation 5.4, on 27 February 2018 (at 2.43pm} the First Respondent and the Second Respondent caused the report called My Desktop Clients to be emailed from the Second Respondent's Harcourts International email account to First Respondent's Harcourts International email account.

45.4 In relation to allegation 5.5, on 27 February 2018 (at 2.47pm) the First Respondent and the Second Respondent caused the My Desktop Clients report to be emailed from the First Respondent's Harcourts International email account to Emmanuel Marios, a Mortgage Broker at Derwent Finance, with the message *"The golden list my man. This is highly confidential but I trust you xo".*

46. The Tribunal finds in accordance with the above undisputed facts. Consequently, the Tribunal finds that each respondent is guilty of the conduct in allegation 5 of the complaint.

Allegation 6 - false or misleading conduct

47. That the First Respondent and Second Respondent are guilty of professional misconduct in that they provided a written submission dated 25 May 2018 which was signed by the First Respondent and prepared by the Second Respondent to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are:

6.1 It was falsely submitted that information on the Harcourts computer system relating to persons listed in the Ray White Hobart Database had been sourced from the First Respondent's profile on a database called *"RateMyAgent"* when in fact the First Respondent and Second Respondent had improperly downloaded that information onto the Harcourts Hobart computer system;

6.2 It was a misleading submission to state that *"it is simply not possible to export content from the Ray White Hobart systems without the appropriate level of access regardless of whether it is in fact your intention to do so"* and this was done in order to mislead the Investigator into believing the First Respondent and Second Respondent could not have accessed, copied, and otherwise misused the contents of the Ray White Hobart Database and Ray White Hobart My Desktop Reports;

6.3 It was falsely submitted that the Second Respondent had removed the Ray White Hobart Database and Ray White Hobart My Desktop Reports from the Harcourts computer system when in fact at that time the Ray White Hobart Database and Ray White Hobart My Desktop Reports still remained on the Harcourts computer system.

48. The following facts were undisputed:

48.1. In relation to Allegation 6.1 the First Respondent falsely submitted that information on the Harcourts computer system relating to persons listed in the Ray White Hobart Database had been sourced from the First Respondent's profile on a database called *"RateMyAgent"* and not the Ray White Hobart Database.

48.2 This submission was prepared and written by the Second Respondent and signed by the First Respondent.

48.3. What had occurred was that the First Respondent and Second Respondent had deliberately put the relevant information onto the Harcourts Hobart computer system by improperly downloading the Ray White Hobart Database onto it.

49. The First Respondent and the Second Respondent had previously and improperly obtained the Ray White Hobart Database from iRealty.com.

50. A copy of the written submission can be found in Annexure B of the Affidavit of the Investigator, Cheryl McCulloch sworn 2 March 2020.

51. In relation to Complaint 6.2, the First Respondent provided a misleading statement that *"it is simply not possible to export content from the Ray White Hobart systems without the appropriate level of access regardless of whether it is in fact your intention to do so".*

52. This statement was prepared and written by the Second Respondent and signed by the First Respondent.

53. This statement was provided in order to mislead the Board's Investigator into believing the First Respondent and Second Respondent could not have accessed, copied, and otherwise misused the contents of the Ray White Hobart Database and Ray White Hobart My Desktop Reports.

54. This statement omitted and attempted to disguise the truth, which is that the "content from Ray White Hobart systems" was improperly obtained and exported by the First Respondent and Second Respondent by a request for the information from iRealty.com.

55. In relation to Complaint 6.3, the First Respondent falsely submitted that the Second Respondent had removed the Ray White Hobart Database and Ray White Hobart My Desktop Reports from the Harcourts computer system when in fact at that time he knew the Ray White Hobart Database and Ray White Hobart My Desktop Reports still remained on the Harcourts computer system.

56. This submission was prepared and written by the Second Respondent and signed by the First Respondent.

57. The Tribunal finds in accordance with the above undisputed facts. Consequently, the Tribunal finds that each Respondent is guilty of the conduct in allegation 6 of the complaint.

