

# Millens

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28 June 2013

Millens Pty Ltd  
ACN 127 401 593  
[www.millens.com.au](http://www.millens.com.au)

100 Whiteman Road  
Dandenong VIC 3170  
Phone 9817 6530

**Attention: Glenn Thexton**  
Thexton Lawyers  
Level 2  
451 Little Bourke Street  
MELBOURNE VIC 3000

By facsimile: 9670 7340

No. of pages 12

Date & Time of Transmission: 28 June 2013 at 2.13pm

This transmission is by way of service under Rule 6.07(1)(e) of the Supreme Court (General Civil Procedure) Rules 2005.

Please contact Stephanie Warburton on 9817 6530 in the event of any problem in transmission.

Dear Sirs,

**MMP Greater Geelong Pty Ltd v. Hayeswinckle Holding Pty Ltd and Team 3216 Pty Ltd**  
**County Court Proceeding No. CI-13-00593**

We enclose by way of service, Defence and Counterclaim filed today.

Yours sincerely,

Ross Millen  
Director

**MILLENS**

Mobile 0419 341 278  
Email [rmillen@millens.com.au](mailto:rmillen@millens.com.au)

Encl.

IN THE COUNTY COURT OF VICTORIA  
 AT MELBOURNE  
 COMMERCIAL LIST  
 GENERAL DIVISION

No. CI 13-00593

BETWEEN:

MMP GREATER GEELONG PTY LTD (ACN 159 938 806) Plaintiff /Defendant by Counterclaim

and

HAYESWINCKLE HOLDING PTY LTD (ACN 160 671 483) First Defendant/First Plaintiff by Counterclaim

and

TEAM 3216 PTY LTD (ACN 134 067 655) Second Defendant/Second Plaintiff by Counterclaim

## DEFENCE AND COUNTERCLAIM

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Date of document:	28 June 2013
Filed on behalf of:	The Defendants/Plaintiffs by Counterclaim
Prepared by:	Telephone: (03) 9817 6530
Millens Solicitors	Faxsimile: (03) 9817 5365
62 Whitehorse Rd	Ref: Ross Millen
DEEPPDENE VIC 3103	Email: <a href="mailto:rmillen@millens.com.au">rmillen@millens.com.au</a>

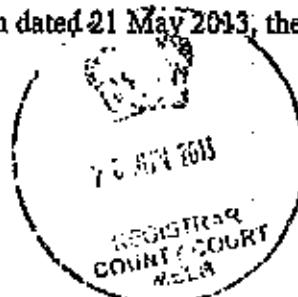
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Note that capitalised terms appearing below have the same meaning as in the Plaintiff's Further Amended Statement of Claim dated 21 May 2013 unless stated otherwise.

## DEFENCE

To the Plaintiff's Further Amended Statement of Claim dated 21 May 2013, the Defendants say as follows:

1. They admit paragraph 1
2. They admit paragraph 2.
3. They admit paragraph 3.



4. They admit paragraph 4.
5. They admit paragraph 5.
6. They admit paragraph 6.
7. They admit paragraph 7, and say that there was a further term of the Shareholders' Agreement that the Shareholders' Agreement contains the entire agreement of the parties with respect to its subject matter, and sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter (clause 18.3).
8. They admit paragraph 8.
9. Save to say that by causing its nominee Team 3216 to enter into the Advertising Agreement with MMP, Hayeswinckle Holding fully performed its obligations under clause 2.1 of the Subscription Agreement and clause 3.3 of the Shareholder Agreement, they admit paragraph 9.
10. They admit paragraph 10.
11. They deny each and every allegation in paragraph 11.
12. They deny each and every allegation in paragraph 12.
13. They deny each and every allegation in paragraph 13.
14. They deny each and every allegation in paragraph 14.
15. In relation to paragraph 15, they:
  - (a) deny that Hayeswinckle Holding has repudiated either the Subscription Agreement or the Shareholder Agreement;
  - (b) deny that Team 3216 has repudiated the Advertising Agreement; and
  - (c) deny that MMP was entitled to or has accepted any repudiation of the Subscription Agreement, the Shareholder Agreement, or the Advertising Agreement.
16. They deny each and every allegation in paragraph 16.

