

When material is available online, the limitation period is effectively open-ended

Another effect of the multiple publication rule is to enable a plaintiff to commence an action in any jurisdiction in which the matter complained of was read, seen or heard, subject only to considerations of forum non conveniens. In *Dow Jones v Gutnick*,³ US publisher Dow Jones urged the Australian High Court to apply a single publication rule, the effect of which would have been to enable Dow Jones to avoid having to defend defamation proceedings in Australia with respect to material made available on a US-based server. The High Court held instead that the multiple publication rule was firmly entrenched in Australian defamation law.

How might a single publication rule operate?

In the US, the single publication rule has been applied by the courts to determine both the place of publication and the time of publication. The Consultation Paper released by the UK Ministry of Justice appears only to canvass the question of *when* publication should be taken to have occurred.

One question canvassed in the Consultation Paper is what would constitute a new publication under a single publication rule. The Paper notes that in the US, in relation to hard copy publications, morning and afternoon editions of a newspaper have been held to constitute separate publications, as have hard copy and paperback editions of a book, but the reprinting of a magazine in response to public demand has been held not to constitute a new publication.

The Paper also asks whether modification of online material should suffice to trigger a fresh publication. In *Firth v State of New York*,⁴ it was held that unrelated modifications made to a website did not

result in a new publication with respect to a report that had published on the website.

Extending qualified privilege to material in online archives

The UK Consultation Paper has also raised the possibility of maintaining the multiple publication rule, but extending a defence of qualified privilege to online archives outside of the one year limitation period "unless the publisher refuses or neglects to update the electronic version, on request, with a reasonable letter or statement by the claimant by way of explanation or contradiction".

Interaction with limitation periods

Finally, the Consultation Paper seeks comment as to whether it is appropriate to reform limitation periods for defamation.

A 2001 report on Limitation of Actions by the UK Law Council recommended extending the limitation period for defamation to three years.⁵ A study by the Commission in 2002 reiterated that recommendation, suggesting that the current short (one year) limitation period combined with a multiple publication rule was disadvantageous for both claimants and defendants.

Issues raised for consideration by the Consultation Paper include not only the time period for any new limitation period, but also the question of whether time should begin to run from the date of publication or from the date that the claimant first becomes aware, or could reasonably be expected to become aware, of the publication.

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(Endnotes)

1 *Loutchansky v Times Newspapers Ltd* [2002] 1 All ER 652.

2 *Ibid.*

3 (2002) 210 CLR 575.

4 (2002) NY int 88.

5 Report No 270.

Pre-paid Calling Cards Industry Update: Federal Court Proceedings, ACCC Investigations and Recent Communications Alliance Industry Guidelines

Mitch Kelly looks at the increased regulatory attention being paid to pre-paid calling cards.

Background

In recent years, a growing telecommunications market has been the provision of pre-paid calling cards (**Calling Cards**). Using a dedicated card number and a PIN, Calling Cards provide a method for accessing either locally or remotely stored credit for the purpose of making telephone calls (predominantly to international locations).

Increased consumer demand has seen service providers utilising more aggressive marketing strategies to improve their market share. Such strategies have tended to focus on price and value as key differentiators in comparison to competitor products. Historically, these strategies have focused on utilising one, or a combination, of the following:

- advertising that Calling Cards have "No Connection Fee[s]", "24 Hour Great Rates", "Flat Rates" or "No Service Fees";
- advertising that a stipulated number of minutes of calls are available on a Calling Card; and/or
- advertising that a Calling Card can be used for "up to" a specified number of minutes.

However, in practice the use of Calling Cards may involve a wide range of charges in addition to the per-minute calling charge predominantly advertised. These charges may include: connection or disconnection fees; service fees; surcharge fees; as well as calls being charged in blocks of minutes. While a Calling Card may advertise low per-minute call charges (e.g. 3 cents per minute to the UK), in practice these additional charges may range from tens of cents to many dollars, and therefore could significantly diminish the value available using the Calling Card within only a handful of short calls.

The marketing strategies identified above, when viewed in light of the reality of charges applied to use of a Calling Card, have the potential to mislead or deceive customers if not appropriately prepared. It is this potential which was a factor in the industry recently coming to the attention of the Australian Competition and Consumer Commission (**ACCC**). Specifically, the ACCC began querying whether the marketing strategies used by the industry could constitute false, misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) (**Act**).

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The effect of the ACCC's review of industry conduct has been immediate and significant. In the space of six months this review has resulted in:

- two Federal Court orders against the two largest service providers;
- an additional two Federal Court proceedings being commenced against another two service providers; and
- the publication of a set of industry guidelines drafted by the peak communications industry body, the Communications Alliance Limited.

