

RLR Telecoms:

SMART CALL

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ROTSTEIN LOCKWOOD REDDY
COMMERCIAL LAWYERS



Welcome to RLR Telecoms: Smart Call

It certainly has been an eventful few months in the telco sphere, culminating in the Government's recent demands for the structural separation of Telstra.

In this issue of **RLR Telecoms: Smart Call**, we examine a number of recent issues affecting our clients and consumers at large, including:

- The commencement of a class action against Allphones by the Australian Competition & Consumer Competition, on behalf of Allphones' current and former franchisees, for alleged unconscionable conduct.
- The Australian Communications & Media Authority issuing Telstra with a \$101,200 fine for contravening the *Do Not Call Register Act 2006* (Cth).
- The first 'SMS spam' case, with injunctions granted and declarations made by the Federal Court.

- A huge jump in the frequency of 'bill shock' incidents, with the Telecommunications Industry Ombudsman providing a number of suggestions for consumers, who seek to minimise the chances of receiving an exorbitant smart phone bill, to follow.
- The proposed implementation of a national consumer law regime, which will (amongst other things) address unfair contract terms in standard form consumer contracts.

I trust you will enjoy this issue of **RLR Telecoms: Smart Call** and, most importantly, be the wiser for having read it.

Dean Lockwood
Principal
Rotstein Lockwood Reddy

Allphones: The Latest Installment



Dean Lockwood*

Key takeaways

- In the June 2009 edition of *illuminate*, we provided our readers with an update on the *Hoy Mobile* decision.¹ There has been a number of significant developments since then.
- In August 2009, the Australian Competition and Consumer Commission (“ACCC”) launched a class action against Allphones on behalf of the company’s franchisees, from which Allphones allegedly withheld commissions, rebates for mobile handsets and bonus payments.
- The ACCC also instituted proceedings against Allphones for contempt of court on the basis that Allphones allegedly breached interim undertakings that were given by it to the Federal Court in October 2008.

Background

In the *Hoy Mobile* decision, Justice Rares of the Federal Court held that Allphones had engaged in unconscionable conduct in contravention of the *Trade Practices Act 1974* (Cth) (“TPA”) by withholding around \$75,000 in commission payments from one of its franchisees, *Hoy Mobile Pty Ltd*.

The proceedings concluded with Allphones giving interim undertakings to the Federal Court that:

- (1) Prohibited Allphones from withholding consent to the assignment of an Allphones franchise on the basis that the franchisee would not sign a deed releasing Allphones from liability.

- (2) Required Allphones to give the ACCC seven days written notice of its intention to withhold consent to the assignment of an Allphones franchise on the basis that the incoming franchisee must enter into a new franchise agreement.

The court also ordered injunctions restraining Allphones from engaging in specific conduct in negotiations with its existing franchisees, which conduct the ACCC alleges breached the TPA.

The proceedings against Allphones for contempt of court are on the basis that Allphones allegedly breached the first undertaking (described in point 1 above) on one occasion and the second undertaking (described in point 2 above) on three occasions.

The class action

In August 2009, the ACCC instituted class action proceedings against Allphones on behalf of the company’s 74 then current and former franchisees.

The ACCC claims that Allphones, in breach of its franchise agreements:

- Received commission or bonus payments from telecommunications carriers, which were neither disclosed, nor paid, to its franchisees.
- Received rebates from suppliers of mobile handsets and other products, which Allphones failed to pass on to its franchisees.
- Made unilateral deductions from commission payments owed to its franchisees.

The ACCC is also pursuing Allphones’ CEO Matthew Donnellan, Chief Operating Officer Tony Baker and former national franchising manager Ian Harkin for allegedly being “knowingly concerned in or a party to the contravening conduct.”

The ACCC is seeking damages for losses sustained by the represented franchisees, which the ACCC claims flowed from the alleged unconscionable conduct described above. The ACCC has stated that it will not seek damages for the earlier alleged contraventions (to ensure the “best prospects of an efficient and effective outcome for the franchisees who are a party to the class action”²) but it will, however, still seek declarations, injunctions, compliance programs and costs.

Conclusion

With the Allphones’ story far from over, this certainly has been an interesting chapter. If the class action is successful, Allphones may be liable for substantial damages which, in turn, may have significant repercussions for telecommunications service providers and franchisors alike. We will continue to keep our readers informed of developments in the Allphones proceedings.

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¹ *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* (includes corrigendum dated 18 June 2008) [2008] FCA 810 (30 May 2008).