17. In relation to paragraph 17, they:

- (a) deny making the MMP Commitment Representations and Warranties;
- (b) rely on clause 18.3 of the Shareholders' Agreement;
- (c) say further that in the course of discussions between Hallo for MMP and Hayes for Hayeswinckle Holding and Team 3216 in or about October 2012:
  - (i) Hallo stated that MMP wanted Team 3216 to agree to a minimum of seven pages of advertising in the weekly MMP Publication at an agreed page rate of \$1,400 (MMP Advertising Spend Request);
  - (ii) Hayes rejected the MMP Advertising Spend Request and stated that he thought 4 pages of advertising was more realistic;
  - (iii) Hallo responded, stating words to the effect that MMP would never have made Team 3216 stick to 7 pages of advertising in any event; and
  - (iv) no agreement was reached between the parties on the minimum number of pages of advertising to be placed in the MMP Publication by Team 3216 each week; and

#### PARTICULARS

The discussion took place at the office of Daniel Hayes in Geelong during October 2012 to the effect alleged.

- (d) MMP and Team 3216 each signed the Advertising Agreement without inserting any sum in Particulars C relating to the "Agreed Advertising Spend".

18. In relation to paragraph 18, they:

- (a) say that paragraph 18 is embarrassing and irrelevant to any cause of action pleaded by MMP and it should be struck out;
- (b) under cover of that objection, deny each and every allegation therein and refer to and repeat paragraph 17.

19. They deny each and every allegation in paragraph 19 and refer to and repeat paragraph 17.

20. They deny each and every allegation in paragraph 20 and refer to and repeat paragraph 17.
21. In relation to paragraph 21, they:
  - (a) say that the paragraph is embarrassing and should be struck out; and
  - (b) under cover of that objection, deny each and every allegation therein.
22. They deny each and every allegation in paragraph 22 and refer to and repeat paragraph 17.
23. In relation to paragraph 23, they:
  - (a) deny making the MMP Commitment Representations and Warranties and refer to and repeat paragraph 17;
  - (b) deny that they continued to make the MMP Commitment Representations and Warranties as alleged in paragraph 23(a);
  - (c) admit that:
    - (i) Hayeswinckle Holding executed the Subscription Agreement and the Shareholders' Agreement; and
    - (ii) Team 3216 executed the Advertising Agreement;
  - (d) say that paragraphs 23(i) to (iii) are embarrassing, not material to any cause of action relied upon by MMP and should be struck out; and
  - (e) under cover of the objection in paragraph (d):
    - (i) admit that on about 28 November 2012, Team 3216 entered into an agreement with The Geelong Advertiser Pty Ltd (Sponsorship Agreement) and say that they will rely at trial on the full terms and effect of the Sponsorship Agreement;
    - (ii) admit that from 1 January 2013 to the date of this defence, Team 3216 has not placed any print media advertisements with MMP and has placed print media advertisements with the Geelong Advertiser; and

(iii) otherwise deny each and every allegation therein.

24. In relation to paragraph 24, they:

- (a) say that the paragraph is embarrassing and should be struck out;
- (b) under cover of that objection, deny each and every allegation in paragraph 24 and refer to and repeat paragraph 17.

25. In relation to paragraph 25, they:

- (a) say that the paragraph is embarrassing and should be struck out;
- (b) under cover of that objection, deny each and every allegation therein.

26. They deny each and every allegation in paragraph 26 and refer to and repeat paragraph 17.

27. They deny each and every allegation in paragraph 27 and refer to and repeat paragraph 17.

28. They deny each and every allegation in paragraph 28 and refer to and repeat paragraph 17.

29. They deny each and every allegation in paragraph 29.

30. They deny each and every allegation in paragraph 30.

31. Further or in the alternative, if (which is denied) the Defendants are liable to MMP as alleged or at all, they will seek to set off so much of their counterclaim herein as will be sufficient to satisfy MMP's claim.

