

1 June 2009

Commercial Law Ealert

Was/Now Pricing – When is it misleading?

Often retailers will advertise products for sale by showing a “was” price and comparing that price to the “now” price or “reduced price” in order to demonstrate how much a consumer will save by purchasing the product during the sale period.

Depending on the facts, was/now pricing may constitute an offence under section 75AZC(1)(g) of the *Trade Practices Act 1974* (“TPA”) which provides that it is an offence for a corporation, in trade or commerce, in connection with the supply of goods or the promotion of the supply of goods, to make a false or misleading representation about the price of goods.

Previous position

It has previously been thought that the Full Court of the Federal Court of Australia’s (“Full Court”) position on was/now pricing was that a “was” price was likely to be understood by consumers as a representation as to the price that the product was originally “offered” for sale, rather than the price at which the product had actually been sold (*ACCC –v– Prouds Jewellers Pty Ltd [2008] FCAFC 199* (“Prouds”)). Therefore, provided the product was offered at the “was” price, it did not matter whether that product was actually sold at the “was” price.

Ascot Four Pty Ltd –v– ACCC

The Full Court in *Ascot Four Pty Ltd –v– ACCC [2009] FCAFC 61* (“Ascot”) (a decision handed down on 26 May 2009) has recently reviewed the decision in *Prouds* and provided guidance as to what was/now pricing is representing to consumers and in what circumstances that representation will be misleading.

Both *Prouds* and *Ascot* concerned the advertisement of jewellery. Relevantly, the facts in *Ascot* were that *Ascot Four Pty Ltd* (“Ascot Four”), through its stores *Zamel’s*, had advertised 11 items in a Christmas sale catalogue by a sale price in large print coloured red and a strike through price in smaller print coloured black. The strike through price was always higher than the sale price.

The Australian Competition and Consumer Commission (“ACCC”) alleged that *Ascot Four’s* publication of the Christmas sale catalogue represented either that (a) it had sold each of the 11 items at the strike through price within a reasonable time before the sale period, or (b) the purchase price of each item during the sale period would result in a saving of the difference between the sale price and the strike through price. The ACCC alleged that this representation was false as none of the 11 items had previously been sold prior to the sale at the strike through price.

The trial judge found that in respect of 10 of the items *Ascot Four* had previously displayed the items with a ticketed price that was equal to the strike out price. However, evidence was given that, despite the previous ticketed prices, *Ascot Four* had not previously sold any of the items at the ticketed (strike through) price. This was reflective of the jewellery industry where the ticketed price is normally a starting negotiation price.

The trial judge found that the was/now pricing in the Christmas catalogue was a representation that, by purchasing the several jewellery items in which there was a catalogue sale price and a strike through price, there would be a saving of the difference between the catalogue sale price and the strike through price. The trial judge found that this representation was misleading as having regard to the previous sales of the jewellery, there was no such saving. Importantly, the trial judge found that some sections of the community would view the strike out price as the price the items were actually sold at, rather than the price at which they were offered for sale.

Ascot Four appealed to the Full Court, in part on reliance of the decision in *Prouds*. On appeal the Full Court upheld the decision of the trial judge. In doing so the Full Court explained the decision in *Prouds* and explained how *Ascot* was different.

The Full Court clarified that, in *Prouds*, the trial judge actually held that some consumers may view the “was price” as the actual price rather than an offer price. However, that representation would not be misleading as a consumer, with that mindset and unaware of the discount culture, would have paid the “was price” had it purchased the goods outside of the sales period. Therefore, the difference between the “was price” and “now price” did represent the saving that consumer would have experienced. Although the “was price” was not a representation as to a “bare” offer price, it was nevertheless held not to be misleading.

The Full Court in *Ascot* agreed with this approach but held that the facts were different from those in *Prouds* as based on the evidence before it, there had been no sales of jewellery at or near the “was price” prior to the Christmas catalogue sale. Therefore, in *Ascot* it was simply implausible that any customer, no matter how ill-informed about bargaining opportunities, would have paid the “was price”.

As a result, the Full Court found that the was/now pricing was a misleading representation as to price.

What does this mean?

Retailers must be very careful in using was/now pricing. The Full Court has held that even in an industry where there is a bargaining culture, a “was price” will be taken as a representation as to the price that would have been paid before the sale and is not merely a representation as to a previous starting offer.

It will not be sufficient for retailers to demonstrate that a product was offered at a “was price” if it was not plausible that any consumer would have purchased the product as the “was price”.

Before using a “was price” in advertising we recommend that retailers ensure that there are previous sales of the relevant good at that price.

If there are no previous sales of a good at a “was” price retailers will be risking breaching the TPA by using that price in was/now pricing. Even using qualifying words such as “valued at” or “originally offered at” may not reduce that risk as the was/now pricing may still constitute a representation as to a saving that may in fact be illusory.

Given the recent component pricing changes (see previous e-alert dated 18 May 2009) and the above mentioned litigation, representations as to price are clearly at the forefront of the ACCC’s activities. Given this environment, we recommend a careful approach to the making of pricing representations and that you seek legal advice if you have any doubts as to your obligations.

The period under review in Ascot was around July 2005 to early 2006. Since that time the business of Zamel’s has been sold to an unrelated entity. The judgment in Ascot does not relate to the current operator of the Zamel’s jewellery stores.

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