² ACCC News Release NR 196/09 (18 August 2009).



Allphones may be liable for substantial damages which, in turn, may have significant repercussions for telecommunications service providers and franchisors alike



When Talk Isn't Cheap

Shelley Wheatley*

Key takeaways

- *Approximately one year ago, in response to an influx of complaints by consumers against Telstra's telemarketers, the Australian Communications and Media Authority ("ACMA") commenced an investigation into Telstra's compliance with the Do Not Call Register Act 2006 (Cth) ("Act").*
- *The investigation revealed deficiencies at Telstra in a number of areas, such as systems, procedures and supervision.*
- *In August 2009, Telstra was issued with a fine of \$101,200.00 by ACMA and provided various enforceable undertakings to ACMA (with which Telstra must abide for the next three years).*

Background

A telemarketing call is any voice call that is made for a commercial purpose. The Act lists a wide range of purposes that are viewed as commercial, including the offer of business opportunities or products for sale.

Under the Act, a person can list his or her Australian fixed household line or private telephone number(s) on the Register. Telemarketers are obliged to refrain from making any unsolicited telemarketing calls to any number that is listed on the Register.

The Register is intended to be used solely for private or domestic telephone numbers. A business is not permitted to list its number(s) on the Register.

ACMA

ACMA is responsible for enforcing the provisions of the Act and can seek significant pecuniary penalties of up to:

- \$110,000 per contravention of the Act (if ACMA itself issues an infringement notice); or
- \$1.1 million per contravention of the Act (if ACMA seeks penalties from the Federal Court).

ACMA is most likely to exercise its enforcement powers when there is evidence that a company is in flagrant breach of the Act, or the company has failed to take reasonable steps to check its calling lists against the Register. This is in line with ACMA's mandate to focus on systemic breaches of the Act.

Telstra's telemarketing troubles

Despite having notified Telstra of potential compliance problems (following the introduction of the Register), ACMA continued to receive numerous complaints by consumers in relation to Telstra's telemarketing practices. Consequently, in August 2008, ACMA commenced an investigation into Telstra's compliance with the Act.

ACMA's investigation found that Telstra's compliance procedures, systems and supervision were inadequate, which led to calls being made by one of Telstra's external call centers to numbers listed on the Register.

In August 2009, Telstra was issued, and paid, a fine of \$101,200.00 and gave a number of wide-ranging enforceable undertakings with ACMA, which include the appointment of an external consultant whose role it will be to review Telstra's systems and procedures for

compliance with the Act. Telstra is obliged to implement recommendations made by the consultant.

The consultant will be using ACMA's recently released Compliance Guide as the benchmark for the recommendations. The Guide "is a compilation of practical measures telemarketers can take to comply with the Act."¹ That said, ACMA notes that the Guide "is not intended as a statement of things telemarketers must do to comply with the Act, nor is it a list of measures that, if applied, would necessarily ensure a person's compliance."²

The undertakings, which last for three years, also canvass:

- Record-keeping;
- Telemarketing agreements with third party suppliers;
- Staff education and training; and
- Systems and procedures enabling an individual to opt-out of Telstra telemarketing.³

Conclusion

In the words of Chris Chapman, Chairman of the ACMA:

"ACMA expects large businesses like Telstra to be leading the way and setting an example when it comes to compliance with the Do Not Call Register - not falling behind... The market leaders in the telco industry should consider themselves soundly on notice - size and complexity are no excuse for non-compliant practice."⁴

Those who would like to include their number on the Register or make a complaint, should visit www.donotcall.com.au or telephone 1300 792 958.

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- ¹ ACMA Media Release 105/2009 - 18 August 2009, page 3.
- ² ACMA Media Release 105/2009 - 18 August 2009, page 3.
- ³ ACMA Media Release 105/2009 - 18 August 2009.
- ⁴ ACMA Media Release 105/2009 - 18 August 2009, page 1.



The market leaders in the telco industry should consider themselves soundly on notice - size and complexity are no excuse for non-compliant practice



I Just Called, To Say, Injunct You...