#### COUNTERCLAIM

1. The First Plaintiff by Counterclaim (Hayeswinckle Holding) is and was at all material times:

- (a) a company conducting a real estate business in the Geelong area under and by reference to the name Hayeswinckle;

- (b) a company duly incorporated at law and capable of suing; and  
(c) a corporation within the meaning of section 4 of the *Competition and Consumer Act 2010* (Cth) (CCA).
2. The Second Plaintiff by Counterclaim (Team 3216) is and was at all material times:
  - (a) a company duly incorporated at law and capable of suing; and  
(b) a corporation within the meaning of the CCA.
3. The Defendant by Counterclaim (MMP) is and was at all material times:
  - (a) a company duly incorporated at law and capable of being sued;
  - (b) a corporation within the meaning of the CCA; and  
(c) the owner and publisher of the real estate publication titled *The Weekly Review Greater Geelong*.

**Misleading or deceptive conduct**

4. In or about September and October 2012, Daniel Hayes (Hayes), for and on behalf of Hayeswinckle Holding and Team 3216, entered into discussions (Discussions) with Mark Hallo (Hallo) for and on behalf of MMP, relating to the proposed establishment by MMP of a real estate publication and advertising business (New Business).

**PARTICULARS**

Hallo approached Hayes in approximately September 2012 saying MMP was setting up a magazine to compete with the *Geelong Advertiser*. Hallo stated that the New Business would be very profitable as he had contacts with all the Geelong real estate agents having previously worked for the *Geelong Advertiser*. Hallo gave Hayes an example of the profit made from the *Leader*. Hallo also told Hayes that he needed Hayes on board to get the other real estate agents in Geelong on board.

5. In the course of the Discussions, Hallo, on behalf of MMP, told Hayes that MMP was proposing to establish a weekly real estate publication to be called the *Weekly Review Greater Geelong* (MMP Publication) in, and about, the City of Geelong, Western Victoria, the Surf Coast and the Bellarine Peninsula, in competition with the

*Geelong Advertiser.*

6. In the course of the Discussions, Hallo on behalf of MMP, represented to Hayes on behalf of Hayeswinckle Holding and Team 3216 that a significant and immediate advantage of the New Business compared to its competitor, the *Geelong Advertiser*, was that the MMP Publication would be distributed each week on a Thursday and Friday to every household in Geelong (Representation).

**PARTICULARS**

Hallo told Hayes that MMP would own a share in the company that would distribute the MMP publication and would ensure distribution succeeded even if MMP had to have its employees deliver the MMP publication to every household in Geelong themselves.

7. The Representation was a representation with respect to a future matter.
8. MMP made the Representation in trade or commerce.
9. In reliance on and induced by the Representation, on or about 26 October 2012:
  - (a) Hayes, for and on behalf of Hayeswinckle Holding, executed the Subscription Agreement between MMP and Hayeswinckle Holding;
  - (b) Hayes, for and on behalf of Hayeswinckle Holding, executed the Shareholders' Agreement between MMP and Hayeswinckle Holding; and
  - (c) Hayes, for and on behalf of Team 3216, executed the Advertising Agreement between MMP and Team 3216.
10. The first issue of the MMP Publication was published by MMP on or about 15 November 2012.
11. In further reliance on and induced by the Representation, on and after 26 October 2012, Team 3216:
  - (a) placed and paid for real estate advertisements on behalf of its vendor clients in the MMP Publication; and

#### PARTICULARS

Between 26 October 2012 and 31 December 2012, Team 3216 placed 24  $\frac{1}{2}$  pages of real estate advertisements for its clients in the MMP Publication at a cost of \$37,703.

(b) Introduced, marketed and promoted the MMP Publication to clients.

#### PARTICULARS

- (i) On and from 26 October 2012 until 31 December 2012, Team 3216 actively encouraged vendors and potential clients to place all of their real estate advertising in the MMP Publication.
- (ii) On and from 1 January 2013, Team 3216 has offered clients the choice of advertising their property in the MMP Publication and/or the *Geelong Advertiser*.
- (iii) Team 3216 Print Advertising Campaign forms list both the MMP Publication and the Geelong Advertiser. Clients are offered a choice of which publication to advertise in. A copy of the form is available for inspection at the office of the solicitors for Hayeswinckle Holding and Team 3216.
- (iv) Current copies of the MMP Publication have been at all times and remain on display at meeting rooms at Team 3216's premises in Geelong.
- (v) At weekly sales meetings, Team 3216 sales consultants are regularly directed by Daniel Hayes and Michelle Winckle to offer vendors and potential vendors the choice of advertising in the MMP Publication and/or the *Geelong Advertiser*.

