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Commercial Law Update

The ACCC enforces provisions against unconscionable conduct

Although *ACCC v Allphones Retail Pty Limited* [2011] FCA 538 was a case to which the now repealed *Trade Practices Act 1974* (Cth) (TPA) applied, the same provisions which were relied in this case under the TPA have been re-enacted and expanded by the *Competition and Consumer Act 2010* (Cth) (CCA) in the Australian Consumer Law (ACL).

In this case Allphones was alleged to have engaged in unconscionable conduct against franchisees which included the following:

- » unilaterally imposing fees, fines and charges including charges for a complete refurbishment of franchisee stores;
- » issuing breach notices to franchisees for failing to follow Allphones' directions;
- » setting key performance indicators (KPIs) which were not disclosed to franchisees and then penalising franchisees who failed to meet the KPIs without due consideration to individual circumstances;
- » imposing a hold on stocks (stock hold) and commissions (commission hold) often at the same time so that franchisees were effectively prevented from meeting KPIs;
- » implementing a "no dickheads policy" pursuant to which the lower 10% of performing franchisees were issued with breach notices;
- » threatening, fining and placing franchisees on stock hold and commission hold;
- » preventing franchisees from associating with each other; and
- » requiring a complete refurbishment of franchisee stores, regardless of the individual store's need for a complete fitout and individual circumstances of the franchisee.

Under the TPA there was no clear definition of what constitutes unconscionable conduct. The proceedings themselves and the allegations by the ACCC against Allphones is therefore a good indication of what the ACCC considers to be the type of conduct falling under the heading of unconscionable conduct.

The ACCC's case was not limited to individual instances of unconscionable conduct but it was framed so as to allege that the system of conduct by the franchisor in these circumstances as a whole was unconscionable.

The new *Competition and Consumer Legislation Amendment Bill 2011* (Cth) (2011 Bill) was introduced, inter alia, to insert a statement of interpretive principles into the unconscionable conduct provision of the ACL. These principles were basically illustrated by the ACCC's case against Allphones.

It is important to note that under the ACL unconscionable conduct can be found to have occurred not only prior to



contracts being entered into but during the term of those contracts and in the way they may be renewed, renegotiated or terminated.

It is now also quite clear that unconscionable conduct provisions apply not only to business to consumer arrangements but also in business to business arrangements.

The *Allphones* case was settled with the Federal Court making a number of declarations and issuing injunctions against Allphones its CEO and COO, who were declared to have been knowingly concerned in some of Allphones' contraventions and unconscionable conduct as well as contraventions of the franchising code.

The Court made declarations that Allphones had engaged in misleading and deceptive conduct and false or misleading conduct in contravention of the TPA against potential franchisees by:

- » not paying a specified percentage of its gross profit to franchisees;
- » negotiating bonuses and rebates for its own benefit and not shared with franchisees (such benefits being derived both from company-owned stores and franchisee stores);
- » not always providing franchisees with continuous cashflow by paying them their commissions 3 times every month; and
- » by altering original carrier payment summaries so as not to show the true amounts being paid by the carriers to Allphones (given these amounts were not being shared appropriately with the franchisees).

The Court made orders requiring Allphones, the CEO and COO to jointly pay \$3 million in compensation to a class of franchisees which were being represented by the ACCC in the proceedings. This was an agreed amount by the ACCC given the difficulties of establishing the actual losses incurred by franchisees of the whole class over the period of time during which the conduct was complained of. In addition, orders were made for the ACCC's costs to be paid.

The ACCC has the same ability to bring representative actions under the ACL seeking compensation on behalf of persons that have suffered a loss by virtue of the contravention of a relevant term of the ACL.

This case highlights to the franchising industry the ACCC's position on enforcing these types of contraventions. In particular franchisor's should take note that their conduct and systems as a whole will be taken into account as well as individual acts or omissions resulting in unconscionable conduct towards franchisees.