Allegation 7 - false or misleading conduct *(This complaint relates to the First Respondent only)*

58. That the First Respondent is guilty of professional misconduct in that he provided a document to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are that the First Respondent gave the Investigator a statutory declaration he signed on 1 October 2018 in which he falsely claimed he did not export or instruct another person to export a confidential computer database belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart on or about 15 November 2017 and on or about 24 November 2017, nor did he email or have another person email on his behalf the Ray White Hobart Database to Second Respondent's Ray White Hobart email address.

59. The following facts were undisputed:

    59.1 The First Respondent provided the Board's Investigator with a document which was false in that he gave the Investigator a statutory declaration he signed on 1 October 2018 in which he falsely claimed he did not export or instruct another person to export a confidential computer database belonging to Ray White Hobart on or about 15 November 2017 and on or about 24 November 2017; when in fact he and the Second Respondent had improperly obtained and exported a confidential computer database belonging to Ray White Hobart on or about 15 November 2017 and on or about 24 November 2017.

    59.2 Further, in the same statutory declaration the First Respondent falsely claimed he did not email or have another person email the Ray White Hobart Database to Second Respondent's Ray White Hobart email address when in fact on or shortly after 24 November 2017 the Second Respondent emailed the Ray White Hobart Database from conor.canning@raywhite.com to joel.solak@raywhite.com and this was done with the knowledge and consent of the First Respondent.

60. The Tribunal finds in accordance with the above undisputed facts. Consequently, the Tribunal finds the first named Respondent is guilty of the conduct in this allegation.

Allegation 8 - false or misleading conduct *(this complaint relates to the First Respondent only)*

61. That the First Respondent is guilty of professional misconduct in that he provided a written statement dated 4 December 2018 to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are:

    8.1 The First Respondent falsely stated he was unaware that the Second Respondent had sent an email to his Harcourts International email address on 27 February 2018 at 11.31am which had 4 attachments all containing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart;

    8.2 The First Respondent falsely stated he was unaware that the Second Respondent had sent an email to his Harcourts International email address on 20 March 2018 which had eight (8) attachments all containing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart; and

    8.3 The First Respondent falsely stated "*I* cannot *explain why the Ray White files and the Ray White Database are on the Harcourts Hobart IT system. I can only suspect that Mr Solak did it out of appreciation to me for leaving the business {Ray White) on his behalf, but I have not spoken with him to confirm this*" in order to mislead the Investigator into believing he had no part in accessing, copying and otherwise misusing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart.

62. The following facts are undisputed:

    62.1 In relation to Allegation 8.1, the First Respondent falsely stated he was unaware that the Second Respondent had sent an email to his Harcourts International email address on 27 February 2018 at 11.31am which had 4 attachments all containing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart.

    62.2 In relation to Complaint 8.2, the First Respondent falsely stated he was unaware that the Second Respondent had sent an email to his Harcourts International email address on 20 March 2018 which had eight (8) attachments all containing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart.

    62.3 In relation to Complaint 8.3 the First Respondent falsely stated "*I cannot explain why the Ray White files and the Ray White Database are on the Harcourts Hobart IT system. I can only suspect that Mr Solak did it out of appreciation to me for leaving the business (Ray White) on his behalf, but I have not spoken with him to confirm this*" in order to mislead the Investigator into believing he had no part in accessing, copying and otherwise misusing confidential information belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart.

63. The Tribunal finds in accordance with the above undisputed facts. Consequently, the Tribunal finds that the First Respondent is guilty of the conduct in this allegation.

Allegation 9 - false or misleading conduct *(this allegation relates to the First Respondent only)*

64. That the First Respondent is guilty of professional misconduct in that he provided a document to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are that he signed a statutory declaration on 13 December 2017 in which he falsely claimed there was *"no data, content or intellectual property of Ant Farm Tasmania Pty Ltd within Harcourts Hobart IT systems and sites under the control of myself, Mr Solak, or collective associates".*

65. The following facts were undisputed:

    65.1 That the First Respondent provided a document to the Board's Investigator which was false or misleading the particulars of which are that he signed a statutory declaration on 13 December 2017 in which he falsely claimed there was "no data, content or intellectual property of Ant Farm Tasmania Pty Ltd within Harcourts Hobart IT systems and sites under the control of myself, Mr Solak, or collective associates" and gave this to the Board's Investigator.