12. The Representation was false, misleading or deceptive, and Hayeswinckle Holding and Team 3216:

- (a) rely on section 4 of Schedule 2 (the *Australian Consumer Law*) of the CCA (ACL); and
- (b) say further or alternatively that the first and subsequent issues of the MMP Publication were not delivered to every household in Geelong.

#### PARTICULARS

- (i) Hayeswinckle Holding and Team 3216 rely on admissions made by MMP in an email from Hallo to Michelle Cortorillo of

Hayeswinckle Holding and Team 3216 sent on 19 November 2012 at about 10.06am that the MMP Publication was not delivered to households in, at least:

Rivergum Drive, Highton  
Leigh Rd, Highton  
Kyeema, Highton  
Lippazana, Highton  
Hilcrest, Highton  
Lansbury Crescent Highton  
Church St, Hamlyn Heights  
Belfast, Newtown  
Noble St, Newtown  
Areas of Whittington, East Geelong.

A copy of that email may be inspected by appointment at the offices of the solicitors for Hayeswinckle Holding and Team 3216.

(ii) The issue of the MMP Publication dated 10 December 2012 was not delivered to households in, at least, the following streets:

Noble  
Peary  
Lansbury  
Clydesdale  
Noble  
Wallaroo  
Pitman  
South Valley Road  
Percy  
Culzean  
Buangor.

(iii) The issue of the MMP Publication dated 17 December 2012 was not delivered to households in, at least, the following streets:

Percy Street  
Buangor  
Manor Crescent  
Lansbury Crescent  
Noble  
Sangolan Terrace  
Viognier Place.

(iv) Further particulars may be provided after discovery.

13. By reason of the matters in paragraphs 6 to 8 and 12 above, MMP contravened section 18 of the ACL.

14. By reason of the said contravention, Hayeswinckle Holding and Team 3216 have suffered loss and damage.

#### PARTICULARS

- (i) Hayeswinckle Holding and Team 3216 received a number of complaints from client vendors who had paid for advertising in the MMP Publication, complaining about the poor circulation of the MMP Publication and about Hayeswinckle Holding and Team 3216 having encouraged them to advertise in the MMP Publication, damaging Hayeswinckle and Team 3216's trading and business reputation.
- (ii) Hayeswinckle Holding and Team 3216 lost vendor clients and potential clients.
- (iii) Further particulars of loss and damage will be provided before trial.

#### Breach of the Shareholders' Agreement

15. Hayeswinckle Holding and Team 3216 refer to and repeat paragraph 7 of the further amended statement of claim and paragraph 7 of the defence.

16. By reason of the conduct referred to in paragraph 12(b), MMP has breached clause 3.4.1 of the Shareholders' Agreement by failing to co-operate with Hayeswinckle Holding in order to further the objectives of MMP.

17. By reason of MMP's breach of the Shareholders' Agreement, Hayeswinckle Holding has suffered loss and damage.

#### PARTICULARS

- (i) Diminution in the value of the shares issued by MMP to Hayeswinckle Holding under the Subscription Agreement.
- (ii) Hayeswinckle Holding refers to and repeats the particulars to paragraph 14.
- (iii) Further particulars of loss and damage will be provided before trial.

#### AND THE PLAINTIFFS BY COUNTERCLAIM CLAIM:

A. An order pursuant to section 243 of the *Competition and Consumer Act 2010*:

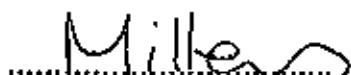
- (i) varying clause 2.1 of the Subscription Agreement between MMP and Hayeswinckle Holding by deleting the words 'and commit to an Agreed Advertising Spend in the amount specified in Item 3 of the Schedule with the Company', and deleting Item 3 in the Schedule; and
- (ii) varying the Advertising Agreement between MMP and Team 2316 by deleting clause 4 thereof.

- B. Damages pursuant to section 236 of the Australian Consumer Law.
- C. Damages at common law for breach of contract.
- D. Interest pursuant to Statute.
- E. Costs.
- F. Such further or other orders as this Honourable Court deems fit.