The following is a brief update and review of the recent Federal Court proceedings instituted by the ACCC, as well as the recommendations made within the recently published industry guidelines.

ACCC Investigations and Federal Court Proceedings

Following commencement of proceedings by the ACCC, the Federal Court recently made declarations and orders by consent against the two largest industry service providers, Tel.Pacific Limited and Cardcall Pty Limited.¹ In addition, the ACCC has also commenced separate proceedings against Prepaid Services Pty Limited and Boost Tel Pty Limited. The ACCC has alleged that the service providers misrepresented the benefits and value of their Calling Cards as part of their marketing strategies, and that such conduct was in breach of provisions of the Act (including sections 52, 53(aa), 53C and 55A).

In the concluded proceedings, the Federal Court declared that the relevant conduct by the service providers was false, misleading and deceptive and in breach of the Act. The service providers were made subject to orders including: providing information to retailers, customers, and competitors about the proceedings; providing information on applicable charges to consumers; establishing compliance programs; and paying a fixed amount for the ACCC's legal costs.

In holding that the relevant conduct was in breach of the Act, the Federal Court made the following declarations, believing that certain representations made in relation to the marketing strategies above were false, misleading or deceptive:

- in advertising that Calling Cards had "No Connection Fee[s]", "24 Hour Great Rates", "Flat Rates" or "No Service Fees" it was represented that no fees other than timed call charges would apply - when in fact other fees were charged (including connection fees, service fees and surcharges); and
- in advertising that a stipulated number of minutes or "up to" a specified number of minutes were available in relation to a Calling Card, it was represented that consumers could use the Calling Card for more than one connection, and would still be able to achieve the total stipulated call duration for the location and type of connection specified - when in fact that could only at best be achieved if one continuous call was

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made. Additional charges could diminish the value and number of available minutes.²

The effect of these proceedings has seen an effort by the service providers to change their advertising practice. A key example of this has been the recent publication of industry guidelines by Communications Alliance.

Communications Alliance Industry Guidelines

On 13 August 2009, the Communications Alliance announced the publication of industry guidelines for Calling Cards (**Guidelines**).³ The Guidelines focus on providing standards for the provision and advertising of Calling Cards with a view to improving customer satisfaction. They will be reviewed after 2 years of initial publication and every 5 years subsequently (or earlier in the event of significant developments within the industry).

As described in the Guidelines, the objective is to establish community safeguards by ensuring service providers provide sufficient information to allow consumers to make informed decisions about the nature and benefits of the Calling Cards. The Guidelines are recommended to be read in conjunction with other Communications Alliance publications, including the *Telecommunications Consumer Protections Code*⁴ (**TCP Code**) and the *Telecommunications Consumer Protections Guideline*.⁵

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At present, the Guidelines **do not** have any legal effect. They are a guide only and have been developed with the aim of advising service providers on how to provide greater clarity for both the industry and customers. Normally, codes (as opposed to guidelines) developed by the Communications Alliance may be presented to the Australian Communications and Media Authority (**ACMA**) for registration pursuant to section 117 of the *Telecommunications Act 1997 (Cth)*. When a code is registered, ACMA may direct any industry participant which is not complying with the code to comply with it (whether they were a voluntary signatory or not). This gives a registered code effective legal force.

There is no current indication from the Communications Alliance or the ACMA that the Guidelines will be further developed into a code. In the event that there is such an intention, significant participants in the industry would likely be invited to be included in the consultation and/or development of such a code.

It is worth noting though that the Guidelines are not endorsed or approved by the ACCC. As a result, there is the risk that compliance with the Guidelines will not necessarily be sufficient conduct in the eyes of the ACCC.

There are 11 key conduct areas considered by the Guidelines as follows:

- (a) **Necessary contact details to be printed on Calling Cards.** Details of the service provider (including a free call or local call helpdesk number and the business name) should be noted on each physical Calling Card.
- (b) **General stipulations on advertising Calling Cards.** Calling Card advertisements must not be false or misleading (as also required under the Act). Specifically informed by the ACCC investigations, the Guidelines provide a number of examples. Firstly, Calling Cards may not be advertised by representing that a number of minutes are available when that number is only available from one continuous call. Secondly, if rates do

not apply to an entire country, the specific locations should be clearly set out (on an inclusive or exclusive basis). Finally, any advice to a consumer that they have a certain number of minutes for a certain destination must be accurate and any conditions attached must be clearly spelt out at the time the advice is given.