66. The Tribunal finds in accordance with the above undisputed facts. Consequently, the Tribunal finds that the First Respondent is guilty of the conduct in this allegation.

Allegation 10 - false or misleading conduct *(this complaint relates to the second named Respondent only)*

67. That the Second Respondent is guilty of professional misconduct in that he provided a document to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are that he signed a statutory declaration on 13 December 2017 in which he falsely claimed there was *"no data/ content/ intellectual property of Ant Farm Tasmania Pty Ltd trading as Ray White Hobart present within Harcourts IT systems and sites under the control of myself, Mr Solak (sic}, or collective associates".*

68. The facts in this allegation were undisputed, and the Tribunal finds in accordance with them. Consequently, the Tribunal finds that the Second Respondent is guilty of the conduct alleged in this particular of complaint.

Allegation 11 - false or misleading conduct *(this complaint relates to the Second Respondent only)*

69. That the Second Respondent is guilty of professional misconduct in that he provided written information to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are that he provided a written submission to the Investigator dated 28 February 2019 (but received 29 April 2019) in which:

    11.1 The Second Respondent falsely stated that he had *"engaged in no actions related to any Ray White materials..."* in response to an allegation that he had facilitated the exportation of the Ray White Hobart Database; and

    11.2 The Second Respondent falsely stated that to the best of his knowledge no data from a confidential computer database belonging to Ant Farm Tasmania Pty Ltd t/as Ray White Hobart was provided to any third parties during the time that data was kept on the Harcourts International computer system.

70. The facts in allegation 11.2 were undisputed, and the Tribunal finds in accordance with them. Accordingly, the Tribunal finds that the second respondent is guilty of the conduct in this allegation.

Allegation 12 - false or misleading conduct *(this complaint relates to the Second Respondent only)*

71. That the Second Respondent is guilty of professional misconduct in that he provided a document to the Board's Investigator which was false or misleading contrary to s.97(5) of the Act, the particulars of which are that he provided the Investigator with a Statutory Declaration signed on 13 May 2019 in which he falsely claimed that his written submission dated 28 February 2019 had, to the best of his ability, been answered honestly and correctly.

72. The facts in this allegation were undisputed, and the Tribunal finds in accordance with them. Accordingly, the Tribunal finds that the Second Respondent is guilty of the conduct alleged.

The respective roles of the Respondents

73. The respective roles of the two Respondents in the above conduct differed, principally in that the first named Respondent was less technically involved than the second named Respondent, but the Tribunal is satisfied that they formed a common intention or purpose with respect to the conduct in allegations numbered 1, 2, 3, 4, and 5. That common purpose was to take the databases and proprietary reports and use them for their own purposes and to their own advantage, without the knowledge or consent of the owner of those databases and proprietary reports. With respect to allegation 6, the Tribunal is satisfied on the evidence that the common purpose was to exculpate themselves with respect to the conduct being investigated.

Whether the above conduct constitutes unsatisfactory professional conduct or professional misconduct

74. Section 83 (1) of the Act contains the definitions of professional misconduct and unsatisfactory professional conduct, as follows:

> "professional misconduct includes
> …
>
> (b) conduct of a property agent whether occurring when acting as a property agent or occurring otherwise than when acting as a property agent, that would, if established, justify a finding that the property agent is not a fit and proper person to continue to act as a property agent;"
>
> …
>
> "unsatisfactory professional conduct includes conduct of a property agent when acting as a property agent that falls short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent."

75. Allegations 1 – 5 relate to the misappropriation and misuse of the "Ray White Hobart" property. The facts can be summarised as follows:

75.1 Whilst in the employ of Ray White Hobart, the Respondents together took a database compiled by Ant Manton containing customer and client contact details ("the Ray White Hobart database") (allegation 1).

75.2 Further, upon leaving the employment of Ray White Hobart, the Respondents misused property belonging to Ray White Hobart without authority or consent, as follows:

(a) the Ray White Hobart database.

(b) six Ray White Proprietary Reports which contained client and customer contact details, details of property appraisals, current listings and properties sold (Ray White Hobart MyDesktop Reports) (allegations 2 and 3).