Dated: 28 June 2013

M J COLLINS

M MARCUS

  
MILLENS  
Solicitors for the Defendants/  
Plaintiffs by Counterclaim

# Millens

Millens  
100-102 Little Bourke Street  
Melbourne VIC 3000

28 June 2013

Millens Pty Ltd  
ACN 127 421 563  
[www.millens.com.au](http://www.millens.com.au)

100-102 Little Bourke Street  
Melbourne VIC 3000  
Phone 03 8617 6630

**Attention: Glenn Thexton**  
Thexton Lawyers  
Level 2  
451 Little Bourke Street  
MELBOURNE VIC 3000

By facsimile: 9670 7940

No. of pages 12

Date & Time of Transmission: 28 June 2013 at 2.15pm

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Dear Sirs,

**MMP Greater Geelong Pty Ltd v. HayesWinckie Holding Pty Ltd and Team 3216 Pty Ltd**  
**County Court Proceeding No. CI-13-00593**

We enclose by way of service, Defence and Counterclaim filed today.

Yours sincerely,

Ross Millen  
Director

**MILLENS**

Mobile 0419 341 278  
Email [rmullen@millens.com.au](mailto:rmullen@millens.com.au)

Encl.

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL LIST  
GENERAL DIVISION

No. CI 13-00593

## BETWEEN:

MMP GREATER GEELONG PTY LTD (ACN 159 938 806) Plaintiff/Defendant by Counterclaim

and

HAYBESWINCKLE HOLDING PTY LTD (ACN 160 671 483) First Defendant/First Plaintiff by Counterclaim

and

TEAM 3216 PTY LTD (ACN 134 067 655) Second Defendant/Second Plaintiff by Counterclaim

## DEFENCE AND COUNTERCLAIM

---

Date of document: 28 June 2013  
Filed on behalf of: The Defendants/Plaintiffs by Counterclaim  
Prepared by: Telephone: (03) 9817 6530  
Millens Solicitors Facsimile: (03) 9817 5365  
62 Whitehorse Rd Ref: Ross Millen  
DEEPPDENE VIC 3103 Email: rmillen@millens.com.au

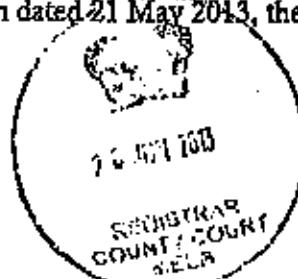
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Note that capitalised terms appearing below have the same meaning as in the Plaintiff's Further Amended Statement of Claim dated 21 May 2013 unless stated otherwise.

## DEFENCE

To the Plaintiff's Further Amended Statement of Claim dated 21 May 2013, the Defendants say as follows:

1. They admit paragraph 1
2. They admit paragraph 2.
3. They admit paragraph 3.



4. They admit paragraph 4.
5. They admit paragraph 5.
6. They admit paragraph 6.
7. They admit paragraph 7, and say that there was a further term of the Shareholders' Agreement that the Shareholders' Agreement contains the entire agreement of the parties with respect to its subject matter, and sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter (clause 18.3).
8. They admit paragraph 8.
9. Save to say that by causing its nominee Team 3216 to enter into the Advertising Agreement with MMP, Hayeswinckle Holding fully performed its obligations under clause 2.1 of the Subscription Agreement and clause 3.3 of the Shareholder Agreement, they admit paragraph 9.
10. They admit paragraph 10.
11. They deny each and every allegation in paragraph 11.
12. They deny each and every allegation in paragraph 12.
13. They deny each and every allegation in paragraph 13.
14. They deny each and every allegation in paragraph 14.
15. In relation to paragraph 15, they:
  - (a) deny that Hayeswinckle Holding has repudiated either the Subscription Agreement or the Shareholder Agreement;
  - (b) deny that Team 3216 has repudiated the Advertising Agreement; and
  - (c) deny that MMP was entitled to or has accepted any repudiation of the Subscription Agreement, the Shareholder Agreement, or the Advertising Agreement.
16. They deny each and every allegation in paragraph 16.