- (c) **Information to be included on POS Materials.** A number of provisions relate to point of sale (POS) material (which includes posters or brochures of the size 110mm x 220mm). All advertising must be prominent and legible in plain language and in a minimum 8 point font. Additionally, all advertising must include (as a minimum) the:

- price;
- basis for calculating charges;
- conditions of expiration;
- date at which prices are correct;
- details regarding rounding up;
- details of surcharges or other fees;
- website or call centre details;
- recharge methods; and
- details of how to use the card.

Disclaimers on POS materials should be placed next to the offer, linked by an asterisked footnote (or other symbol), readily available and clearly indicated with regard to the intended audience.

- (d) **Information to be included in media advertisements.** Media advertisements should clearly state that terms and conditions may apply and provide the location where those terms and conditions may be viewed. At a minimum the terms must be available on a website and via a toll free number.

- (e) **How service fees are to be charged.** Where a Calling Card incurs service fees after a certain number of days, such service fees should be applied only after midnight on the last such day.

The example provided by the Guidelines is that where the first call is made on Tuesday morning and a surcharge is said to be applied after 2 days, the surcharge should only be applied after midnight on Thursday.

- (f) **How Calling Card terms may be changed without notice.** The Guidelines appear to acknowledge that Calling Card charges may change frequently due to a change in third party charges. It is permissible to include a term within Calling Card terms and conditions that applicable charges may change without notice. However, service providers are advised to be careful to ensure that such changes are directly referable to a change in the underlying third party charges.

- (g) **Requirements to replace out-of-date advertising material.** It can be quite difficult for service providers, given the size, scope and range of marketing material, along with the frequency at which charges may change, to ensure that out of date advertising material is replaced. This is acknowledged by providing that each service provider should maintain a procedure for updating and replacing in-store advertising material which is out of date by 3 months.

- (h) **Telemarketing obligations.** Service providers are advised to ensure that they satisfy themselves as to the conduct of telemarketing service providers and ensure such providers are capable of complying with relevant Communications Alliance codes as well as the Act.

Service providers should actively ensure that scripts and training undertaken by the telemarketing service provider are sufficient to comply with the Act and demonstrate extensive knowledge of the service provider's calling cards and applicable charges.

- (i) **Customer service staff training obligations.** Provisions dealing with customer service staff training generally echo those relating to telemarketing service providers. There is a requirement placed on service providers to ensure that customer service representatives undergo training prior to commencing duties which ensure that they are conversant with all details of the Calling Cards (including applicable charges) as well as the relevant provisions of the Act (especially those dealing with misleading and deceptive conduct)

- (j) **Minimum complaint handling procedures.** Service provider complaint handling procedures should have as a minimum: a free call or local number; be answered by a live agent within a reasonable time; be staffed between 9am-5pm AEST on business days; be capable of providing refunds and/or replacement cards; and include appropriate methods of resolving complaints and monitoring any undertakings made to complaining consumers.

Additionally, the Guidelines recommend that service providers comply with the rules contained in Chapter 9 (Complaint Handling) of the TCP Code, as well as meeting the requirements of standard AS/ISO 10002:2206.

- (k) **Return and refund policies.** Service providers should ensure they maintain a return and/or refund policy that is fully communicated and made aware to their retailers, and presumably customer services staff.

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Future Performance

As mentioned, there is no current indication that the Guidelines will be further developed into a code. Additionally, the Guidelines have not been endorsed or approved by the ACCC, and while compliance would be a strong presumption for sufficient conduct, there is the risk that compliance with the Guidelines will not necessarily be sufficient in the eyes of the ACCC.

Given the recently commenced Federal Court proceedings, and the immediate reaction of the industry in publishing the Guidelines, it would appear likely that further developments will occur within the near future which should have additional impacts on the industry and associated service providers.

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(Endnotes)

1 *ACCC v Tel.Pacific Limited* [2009] FCA 279 and *ACCC v CardCall Pty Limited* [2009] FCA 583

2 *ACCC v Tel.Pacific Limited* [2009] FCA 279 per Gordon J at [8] and *ACCC v CardCall Pty Limited* [2009] FCA 583 per Lindgren J at [4]

3 Communications Alliance *Prepaid Calling Card Guideline* G640:2009 (August 2009) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0015/10275/G640_2009.pdf

4 Communications Alliance *Telecommunications Consumer Protections Code* C628:2007 (September 2007) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0014/1346/C628_2007.pdf.

5 Communications Alliance *Telecommunications Consumer Protections Guideline* G631:2007 (September 2007) available at http://www.commsalliance.com.au/__data/assets/pdf_file/0018/1728/G631_2007.pdf