Dean Lockwood*

“The use of trickery to prey for reward upon the lusts or emotional vulnerabilities of others is hardly a vice confined to modern times. What modern times do offer, for those disposed to such a vice, are new means of prey, the internet and the mobile telephone.”¹

Key takeaways

- The Australian Communications and Media Authority (“ACMA”) recently obtained injunctions and declarations against five out of eight respondents in the first SMS spam case brought by ACMA in the Federal Court.
- The respondents were found to have contravened the Spam Act 2003 (Cth) (“Spam Act”) and the Trade Practices Act 1974 (Cth) (“TPA”) in relation to premium SMS chat services, by reason of a complex scheme involving members of online dating websites.
- The case is a timely reminder for all businesses to ensure that they do not send spam (and to take particular care when visiting a dating website!)

Background

The Spam Act prohibits the sending of a commercial electronic message, by way of email, SMS, MMS, instant messaging message or any other similar message, unless:

- The recipient has consented to receiving the message (which consent can be express or inferred from the recipient’s conduct and existing business or other relationships);
- The message contains clear and accurate information about the person or organisation that authorised the sending of the message; and
- The message contains a functional ‘unsubscribe’ facility to allow the recipient to opt out from receiving future messages from that sender.

ACMA, a government regulatory body, is responsible for investigating alleged contraventions of, and for enforcing, the Spam Act.

The case

In December 2008, ACMA commenced proceedings against eight respondents in the Federal Court alleging that those respondents had contravened the Spam Act and the TPA by reason of the following:

- The respondents, through the use of fake member profiles, were engaged in a scheme to obtain the mobile telephone numbers of members of various dating websites (the respondents neither owned, nor were genuine members of, those websites).
- The respondents sent unsolicited SMSs to those members’ mobile telephone numbers, offering an SMS chat service called ‘Safe Divert’ or ‘Maybemeet’.
- The recipients of the SMSs were charged as much as \$5.00 per message.

In May 2009, ACMA obtained interlocutory orders against the respondents, which, among other things,

required the respondents to refrain from various activities in respect of dating websites. The prohibited conduct included:

- Posting fictitious profiles;
- Using photographs without permission; and
- Contacting users of those websites.

On 14 August 2009, Justice Logan of the Federal Court held that the conduct alleged to have been engaged in by five of the eight respondents contravened the Spam Act and the TPA. His Honour stated that the conduct displayed a sustained and systemic violation of statutory provisions, rather than a mere isolated aberration.

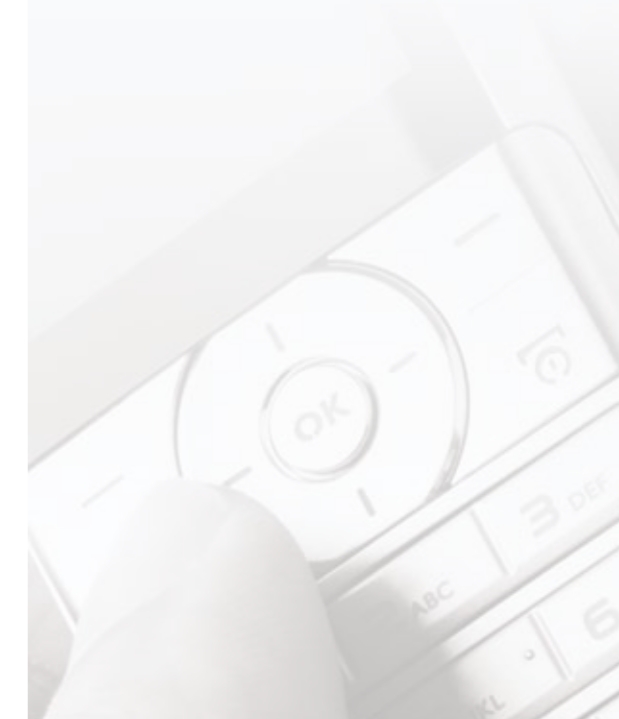
In the result, numerous injunctions were granted, and declarations made, against the five respondents. The hearing in respect of the pecuniary penalties for the five respondents is pending and a further hearing against the remaining three respondents is scheduled to commence on 30 November 2009.

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¹ Logan J, Australian Communications and Media Authority v Mobilegate Ltd & Ors, QUD 426 of 2008, 22 May 2009.



The case is a timely reminder for all businesses to ensure that they do not send spam



Un-bill-ievable!