75.3 Further, whilst in the employ of Harcourts Hobart, the Respondents misused Ray White Hobart property by emailing it to each other (Complaint 4, 5.4) and to a mortgage broker (allegation 5.5).

75.4 The Respondents misused Ray White Hobart property by emailing existing clients of Ray White Hobart information in an attempt to get their business (allegations 5.2, 5.3).

76 The aggravating features of that misconduct are as follows:

76.1 Whilst the description of their misconduct was couched in language appropriate to this jurisdiction ("misappropriation", "exportation" and "misuse"), the misconduct of the Respondents in taking property from Ray White Hobart without authority or consent was clearly dishonest.

76.2 It was the result of significant and deliberate planning by the Respondents. The property was taken in a manner calculated to avoid detection and done immediately prior to the Respondents taking up their new employment at Harcourts Hobart.

76.3 The Ray White Hobart property that was taken by the Respondents was valuable. The Ray White Hobart database for instance was Mr Manton's contact list which gave access for the Respondents to potential clients.

76.4 The Ray White Hobart property was taken by the Respondents to their new employment at Harcourts Hobart in order that it could be used for their own financial advantage and to the detriment of Ray White Hobart.

76.5 The Respondents manipulated the Ray White Hobart property in an attempt to avoid detection by deleting 126 email addresses directly traceable to Ray White.

76.6 The Respondents disseminated the property of Ray White Hobart to a Tasmanian mortgage broker. This was done in secret and the Tribunal is satisfied this was done for the attempted financial advantage of the Respondents and /or the broker. It is not known what that mortgage broker did with that information, or if any financial benefit was derived by the Respondents or the mortgage broker as a result of that action.

76.7 The Respondents jeopardised the reputation of Harcourts Hobart by placing the improperly obtained Ray White Hobart property on the Harcourts Hobart computer system.

76.8 The First Respondent ultimately bowed to the inevitable and signed a document in which he acknowledged that the misconduct in allegations 1 -5 was done with his knowledge and agreement, but he repeatedly attempted to exonerate himself by placing the blame for the misconduct on the Second Respondent.

76.9 Both Respondents repeatedly denied taking and misusing Ray White Hobart property until the matter was to go to hearing, some two years after Respondents became aware that the Board was investigating the matter.

76.10 The misappropriation of the Ray White Hobart property resulted in a breach of confidentiality for Ray White Hobart clients and customers.

76.11 The Second Respondent for a substantial period of time remained unable to accept the magnitude of his wrong doing. In a submission to the Tribunal dated 30 March 2020, the Second Respondent stated the following about the Complaint by the Property Agents Board:

> **"***Both CC and myself have been pursued to the ends of the Earth as part of this blatant, vexatious litigation and we have in now (sic) way gotten out of these matters lightly be it with respect to the damaging financial implications and/ or the psychological repercussions.*
>
> *These matters have all be designed in such an aggressively nasty manner to exonerate the truly guilty parties.*
>
> *At no time have I engaged in intentionally malicious behaviour*"

78. The Tribunal is satisfied that the conduct of both Respondents outlined in complaints 1-5 involved dishonest behaviour, and attempts to conceal that behaviour, of a nature and degree that satisfies the Tribunal that each Respondent is not a fit and proper person to continue to act as a property agent for the purposes of s. 83(1) the Act. Accordingly, the Tribunal is satisfied that in respect of the conduct in allegations 1 – 5 each Respondent is guilty of professional misconduct.

False declarations and misleading conduct – allegations 6 - 12

79. It is the Board's statutory obligation to administer the licensing system for Tasmanian property agents and to ensure those agents comply with the requirements of the Act: [s.6 (1)(a)&(c) of the Act]. There is a corresponding responsibility on property agents to support and co-operate with the Board, and in particular not to mislead it.

80. The misconduct of both Respondents in taking and using property belonging to Ray White Hobart without consent is therefore further aggravated by the fact that both Respondents lied to the Board's Investigator about their involvement in their misconduct and actively attempted to mislead the Board's Investigator by referring her to irrelevant matters which the Tribunal is satisfied was to exculpate themselves.