17. In relation to paragraph 17, they:

- (a) deny making the MMP Commitment Representations and Warranties;
- (b) rely on clause 18.3 of the Shareholders' Agreement;
- (c) say further that in the course of discussions between Hallo for MMP and Hayes for Hayeswinckle Holding and Team 3216 in or about October 2012:
  - (i) Hallo stated that MMP wanted Team 3216 to agree to a minimum of seven pages of advertising in the weekly MMP Publication at an agreed page rate of \$1,400 (MMP Advertising Spend Request);
  - (ii) Hayes rejected the MMP Advertising Spend Request and stated that he thought 4 pages of advertising was more realistic;
  - (iii) Hallo responded, stating words to the effect that MMP would never have made Team 3216 stick to 7 pages of advertising in any event; and
  - (iv) no agreement was reached between the parties on the minimum number of pages of advertising to be placed in the MMP Publication by Team 3216 each week; and

#### PARTICULARS

The discussion took place at the office of Daniel Hayes in Geelong during October 2012 to the effect alleged.

- (d) MMP and Team 3216 each signed the Advertising Agreement without inserting any sum in Particulars C relating to the "Agreed Advertising Spend".

18. In relation to paragraph 18, they:

- (a) say that paragraph 18 is embarrassing and irrelevant to any cause of action pleaded by MMP and it should be struck out;
- (b) under cover of that objection, deny each and every allegation therein and refer to and repeat paragraph 17.

19. They deny each and every allegation in paragraph 19 and refer to and repeat paragraph 17.

20. They deny each and every allegation in paragraph 20 and refer to and repeat paragraph 17.
21. In relation to paragraph 21, they:
  - (a) say that the paragraph is embarrassing and should be struck out; and
  - (b) under cover of that objection, deny each and every allegation therein.
22. They deny each and every allegation in paragraph 22 and refer to and repeat paragraph 17.
23. In relation to paragraph 23, they:
  - (a) deny making the MMP Commitment Representations and Warranties and refer to and repeat paragraph 17;
  - (b) deny that they continued to make the MMP Commitment Representations and Warranties as alleged in paragraph 23(a);
  - (c) admit that:
    - (i) Hayeswinckle Holding executed the Subscription Agreement and the Shareholders' Agreement; and
    - (ii) Team 3216 executed the Advertising Agreement;
  - (d) say that paragraphs 23(i) to (iii) are embarrassing, not material to any cause of action relied upon by MMP and should be struck out; and
  - (e) under cover of the objection in paragraph (d):
    - (i) admit that on about 28 November 2012, Team 3216 entered into an agreement with The Geelong Advertiser Pty Ltd (Sponsorship Agreement) and say that they will rely at trial on the full terms and effect of the Sponsorship Agreement;
    - (ii) admit that from 1 January 2013 to the date of this defence, Team 3216 has not placed any print media advertisements with MMP and has placed print media advertisements with the Geelong Advertiser; and

(iii) otherwise deny each and every allegation therein.

24. In relation to paragraph 24, they:

- say that the paragraph is embarrassing and should be struck out;
- under cover of that objection, deny each and every allegation in paragraph 24 and refer to and repeat paragraph 17.

25. In relation to paragraph 25, they:

- say that the paragraph is embarrassing and should be struck out;
- under cover of that objection, deny each and every allegation therein.

26. They deny each and every allegation in paragraph 26 and refer to and repeat paragraph 17.

27. They deny each and every allegation in paragraph 27 and refer to and repeat paragraph 17.

28. They deny each and every allegation in paragraph 28 and refer to and repeat paragraph 17.

29. They deny each and every allegation in paragraph 29.

30. They deny each and every allegation in paragraph 30.

31. Further or in the alternative, if (which is denied) the Defendants are liable to MMP as alleged or at all, they will seek to set off so much of their counterclaim herein as will be sufficient to satisfy MMP's claim.

#### COUNTERCLAIM

- The First Plaintiff by Counterclaim (Hayeswinckle Holding) is and was at all material times:
  - a company conducting a real estate business in the Geelong area under and by reference to the name Hayeswinckle;

- (b) a company duly incorporated at law and capable of suing; and
- (c) a corporation within the meaning of section 4 of the *Competition and Consumer Act 2010* (Cth) (CCA).