Shelley Wheatley*

“Bill shock... popularised in the telecommunications industry as a term for the negative reaction a subscriber can experience if their mobile phone bill has unexpected charges.”¹

Key takeaways

- The majority of complaints made by consumers to the Telecommunications Industry Ombudsman² (“TIO”) involve billing disputes.
- Complaints to the TIO have increased dramatically due to the surge in popularity of hand-held devices, PDAs and similar devices (collectively “Smart Phones”), such as the ubiquitous iPhone and Blackberry. Fees for excess data usage and the proliferation of applications requiring costly internet access are the main contributing factors to significantly higher bills.
- To minimise the risk of bill shock, customers should be diligent in their research for the service plan best suited to their needs and ensure that they are fully aware of the total costs involved. Also, to minimise the risk of potential brand damage, intervention or investigation (by, for example, the TIO or Australian Competition & Consumer Commission) and possible legal action for or on behalf of a customer, telecommunications service providers, resellers, dealers and retailers must always provide the customer with clear and accurate information about the service and Smart Phone, including in respect of call and usage charges and excess data fees.

Background

The phenomenon of Smart Phones shows no sign of abating. For example, the next time you are sitting on a train, try to count the number of people who are tapping away at, or otherwise absorbed by, their Smart Phones. The technology involved continues to reach new heights and the ‘apps’ associated with Smart Phones can be extremely addictive.

The ‘down side’ for a consumer who is a Smart Phone junkie, is the risk of receiving a substantial bill. According to the TIO, “Bills can amount to thousands of dollars and some people have told us they have taken out personal loans to pay the debt.”³

Protective measures

The onus is very much on the customer to ensure that they make an informed decision when using their Smart Phone. In that regard, the TIO urges customers to:

- Determine whether they will use their Smart Phones to simply check their emails or to download music and movies;
- Ask their service provider how much data will be consumed/is required for each activity;
- Find out the total cost of a plan and how the plan works;
- Investigate how they can track their data usage; and
- Ask their service provider whether they can adjust their plan if they use more data than they expect.

The customer should also remember that even if the Smart Phone is intended to be used by a child or another third party, the customer will still be responsible for the bill if it is in their name.

Conclusion

Whilst the onus is very much on the customer to ensure that they make an informed decision when purchasing and using their Smart Phone, telecommunications service providers, resellers, dealers and retailers should provide the customer with clear and accurate information (including in respect of call and usage charges and excess data fees), so as to minimise the risk of potential brand damage, intervention or investigation (by, for example, the TIO or Australian Competition & Consumer Commission) and possible legal action for or on behalf of the customer. A failure to properly disclose relevant information to the customer could, for example, expose the service provider, reseller, dealer or retailer to an action for misleading and deceptive conduct.

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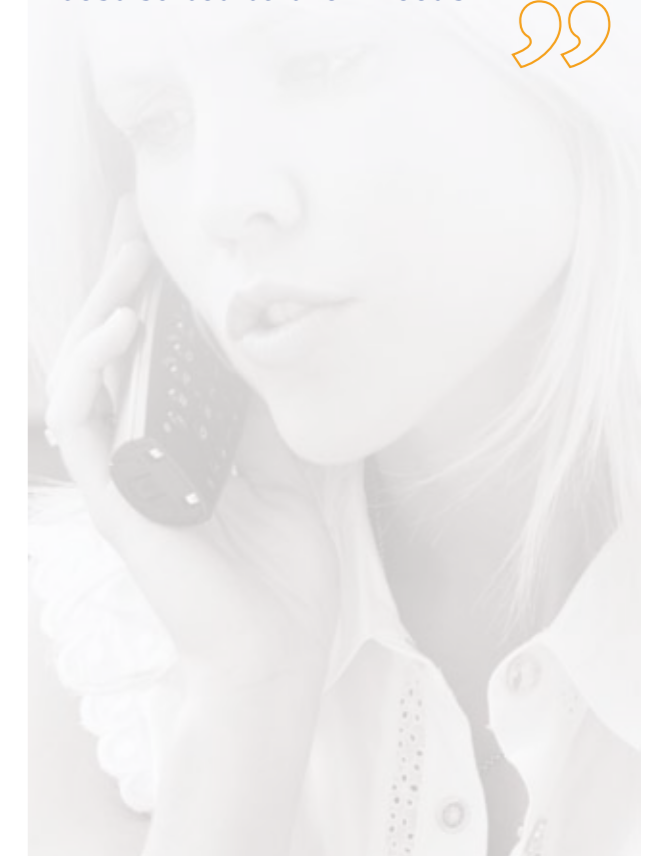
¹ http://en.wikipedia.org/wiki/Bill_shock

² www.tio.com.au

³ TIO Media Release, “Planning ahead a wise move when signing up to a smart phone”, 8 September 2009.



