

Competition Alert

Dual Price Representations - Was/is redefined

December 2013

On 29 November 2013 the Full Federal Court handed down its decision to dismiss an appeal brought by The Jewellery Group Pty Ltd (**Zamel's**) against an earlier successful prosecution by the Australian Competition and Consumer Commission (**ACCC**). The appellate Court upheld the trial judge's findings that Zamel's had engaged in misleading or deceptive conduct and made false and misleading representations with regard to the price of its products.

The case has been closely watched by major retailers in a number of sectors, and provides further guidance on the principles which must be adhered to when promoting 'savings' off the price of goods or services. While the case primarily concerned 'dual price advertising' (commonly referred to as 'strikethrough', 'was/now' or 'was/is' pricing) (**Dual Price Representations**), the principles extend to any form of advertising promoting a 'saving'.

The decision has major implications for retailers who advertise such savings, particularly if they routinely negotiate discounts off the price of their products at the point of sale.

Thomsons Lawyers acted for the ACCC in this matter at both trial and on appeal.

Background

In 2011, the ACCC commenced proceedings against Zamel's. The proceeding related to catalogues published by Zamel's between 2008 and early 2010. The catalogues included certain jewellery items promoted using Dual Price Representations. The ACCC contended that the use of Dual Price Representations conveyed to consumers that a particular saving was to be made, but that such a saving was misleading or deceptive and false in the circumstances.

The basis on which the ACCC alleged the representations were misleading or deceptive and false, was that:

- each Dual Price Representation made by Zamel's had represented that consumers would save an amount being the difference between the 'strikethrough price' and 'sale price' or the 'was price' and 'now price' if the item were purchased during the relevant catalogue sale period; and
- in the period immediately preceding the relevant catalogue sale period, the items of jewellery the subject of the Dual Price Representations were sold either not at all, or only in very limited numbers, at the 'strikethrough' or 'was' price, such that consumers would not have been required to pay the 'strikethrough price' or 'was' price and therefore would not have achieved the represented savings.

In its defence, Zamel's argued (amongst other things) that most of its customers were aware that there is always the ability to negotiate the price of advertised jewellery items in-store and, for those customers, they would have seen both the 'was' and 'now' prices as 'mere offer prices'. Such customers would never see the juxtaposition of the

'was' and 'now' prices as representing a particular saving, and they would understand that each price was just the starting point for negotiations.

In the case of any customers who were unaware of their ability to negotiate a discount, Zamel's argued (amongst other things) that the Dual Price Representations were not misleading, because such customers were always likely to pay the ticketed price, so they would in fact have saved the difference between the 'was' price and the 'now' price during the promotional period.

Judgment at first instance

On 16 August 2012, Justice Lander of the Federal Court of Australia handed down the judgment on liability at first instance. His Honour held that Zamel's had engaged in misleading and deceptive conduct and had made false or misleading representations in contravention of sections 52 and 53(e) of the Trade Practices Act 1974 (respectively now section 18 and 29(1)(i) of the *Australian Consumer Law*).

His Honour found that the effect of the catalogues was to represent to a class of consumers (the 'unaware' consumers) that they would receive a saving, being the difference between the 'was' or 'strikethrough' prices and the 'now' or 'sale' prices, if the relevant item of jewellery were purchased during the catalogue period.

His Honour found that, for the 'unaware' customers, the 'was' price was the price which an ordinary and reasonable 'unaware' customer would have paid for the item if they had sought to purchase it immediately prior to the promotional period. However, his Honour rejected Zamel's contention that such customers would always have paid the ticketed price. That decision (which was pivotal to the outcome of the case) was based on two findings:

- First, his Honour found that because, in the period immediately preceding the promotional period, Zamel's had only rarely achieved sales of the pleaded items at or around the 'was' price (and in some cases not at all), it was implausible that all 'unaware' customers would have paid that price.
- Second, his Honour found that Zamel's had, at the relevant time, a vigorous discounting policy which encouraged staff to 'chase sales' with aggressive discounting of its products. The existence of this policy enabled his Honour to infer sales at the 'was' price would have rarely been achieved (including when sold to the 'unaware' customers).

As his Honour had found that the actual sales by Zamel's did not support that 'unaware' customers would have in

fact been required to pay the 'was' price, the dual price representations by Zamel's were found to be false, misleading and deceptive (because 'unaware' customers would not have in fact achieved the represented savings).