2. The Second Plaintiff by Counterclaim (Team 3216) is and was at all material times:

- (a) a company duly incorporated at law and capable of suing; and
- (b) a corporation within the meaning of the CCA.

3. The Defendant by Counterclaim (MMP) is and was at all material times:

- (a) a company duly incorporated at law and capable of being sued;
- (b) a corporation within the meaning of the CCA; and
- (c) the owner and publisher of the real estate publication titled *The Weekly Review Greater Geelong*.

**Misleading or deceptive conduct**

4. In or about September and October 2012, Daniel Hayes (Hayes), for and on behalf of Hayeswinckle Holding and Team 3216, entered into discussions (Discussions) with Mark Hallo (Hallo) for and on behalf of MMP, relating to the proposed establishment by MMP of a real estate publication and advertising business (New Business).

**PARTICULARS**

Hallo approached Hayes in approximately September 2012 saying MMP was setting up a magazine to compete with the *Geelong Advertiser*. Hallo stated that the New Business would be very profitable as he had contacts with all the Geelong real estate agents having previously worked for the *Geelong Advertiser*. Hallo gave Hayes an example of the profit made from the *Leader*. Hallo also told Hayes that he needed Hayes on board to get the other real estate agents in Geelong on board.

5. In the course of the Discussions, Hallo, on behalf of MMP, told Hayes that MMP was proposing to establish a weekly real estate publication to be called the *Weekly Review Greater Geelong* (MMP Publication) in, and about, the City of Geelong, Western Victoria, the Surf Coast and the Bellarine Peninsula, in competition with the

*Geelong Advertiser.*

6. In the course of the Discussions, Hallo on behalf of MMP, represented to Hayes on behalf of Hayeswinckle Holding and Team 3216 that a significant and immediate advantage of the New Business compared to its competitor, the *Geelong Advertiser*, was that the MMP Publication would be distributed each week on a Thursday and Friday to every household in Geelong (Representation).

**PARTICULARS**

Hallo told Hayes that MMP would own a share in the company that would distribute the MMP publication and would ensure distribution succeeded even if MMP had to have its employees deliver the MMP publication to every household in Geelong themselves.

7. The Representation was a representation with respect to a future matter.
8. MMP made the Representation in trade or commerce.
9. In reliance on and induced by the Representation, on or about 26 October 2012:
  - (a) Hayes, for and on behalf of Hayeswinckle Holding, executed the Subscription Agreement between MMP and Hayeswinckle Holding;
  - (b) Hayes, for and on behalf of Hayeswinckle Holding, executed the Shareholders' Agreement between MMP and Hayeswinckle Holding; and
  - (c) Hayes, for and on behalf of Team 3216, executed the Advertising Agreement between MMP and Team 3216.
10. The first issue of the MMP Publication was published by MMP on or about 15 November 2012.
11. In further reliance on and induced by the Representation, on and after 26 October 2012, Team 3216:
  - (a) placed and paid for real estate advertisements on behalf of its vendor clients in the MMP Publication; and

### PARTICULARS

Between 26 October 2012 and 31 December 2012, Team 3216 placed 24  $\frac{1}{2}$  pages of real estate advertisements for its clients in the MMP Publication at a cost of \$37,703.

(b) introduced, marketed and promoted the MMP Publication to clients.

### PARTICULARS

- (i) On and from 26 October 2012 until 31 December 2012, Team 3216 actively encouraged vendors and potential clients to place all of their real estate advertising in the MMP Publication.
- (ii) On and from 1 January 2013, Team 3216 has offered clients the choice of advertising their property in the MMP Publication and/or the *Geelong Advertiser*.
- (iii) Team 3216 Print Advertising Campaign forms list both the MMP Publication and the Geelong Advertiser. Clients are offered a choice of which publication to advertise in. A copy of the form is available for inspection at the office of the solicitors for Hayeswinckle Holding and Team 3216.
- (iv) Current copies of the MMP Publication have been at all times and remain on display at meeting rooms at Team 3216's premises in Geelong.
- (v) At weekly sales meetings, Team 3216 sales consultants are regularly directed by Daniel Hayes and Michelle Winckie to offer vendors and potential vendors the choice of advertising in the MMP Publication and/or the *Geelong Advertiser*.