Allegation 6

81. The Board's Investigator received a submission dated 25th May 2018 written by the Second Respondent and signed by the First Respondent, in response to a notice given to the First Respondent pursuant to s.97(1) of the Act.

82. That submission was a lengthy and elaborate document requiring considerable preparation by the Respondents. It contained a false denial of wrongdoing in relation to the misappropriation and misuse of Ray White Hobart property. It also contained a series of false and misleading statements designed to convince the Investigator that any Ray White Hobart property found on the Harcourts Hobart computer system had made its way there by innocent means (Complaint 6.1, 6.2).

83. That submission also falsely claimed that all Ray White Hobart property had at that time been removed from the Harcourts Hobart computer system. It was submitted for the Board, and the Tribunal Is satisfied, that this was done by the Respondents in an attempt to convince the Investigator that there was no need to investigate the matter further and so not uncover the true nature of their misconduct (Complaint 6.3).

84. The Tribunal is satisfied that each Respondent is equally culpable for the contents of this submission.

85. As a result of its above findings of fact, and in accordance with s.97(5) of the Act the Tribunal makes a finding that both Respondents are guilty of Professional Misconduct in relation to Complaint 6.

Allegation 7

86. The First Respondent also provided the Board's Investigator with a false or misleading statement on three separate further occasions, which are documented in allegations 7, 8 and 9.

87. In relation to allegation 7, the Board's investigator received a statutory declaration dated 1st October 2018 signed by the First Respondent which was a further response to a notice given to the First Respondent pursuant to s.97(1) of the Act.

88. In that statutory declaration, the First Respondent falsely denied taking and using Ray White Hobart property without consent.

89. The false and misleading statements referred to in allegation 7 have a number of aggravating features.

    89.1 Firstly, they represented a further avoided opportunity for the First Respondent to tell the truth to the Board's Investigator when formally invited to do so, coming some 4 months after he was first approached to give his version of events. They were "*deliberate and pre-meditated and so to be distinguished from lying on the spur of the moment*." (para 73-75 *R v Einfeld [2009] NSWSC 119 (20 March 2009).*

89.2 The most serious aggravating feature of these false and misleading statements is the fact that they were contained in a statutory declaration.

89.3 The seriousness of signing a false declaration is such that it is a crime in Tasmania "*for any person who wilfully makes a statement false in a material particular, if the statement is made…in a statutory declaration.*" (s.113 Criminal Code).

90. Tasmanian Deputy Chief Magistrate Daly in *Barnes v McIntosh* [2016] TASMC 4 (9 March 2016) considered the meaning of*" false in a material particular"* in this context and followed with approval the Full Court of the Federal Court in *Minister for Immigration, Local Government & Ethnic Affairs v Dela Cruz* 1992 FCA71; (1992) 34 FCR 348 *at 352 in concluding* the term "material"' should be interpreted as requiring *"no more and no less than that the false particular must be of moment or of significance, not merely trivial or inconsequential"*.

91. The First Respondent's lies in his statutory declaration of 1st October 2018 clearly meet this test.

92. Whilst the First Respondent is not charged with the criminal offence of signing a false declaration, nor would it be appropriate for the Tribunal to find he had committed such a crime, it is nevertheless appropriate for the Tribunal to make a finding of Professional Misconduct against the First Respondent in accordance with s.97(5) of the Act in relation to allegation 7. The First Respondent's false statements particularised in allegation 7 are in the upper range for the purposes of determining further sanctions in accordance with s.110 of the Act.

Allegation 8

93. The Board's Investigator received a statement dated 4th December 2018 signed by the First Respondent which was a further response to a notice given to the First Respondent pursuant to s.97(1) of the Act

94. In that statement, the First Respondent falsely denied knowing that the Second Respondent had emailed Ray White Hobart property to him at his Harcourts International email address. (Allegations 8.1, 8.2).

95. These false and misleading statements have a number of aggravating features:

95.1 As with allegation 7, the First Respondent's lies were again the avoidance of an opportunity for him to tell the truth to the Board's investigator when formally invited to do so. The lies were again deliberate and pre-meditated. Again, the lies were not about a peripheral or inconsequential matter, but rather went to the substance of the allegations against the Respondents.

