

Order NOT Entered

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

No: **SAD231/2004**

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
Applicant

AUSTRALIAN COMMUNICATIONS NETWORK PTY LTD ACN 108 535 708
First Respondent

MARTIN PAECH
Second Respondent

GIBBSCHADE PTY LTD ACN 110 335 138
Fourth Respondent

JONATHAN GIBBS
Fifth Respondent

KEITH JANKE
Seventh Respondent

ORDER

JUDGE: Justice Mansfield

DATE OF ORDER: 20 July 2005

WHERE MADE: Adelaide

THE COURT DECLARES THAT:

1. The marketing scheme established by the first respondent in connection with the supply of telecommunications services by the first respondent and operated by it between July 2004 and 11 April 2005 (the ACN scheme) pursuant to which:
 - (a) members of the public were invited to make a payment of \$499 plus GST to the first respondent to become participants in the ACN scheme as independent representatives of the first respondent; and

- (b) the payment referred to in par (a) was substantially induced by the prospect held out to new participants that they would be entitled to receive from the first respondent payments described as customer acquisition bonuses and residual override commissions (the recruitment payment) in relation to the introduction to the ACN scheme of further new participants in that the payments were payable if the independent representative sponsored, directly or indirectly, other persons to become new independent representatives and those persons acquired customers on behalf of the first respondent, and where the amount of the payments was dependent upon the number and level of new independent representatives sponsored;
- (c) the customer acquisition bonuses were calculated by a formula depending on the independent representative's 'level' within the ACN scheme and were calculated as described in [6](d)n.-q. of the reasons for judgment of the Court delivered on 23 March 2005 (the reasons for judgment); and
- (d) the residual override commissions were calculated by a formula depending on the independent representative's 'level' within the ACN scheme and were calculated on the total monthly billings of customers of the independent representatives introduced by the participant as described in [6](d)l.-m. of the reasons for judgment;

constituted a pyramid selling scheme within the meaning of s 65AAD of the *Trade Practices Act 1974 (Cth)* (the Act).

2. The first respondent participated in the pyramid selling scheme in contravention of s 65AAC(1) of the Act and induced and attempted to induce other persons to participate in the pyramid selling scheme in contravention of s 65AAC(2) of the Act by:
 - (a) establishing the ACN scheme;
 - (b) promoting the ACN scheme;
 - (c) taking part in the ACN scheme; and
 - (d) by entering into independent representative agreements with persons who agreed to participate in the ACN scheme.
3. The second respondent aided and abetted, and was knowingly concerned in, the first respondent's contraventions of s 65AAC(1) and s 65AAC (2) of the Act as set out in the declaration in order 2 hereof in that he:
 - (i) was aware of the details of the ACN scheme;

- (ii) authorised the promotion of the ACN scheme; and
 - (iii) authorised the entering into of the independent representative agreements on behalf of the first respondent and the receipt of the payment of \$499 (excluding GST) by each independent representative who entered into such agreements.
4. The fourth respondent participated in the ACN scheme in contravention of s 65AAC(1) of the Act and induced and attempted to induce other persons to participate in the ACN scheme in contravention of s 65AAC(2) of the Act by:
- (a) being aware of the ACN scheme;
 - (b) promoting the ACN scheme; and
 - (c) inviting the entering into of the independent representative agreements on behalf of the first respondent and the receipt of the payment of \$499 (excluding GST) by each independent representative who entered into such agreements at its invitation.
5. The fifth respondent and the seventh respondent aided and abetted and were knowingly concerned in the contraventions of s 65AAC(1) and s 65AAC(2) of the Act by the first respondent by:
- (a) being aware of the ACN scheme;
 - (b) promoting the ACN scheme.

AND THE COURT ORDERS THAT

6. The first respondent by itself its agents or servants or otherwise be restrained from:
- (a) establishing, promoting or taking part in the ACN scheme or any scheme which is not materially different from the ACN scheme;
 - (b) inducing or attempting to induce members of the public to take part in the ACN scheme which is not materially different from the ACN scheme.
7. The second respondent be restrained from authorising or being knowingly concerned in:
- (a) the first respondent establishing, promoting or taking part in the ACN scheme or any scheme which is not materially different from the ACN scheme; and
 - (b) the first respondent inducing or attempting to induce members of the public to take part in the ACN scheme or any scheme which is not materially different from the ACN scheme.