12. The Representation was false, misleading or deceptive, and Hayeswinckle Holding and Team 3216:

- (a) rely on section 4 of Schedule 2 (the *Australian Consumer Law*) of the CCA (ACL); and
- (b) say further or alternatively that the first and subsequent issues of the MMP Publication were not delivered to every household in Geelong.

### PARTICULARS

- (i) Hayeswinckle Holding and Team 3216 rely on admissions made by MMP in an email from Hallie to Michelle Coxorillo of

Hayeswinckle Holding and Team 3216 sent on 19 November 2012 at about 10.06am that the MMP Publication was not delivered to households in, at least:

Rivergum Drive, Highton  
Leigh Rd, Highton  
Kyeema, Highton  
Lippazana, Highton  
Hilcrest, Highton  
Lansbury Crescent Highton  
Church St, Hamlyn Heights  
Belfast, Newtown  
Noble St, Newtown  
Areas of Whittington, East Geelong.

A copy of that email may be inspected by appointment at the offices of the solicitors for Hayeswinckle Holding and Team 3216.

- (ii) The issue of the MMP Publication dated 10 December 2012 was not delivered to households in, at least, the following streets:
  - Noble
  - Peary
  - Lansbury
  - Clydesdale
  - Noble
  - Wallaroo
  - Pitman
  - South Valley Road
  - Percy
  - Culzean
  - Buangor.
- (iii) The issue of the MMP Publication dated 17 December 2012 was not delivered to households in, at least, the following streets:
  - Percy Street
  - Buangor
  - Manor Crescent
  - Lansbury Crescent
  - Noble
  - Sangolan Terrace
  - Viognier Place.
- (iv) Further particulars may be provided after discovery.

13. By reason of the matters in paragraphs 6 to 8 and 12 above, MMP contravened section 18 of the ACL.

14. By reason of the said contravention, Hayeswinckle Holding and Team 3216 have suffered loss and damage.

#### PARTICULARS

- (i) Hayeswinckle Holding and Team 3216 received a number of complaints from client vendors who had paid for advertising in the MMP Publication, complaining about the poor circulation of the MMP Publication and about Hayeswinckle Holding and Team 3216 having encouraged them to advertise in the MMP Publication, damaging Hayeswinckle and Team 3216's trading and business reputation.
- (ii) Hayeswinckle Holding and Team 3216 lost vendor clients and potential clients.
- (iii) Further particulars of loss and damage will be provided before trial.

#### Breach of the Shareholders' Agreement

15. Hayeswinckle Holding and Team 3216 refer to and repeat paragraph 7 of the further amended statement of claim and paragraph 7 of the defence.

16. By reason of the conduct referred to in paragraph 12(b), MMP has breached clause 3.4.1 of the Shareholders' Agreement by failing to co-operate with Hayeswinckle Holding in order to further the objectives of MMP.

17. By reason of MMP's breach of the Shareholders' Agreement, Hayeswinckle Holding has suffered loss and damage.

#### PARTICULARS

- (i) Diminution in the value of the shares issued by MMP to Hayeswinckle Holding under the Subscription Agreement.
- (ii) Hayeswinckle Holding refers to and repeats the particulars to paragraph 14.
- (iii) Further particulars of loss and damage will be provided before trial.

#### AND THE PLAINTIFFS BY COUNTERCLAIM CLAIM:

A. An order pursuant to section 243 of the *Competition and Consumer Act 2010*:

- (i) varying clause 2.1 of the Subscription Agreement between MMP and Hayeswinckle Holding by deleting the words 'and commit to an Agreed Advertising Spend in the amount specified in Item 3 of the Schedule with the Company', and deleting Item 3 in the Schedule; and
- (ii) varying the Advertising Agreement between MMP and Team 2316 by deleting clause 4 thereof.

- B. Damages pursuant to section 236 of the Australian Consumer Law.
- C. Damages at common law for breach of contract.
- D. Interest pursuant to Statute.
- E. Costs.
- F. Such further or other orders as this Honourable Court deems fit.

Dated: 28 June 2013

M J COLLINS

M MARCUS

  
MILLENS  
Solicitors for the Defendants/  
Plaintiffs by Counterclaim