95.2 The most aggravating feature of the First Respondent's lies in this particular statement is that when presented with evidence of wrongdoing he attempted to avoid responsibility for it by casting all blame on the Second Respondent (8.3 of the complaint).

96. Having regard to its above findings, and in accordance with s.97(5) of the Act, the Tribunal makes a finding that the First Respondent is guilty of Professional Misconduct in relation to allegation 8.

Allegation 9

97. The Board's Investigator received another statutory declaration dated 1st October 2018 signed by the First Respondent which was a further response to a notice given to the First Respondent pursuant to s.97(1) of the Act.

98. In that statutory declaration, the First Respondent falsely denied taking and using Ray White Hobart property without consent.

99. These lies have a number of aggravating features:

    99.1 They represented a further avoided opportunity for the First Respondent to tell the truth to the Board's investigator when formally invited to do so. Again, the lies were deliberate and pre-meditated.

    99.2 Secondly, the lies were not about a peripheral or inconsequential matter in the investigation, but rather went to the substance of the allegations against the Respondents.

    99.3 The most serious aggravating feature of these lies was that they were contained in a statutory declaration – the second time this was done by the First Respondent in this investigation.

100. Having regard to its above findings, and in accordance with s.97(5) of the Act the Tribunal makes a finding that the First Respondent is guilty of Professional Misconduct upon this allegation. For the purposes of further sanctions, the surrounding circumstances mean that this misconduct was at the upper end of breaches of s.97 of the Act.

Allegation 10

101. The Second Respondent has also pleaded guilty to providing the Board's Investigator with a false or misleading statement on three separate further occasions beyond the submission documented in allegation 6 which are documented in allegations 10, 11 and 12.

102. In relation to allegation 10, the Board's Investigator received a statutory declaration dated 13th December 2017 signed by the Second Respondent which was a further response to a notice given to the Second Respondent pursuant to s.97(1) of the Act.

103. In that statutory declaration, the Second Respondent falsely stated that there was no Ray White Hobart property on the Harcourts Hobart computer system that was under his control.

104. This statutory declaration mirrors the declaration signed by the First Respondent which is the subject of allegation 9.

105. The aggravating features of the Second Respondent's lies in relation to his false statutory declaration mirror the matters raised in this submission in relation to allegation 6.

106. The Tribunal accordingly makes a finding of Professional Misconduct against the Second Respondent in accordance with s.97(5) of the Act in relation to allegation 10. The Tribunal considers that the Second Respondent's false statements particularised in allegation 10 are in the upper end of breaches of s.97 of the Act for the purposes of determining further sanctions against him in accordance with s.110 of the Act.

Allegation 11

107. The Board's Investigator received a statement dated 28th February 2019 signed by the Second Respondent which was a further response to a notice given to the Second Respondent pursuant to s.97(1) of the Act.

108. In that statement, the First Respondent falsely denied engaging in any improper action in relation to Ray White Hobart property (11.1 of the complaint) and falsely denied knowing that Ray White property was provided to third parties during the time that data was on the Harcourts computer system (allegation 11.2).

109. These lies have a number of aggravating features:

    109.1 As with allegations 6 and 10, the Second Respondent's lies represent a further avoided opportunity for him to tell the truth to the Board's Investigator.

    109.2 The lies were elaborate and pre-meditated, being contained in a 7 page document.

    109.3 Ray White Hobart property was located on the Harcourts computer system by Harcourts Hobart managing agent, Daniel Winston, who then alerted the Board's Investigator. The Second Respondent sought to avoid responsibility for his misconduct by improperly attacking the credibility of Mr Winston. He alleged Mr Winston was "dishonest", that his information to the Board about the matter was "ficticous" (sic), and represented a joint effort by Mr Winston and Mr Manton to "persecute" both him and the First Respondent.

110. Having regard to its above findings, and in accordance with s.97(5) of the Act, the Tribunal makes a finding that the Second Respondent is guilty of Professional Misconduct in relation to allegation 11.