On 18 January 2013, Justice Lander ordered Zamel's to:

- pay \$250,000 in pecuniary penalties;
- publish advertisements in a series of Australian newspapers, and on its website, indicating the judgment against it and the penalty it had been required to pay;
- establish a compliance and education program to educate its workforce about their obligations under the Australian Consumer Law and to revise its internal operations which led to the judgment against it; and
- pay the ACCC's legal costs.

The Appeal

Zamel's appealed Justice Lander's decision. On 29 November 2013, the Full Court of the Federal Court (comprised of Justices Greenwood, Besanko, and Katzmann) handed down their decisions. The Full Court unanimously dismissed Zamel's appeal, agreeing with each aspect of Justice Lander's reasoning.

One of the issues to be considered on appeal, was whether there was an inconsistency between the previous decisions of the Court in the Full Court decisions of *Australian Competition and Consumer Commission -v- Prouds Jewellers Pty Ltd* 2008 FCAFC 199 (**Prouds**) and *Ascot Four Pty Ltd -v- Australian Competition and Consumer Commission* [2009] FCAFC 61 (**Ascot Four**). Zamel's had argued that the effect of the Prouds case was that actual sales of items at the 'was' price were not necessary in order to justify the use of Dual Price Representations, provided the items had been 'offered for sale' at the 'was' price in the period prior to the promotion. By contrast, in the Ascot Four case, the court had found Ascot Four liable solely on the basis that there had been no previous sales of the relevant items at the 'was' price.

The Full Court discussed the differences between the decisions in Prouds and Ascot Four, and noted that the Full Court's decision in Ascot Four '[does not] entirely reconcile the differences between the two cases'. However, ultimately the Court found that Justice Lander had followed the reasoning of the Court in Ascot Four, and that it was appropriate for him to have done so. Having made that decision, the Court did not seek to further distinguish the Ascot Four and Prouds judgments.

Practical implications

The Full Court's confirmation of Justice Lander's decision at first instance highlights the need for businesses to be careful when making representations regarding any savings that the customer might achieve if they were to purchase the advertised product. This is particularly the case if the business routinely negotiates discounts with its customers below the ticketed/advertised price of its goods or services.

The Full Court did not specifically discuss whether (prior to the promotion period) offering the item for sale at the represented 'was' price (as opposed to selling the item at that price) was relevant when determining whether the stated 'was' price in the Dual Price Representation was misleading. As such, the decision in *Prouds* would appear to remain relevant – particularly in cases where there have been no prior sales of the advertised goods or services.

The ACCC had analysed the four month period prior to each relevant promotion to identify the prices at which the relevant jewellery items had been sold. The Full Court found that this was an appropriate period of time for the purpose of analysis, and specifically noted that there was no need to look at sales over a 12 month period, or sales post-the promotional period, as *Zamel's* had contended. That does not necessarily mean that a shorter period of analysis will not also be appropriate, but it does provide some guidance to businesses in assessing whether Dual Price Representations can be made.

One aspect of the case which the Full Court did not provide any further clarity on was the extent of sales at the 'was' price which are in fact required in the period prior to a promotion in order to justify the use of Dual Price Representations. *Zamel's* had recorded actual sales at the 'was' price of up to 13% of total sales during the

period prior to the relevant promotion. However, no distinction was made between these items and those that had recorded no sales at the 'was' price in that period; no finding was made by Justice Lander as to what specific level of sales is in fact required, and the Full Court made no comment on this issue.

It is important for businesses to understand that while the *Zamel's* case related to Dual Price Advertising, it is likely to have implications for all forms of advertising that represent a particular saving to be made. Businesses will need to carefully consider whether the 'comparator' price is a genuine price against which it might accurately represent a saving to be made. For example, a statement of "save 50%" without any other qualification, is likely to represent to the viewer that they will in fact save 50% if purchased during the sale period *as opposed to what they would have paid if purchased prior to the sale period*.

Businesses that engage in advertising where they represent particular savings will need to consider carefully how they justify such representations in light of the *Zamel's* decision. For businesses that frequently negotiate discounts off the price of their goods and services, the case may spell the end of Dual Price Representations, unless clear and prominent disclaimers are used to explain exactly what the 'was' price represents.

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