8. A copy of the reasons for judgment, with the seal of the Court thereon, be retained in the Court file for the purposes of s 83 of the Act.
9. Within 14 days of the date of this order, the first respondent do send a notice to each person who is recorded in its records as having entered into an Independent Representative Agreement with it informing that person of the decision and orders of this Court in the form attached to this order as Annexure A ('the statement'). The notice must be sent:
 - (a) if the first respondent ordinarily corresponds with the person by email, by email to the person's email address as recorded by the first respondent;
 - (b) otherwise, by ordinary mail to the person's postal address as recorded by the first respondent;and a copy must be served on the applicant.
10. Within 14 days of the date of this order, the first respondent must publish and maintain for a period of six months on the internet at any website on the World Wide Web the home page of which is owned, operated, created or maintained by or on behalf of the first respondent, including but not limited to the website on the World Wide Web the home page of which is located at the URL www.acnaustralia.com.au, an active pop-up window or message box on the home page of the website containing a notice in the form of the statement that is automatically activated whenever someone accesses the website.
11. The first respondent be authorised to transfer the moneys held in the controlled moneys account established in accordance with its undertaking given to the Court on 24 November 2004 and held in the name of Dale James Kemp and Peter Ludemann Solicitors c/- Dibbs Barker Gosling as trustees, to a controlled moneys account in the name of Luke Woodward Solicitor c/- Gilbert & Tobin as trustee and otherwise held upon the terms of the said undertaking until further order.
12. Within 28 days of the date of this order, the first respondent do comply with order 2 of the undertaking given by it to the Court on 24 November 2004.
13. The first respondent and the second respondent do pay to the applicant its costs of the application.

14. The orders made in orders 9, 10 and 12 hereof be stayed until further order of the Court.
15. The parties have liberty to apply on reasonable notice.

Date that entry is stamped:

DISTRICT REGISTRAR

ANNEXURE A

STATEMENT

Australian Telecommunications Network Pty Ltd

By Order of the Federal Court of Australia

Notice to Independent Representatives

On 15 November 2004, the Australian Competition and Consumer Commission ('the ACCC') commenced proceedings against Australian Communications Network Pty Ltd ('ACN') in respect of the marketing scheme by which ACN marketed its telecommunications services to members of the public. Under the marketing scheme, ACN invited members of the public to become independent representatives of ACN to market the sale of its telecommunications services in consideration of the payment of an initial fee of \$499 plus GST. The ACCC alleged that the marketing scheme was a pyramid selling scheme within the meaning of the *Trade Practices Act 1974* and that by establishing, promoting and taking part in the scheme, ACN had contravened the *Trade Practices Act 1974*.

The ACC also alleged that Mr Martin Paech, Mr Jonathan Gibbs and Mr Keith Janke were knowingly concerned in the contraventions by ACN, and had also contravened the *Trade Practices Act 1974*.

On 23 March 2005, the Federal Court of Australia ruled that ACN's marketing scheme as described above was a pyramid selling scheme and that ACN had contravened the Trade Practices Act 1974 by establishing, promoting and taking part in the scheme. The Court also ruled that Messrs Paech, Gibbs and Janke had contravened the *Trade Practices Act 1974* by being knowingly concerned in the contraventions by ACN. In reaching that conclusion, the Court had particular regard to the amount of the participation payment of \$499 plus GST, the basis upon which customer acquisition bonuses and residual override commissions are paid to independent representatives under the marketing scheme, and the value of the services received by independent representatives from ACN when participating in the marketing scheme. It was necessary to have regard to the interaction of those matters to determine whether the marketing scheme was a pyramid marketing scheme.

The Court has restrained ACN from:

- (a) establishing, promoting or taking part in the particular marketing scheme or any marketing scheme which is not materially different from the particular marketing scheme.
- (b) inducing or attempting to induce members of the public to take part in the particular marketing scheme or any marketing scheme which is not materially different from the particular marketing scheme.

After the reasons for judgment of the Court were delivered on 23 March 2005, on 11 April 2005 ACN altered the participation payment for new independent representatives from \$499 plus GST to \$200 plus GST. In other respects the scheme has not been changed. The decision and orders of the Court do not relate to a scheme in which the participation payment is \$200 plus GST. There has been no decision by the Court as to the legality or otherwise of such a scheme.

ACN previously gave an undertaking to the Federal Court that, should the Federal Court find the ACN scheme in breach of the Trade Practices Act, ACN would refund to each person who became an independent representative of ACN after midnight 23 November 2004:

- (a) the initial fee of \$499 plus GST paid by the independent representative to ACN; and
- (b) interest earned by ACN on the initial fee.

The Court ordered ACN to effect that refund on or before 17 August 2005. The operation of that order has been stayed pending the hearing and determination of ACN's appeal from the Court's orders. If ACN is unsuccessful in its appeal, it will implement that refund. The refund does not result in the cancellation of an independent representative's agreement with ACN, nor otherwise affect the rights of an independent representative.

ACN has also undertaken to the Court that it would extend the cooling off period for each such independent representative until further order of the Court. During the cooling off period each such person has the right to request a refund from ACN of the participation fee of \$499 plus GST (but not interest earned on that amount).