Allegation 12

111. The Board's Investigator received another statutory declaration dated 13th May 2019 signed by the Second Respondent which was a further response to a notice given to the First Respondent pursuant to s.97(1) of the Act.

112. In that statutory declaration, the Second Respondent falsely claimed that his written submission dated 28 February 2019 had, to the best of his ability, been answered honestly and correctly.

113. These lies have a number of aggravating features:

    113.1 They represent yet a further avoided opportunity for the Second Respondent to tell the truth to the Board's Investigator when formally invited to do so.

113.2 Again, the lies were deliberate and pre-meditated.

113.3 Additionally, the lies were not about a peripheral or inconsequential matter in the investigation, but rather went to the substance of the allegations against the Respondents.

113.4 The most serious aggravating feature of these lies is the fact that they were contained in a statutory declaration – the second time this was done by the Second Respondent in this investigation.

114. Having regard to its above findings, and in accordance with s.97(5) of the Act, the Tribunal makes a finding that the Second Respondent is guilty of Professional Misconduct in relation to Complaint 12. For the purposes of further sanctions, the surrounding circumstances mean that this misconduct was at the upper end of breaches of s.97 of the Act.

Mitigation – Mr Canning

115. Mr Canning apologised in September 2020. He contended that he was only aware of the export of the database after the fact, and that at the time of sending his bulk email he believed he was sending it to an exporter list of his LinkedIn connections. He said that he should have admitted to the Board what had happened as soon as he became aware, that he did not do so because of loyalty to the second named Respondent, because he feared Mr Manton would act inappropriately by spreading misinformation and damaging his reputation; and that there have been no complaints to the Board with respect to the conduct.

116. He noted that the time of the relevant conduct he had been having personal and business difficulties; he failed to receive $60,000 in commission from his previous employment; that he had been persistently bullied by various employers; that he was a Director of his current firm; he is currently being mentored by a former REIT President; that he was involved in raising money for charity; that he had a strong reputation in the industry; that he regularly receives requests from young people looking to get into the industry and advises them; and similarly with school students. Finally, that he was committed to not repeating the same mistake.

117. The Tribunal does not see that the personal and business difficulties, or having been bullied, justifies the misconduct alleged. Nor does it consider that they or his current status or reputation are persuasive by way of mitigation in relation to the action to be taken by the Tribunal.

Mitigation – Mr Solak

118. [redacted]

119. The Tribunal considers that even if these matters were true, they provide no excuse either from the responsibility for commission of the conduct the subject of the complaint, or by way of mitigation. What was done was in no way an appropriate response by the Second Respondent to the alleged harassment and threats.

120. The Second Respondent also submitted that he had dedicated his career to building strong relationships and a strong reputation within the real estate industry; that he had been a member of a team raising money for local charities; that he sits on the executive board for Tasmanian community organisations; and was a several time honour graduate of a prestigious school.

121. None of these matters are consistent with the dishonesty involved in the commission of the conduct complained of, or persuasive with respect to the effect upon the appropriate action to be taken by the Tribunal.

122. More recently, the Second Respondent submitted that the commission of the conduct complained of was on the instructions of his employers; inferentially, the First Respondent. The Tribunal does not accept that the Second Respondent was in any way compelled to carry out the conduct complained of; nor upon the uncontested facts is it persuaded that the Second Respondent was in some way overborne by the First Respondent so as to cause the commission of the offences. Upon the facts before it, the Tribunal is satisfied the commission of the conduct complained of was, as previously discussed, the result of the common purpose reached by agreement between the two Respondents.

DETERMINATION BY THE TRIBUNAL

123. There is a significant element of public protection involved in the expectation that property agents act honestly, and that they cooperate with the Board. In this case, there has been a significant failure to act honestly in their actions within the industry, together with an extended failure to recognise the seriousness of those actions, and substantial dishonesty in responding to the Board's investigation. Consequently, the Tribunal considers that the protection of the public requires that the Respondents take no part in the industry for a substantial period.

124. The Tribunal, pursuant to s.110(1)(b) of the Act, will cancel the licence of each Respondent and prohibit the Board from licensing each Respondent without the approval of the Tribunal.