To minimise the risk of bill shock, customers should be diligent in their research for the service plan best suited to their needs



A Fair Go For Australian Consumer Law



Shelley Wheatley and Daniel Song*

Key takeaways

- *The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) ("the Bill") seeks to amend the Trade Practices Act 1974 (Cth) ("TPA") via the implementation of a national consumer law regime referred to as the 'Australian Consumer Law' ("ACL").*
- *The ACL will address unfair contract terms ("Unfair Terms"), include penalties, enforcement powers and consumer redress options and amend the Australian Securities and Investments Commission Act 2001 (Cth) ("ASIC Act") to include corresponding provisions applicable to financial services.*
- *Under the new laws, the courts will have the power to declare Unfair Terms void and unenforceable. The maximum pecuniary penalty payable for using an Unfair Term will be \$27,500 for a company and \$5,500 for an individual.*

Status of the Bill

The Bill was introduced in the House of Representatives on 24 June 2009 and was referred to the Senate Economics Legislation Committee. The Committee received 58 submissions in total and released its 93-page report on 7 September 2009 ("Senate Committee Report").

The Bill will commence on different dates for different purposes, however, Australian jurisdictions will be required, in accordance with the 'National Partnership Agreement to Deliver a Seamless National Economy', to apply the full ACL by 1 January 2011.¹

Application

The Unfair Terms provisions of the ACL and the ASIC Act will apply to all new standard form consumer contracts

(excluding contracts of insurance) in all jurisdictions, entered into on or after the commencement of the provisions. Contracts between businesses are excluded from the scope of the Unfair Terms provisions, except in respect of sole traders.

A term that:

- Defines the main subject matter of the contract; or
- Sets the up front price payable under the contract; or
- Is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory,
- Is excluded from the scope of the Unfair Terms provisions.²

What is a standard form contract?

In determining whether a contract is a standard form contract, the court can consider any matter that it thinks fit, but *must* consider the following factors:

- Who has the bargaining power in the transaction;
- Whether the contract was prepared before any discussion relating to the transaction occurred between the parties;
- Whether one party was required to accept or reject the terms of the contract;
- Whether one party was given an opportunity to negotiate the terms of the contract;
- Whether the terms of the contract took into account the specific characteristics of the other party or the particular transaction;
- Any other matter as prescribed by the regulations.

Standard form contracts are used in a plethora of industries, including, for example, utilities, telecommunications, software, health & fitness, banking, property, professional services, and equipment hire.

What is a consumer contract?

In the context of the ACL, a "consumer contract"

is defined as a contract entered into for:

- A supply of goods or services; or
- A sale of grant of an interest in land,

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.³

When will a term of a standard form consumer contract be unfair?

A term in a standard form consumer contract will be unfair if:

- It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- The term is not "reasonably necessary" to protect the legitimate interests of the party who would be 'advantaged' by the term.⁴

According to the Senate Committee's Report (paragraph 1.4) "A term is likely to be considered unfair if a supplier can vary any term without the consumer's consent or if a supplier can cancel a contract without a corresponding right for the consumer."

A court may take into account any consideration it thinks is relevant in determining whether a term in a consumer contract is unfair. However, the court must take into account:

- Whether the term causes detriment (or a substantial likelihood thereof);
- Whether the term is "transparent"; and
- The contract as a whole.

A term is stated to be transparent if the term is:

- Expressed in reasonably plain language;
- Legible;
- Presented clearly; and

- Readily available to any party affected by the term.⁵

Where the court finds that the term is unfair, that term will be void and the standard form consumer contract will only continue to bind the parties if that contract can operate without the unfair term being included.

Penalties

The maximum pecuniary penalty payable for including an Unfair Term in a standard form consumer contract will be:

- For a company: \$27,500 (250 penalty units)
- For an individual: \$5,500 (50 penalty units)

What you should do now

If you use standard form contracts to supply individuals with goods or services which are acquired for personal, domestic or household use or consumption, should immediately review the terms of those standard form contracts to ensure that you will be compliant with the Bill. You should also review your trade practices compliance program in light of the changes contained in the Bill.

Please contact us if you require any assistance in respect of these very important new laws that will apply from 1 January 2010.

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¹ EM, page 4

² Schedule 1, section 5 of the Bill

³ Schedule 1, sections 1 and 2(3) of the Bill

⁴ Schedule 1, sections 1 and 3(1) of the Bill

⁵ Schedule 1, section 3(3) of the Bill