125. A reprimand is considered unnecessary given the extent of the other penalties.

126. It was the Board's submission that the Tribunal should not be in a position to give the requisite approval referred to in s.110(1)(b) unless and until:

    (a) A significant period of cancellation time has lapsed; and

    (b) Each Respondent has completed a Compliance and Ethics cluster course of training approved by the Board.

    With respect to the Board's above submission, the Tribunal considers that while these may well be relevant matters to take into account at the time the Tribunal considers any application for approval, such an application should be considered upon the facts then before the Tribunal.

127. The Tribunal also considers that in accordance with s.110 (1)(e) of the Act for a period of five (5) years from the date of this decision, each of the First Respondent and Second Respondent should be prohibited from conducting all or any part of a real estate agency business, property management business or general auctioneering business without the approval of the Tribunal.

128. A monetary penalty, in accordance with s. 110(1)(d) of the Act is also appropriate**.** Both the First Respondent and Second Respondent will be fined for their misconduct.

129. A fine cannot exceed 1,000 penalty units. A penalty unit in Tasmania is currently valued at $172, so that the maximum fine possible would be $172,000.

130. In this respect, there is a basis for differentiating between the Respondents. It is clear from the submissions that the Second Respondent is in a significantly less advantageous financial position than the First Respondent; and in addition, the First Respondent in his submissions in mitigation, offered to bear the larger share of any financial penalty. The Tribunal also has regard to the extent of the disqualification of each Respondent from participating in the real estate industry.

131. The First Respondent will be fined the sum of $30,000, and the Second Respondent the sum of $10,000, each fine to be paid within a period of six months of this decision.

Costs

132. It was submitted on behalf of the Board that a costs order in relation to these proceedings should be made against the First Respondent and Second Respondent, and that the order should be on an "indemnity" or "solicitor and client" basis.

133. The Tribunal has a discretionary power to make an order for costs in respect of a hearing before it (s.111(1) of the Act).

134. The Act provides no guidance as to how the discretion should be exercised, nor does it give any guidance as to what rate costs should be awarded. In this case, the Board was entirely successful. The Tribunal is satisfied that the investigation and subsequent proceedings before the Tribunal were rendered significantly more lengthy and extensive by the failure of the Respondents to give truthful answers, or subsequently until late in the proceedings before the Tribunal to admit guilt. Those factors justify an order on an indemnity basis.

135. It is noted that the power accorded by section 111 of the Act is for the Tribunal to make an order for "costs in respect of a hearing before it". While the proceedings did not involve a hearing in person, the Tribunal considers that as far as possible all the costs of the proceedings before the Tribunal should be included in the order as to costs.

136. Pursuant to s.110 of the Act the Tribunal takes the following action:

(a) Each Respondent is prohibited from conducting all or any part of a real estate agency business, property management business or general auctioneering business for 5 years without the approval of the Tribunal;

(b) The Respondents are fined, with payment to be made to the Board within 6 months of the date of this decision:

(i) The First Respondent is fined the sum of $30,000;

(ii) The Second Respondent is fined the sum of $10,000; and

(c) Each Respondent is ordered to pay the costs of the Board in respect of the hearing before the Tribunal, on a solicitor and client basis, calculated at 80% of the higher Supreme Court scale, in an amount to be taxed by the Tribunal in default of agreement. The costs are to be paid within 6 months of the costs being agreed to or determined by the Tribunal, and paid jointly and severally by the Respondents.

The Tribunal orders accordingly.

DATED: 4 November 2020

Keyran Pitt QC, President

RIGHT TO APPEAL DECISIONS OF THE TRIBUNAL

TAKE NOTICE that a person subject to the decision of this Tribunal may appeal under the *Magistrates Court (Administrative Appeals Division) Act* 2001 against this decision of the Tribunal; and

An appeal is to be made within 28 days after notice of the Tribunal's decision is given to the Agent or the Board, or within such further period as a magistrate considers is appropriate in the interests of justice.

Also take notice that an appeal to the Magistrates Court (Administrative Appeals Division) **DOES NOT**

(a) affect the operation of the Tribunal's decision; or
(b) prevent the taking of action to implement the decision

An order of the Magistrates Court would be necessary to stay an order of the Tribunal.