

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/12/2019 7:53:19 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID1337/2019
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
SUPERPHONE PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 10/12/2019 12:49:41 PM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement



No. VID of 2019

Federal Court of Australia
District registry: Victoria
Division: General Division

Australian Competition and Consumer Commission
Applicant

Superfone Pty Ltd (ABN 63 600 625 189)
Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Respondent (**Superfone**) conducts a business of providing mobile, landline and internet services (**Services**) to consumers using networks and other infrastructure owned and/or operated by other telecommunications providers. Between 1 June 2017 and 7 December 2018 (**Relevant Period**), Superfone marketed the Services to consumers in Australia, through sales representatives (**Sales Representatives**) employed by its wholly-owned subsidiary, Inspire Telecom Pvt. At Superfone's direction, the Sales Representatives made unsolicited telephone calls from a call centre based in Delhi, India, for the purpose of concluding contracts for the provision of Services by Superfone to consumers.
2. This proceeding concerns Superfone's sales practices arising from the unsolicited telephone calls, including the making of false and misleading representations to consumers, and breaches of the unsolicited agreements provisions of the *Australian Consumer Law (ACL)* (which is Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (CCA)*). Superfone induced consumers to acquire Services from it, and failed to inform consumers of protections provided by the ACL, resulting in likely harm to consumers and competing service providers.

Method of marketing and sale of Services

3. In the Relevant Period, the Services were promoted and sold to Australian consumers as follows:
 - (a) The Sales Representatives made 'sale calls' to consumers in Australia. Superfone provided the Sales Representatives with a 'lead generation script' for the calls, which contained a series of statements and questions designed to entice the consumer to purchase the Services.

Filed on behalf of	Australian Competition and Consumer Commission, the Applicant		
Prepared by	David Yates		
Law firm	Corrs Chambers Westgarth		
Tel	(08) 9460 1666	Fax	(08) 9460 1667
Email	david.yates@corrs.com.au		
Address for service	Level 6, 123 St Georges Terrace, PERTH WA 6000		

3439-4784-4878v1

- (b) Superfone provided a training manual to the Sales Representatives directing them how to respond to, and overcome, common objections by consumers to acquiring the Services.
- (c) Where, during a sale call, a consumer sounded willing to purchase Services, the Sales Representatives continued on to conclude a verbal agreement, on behalf of Superfone, with the consumer (**Agreement**), which was recorded (the '**VRC**' (voice recording call)). The VRC was made by either the same Sales Representative who had made the earlier sale call, or a different Sales Representative. Superfone directed the Sales Representative to recite, during the VRC, the terms and conditions stated in a 'VRC script' provided by Superfone to the Sales Representatives.
- (d) Often Superfone obtained bank details from the consumer during the VRC, and, within 10 days of the date of the Agreement, deducted the first payment for the Services from the consumer's nominated bank account, and supplied the Services to the consumer.
- (e) Prior to July 2018, Superfone did not provide consumers any documentation evidencing the Agreement. From around July 2018, it started providing, only to some consumers, standard form documents entitled, respectively, 'service agreement'; 'critical information summary'; 'pro-rata explainer'; and 'porting process explainer', (collectively, **Documents**). Superfone did not keep records of when Documents were sent. The recipients were requested to insert their banking and identification details into the 'service agreement', sign and date it, and return it to Superfone.
- (f) Some customers that purchased mobile phone services received from Superfone a SIM card, at which time a Sales Representative made a 'connection call' to set up the mobile connection, using a 'connection request script' provided by Superfone.
- (g) Superfone recorded VRCs and some sale calls and connection calls.

Conduct and representations

4. The Sales Representatives:

- (a) often, during 'sale calls', gave the incorrect impression that the purpose of the call was to provide discounts or savings on the consumer's existing plan for telecommunications services, when in fact the actual purpose was to sell the Services to the consumer; for example:
 - (i) Consumer A was told "as you have been using this number for a pretty long time and been a valuable customer, your number has been selected for some savings and benefits"; and
 - (ii) Consumer B was told "You're using this Optus number [for] a long time and being a valuable customer, you will be glad to know that your number has been selected for some savings and benefits";
- (b) often, during 'sale calls' (examples of which are in paragraph 4(a) above), gave the incorrect impression that:

- (i) Superfone and/or the Sales Representative had an affiliation with the consumer's existing telecommunications provider such that Superfone and/or the Sales Representative was authorised by it to contact the consumer and offer the Services;
 - (ii) the Sales Representative was calling from the consumer's existing provider; and/or
 - (iii) the Services were being offered with the approval of the consumer's existing provider;
- (c) often gave the incorrect impression during 'VRCs' that:
- (i) the consumer had no right to a '*cooling off period*', when in fact the consumer was entitled to terminate the Agreement without incurring any fees during the cooling off period specified in 82(3) of the ACL (**statutory cooling off period**);
 - (ii) the consumer was not entitled to a refund of any deposit paid by the consumer, when in fact the consumer was entitled to a refund under s 84 of the ACL if they terminated the Agreement during the statutory cooling off period, and any provision to the contrary in the Agreement was void under s 89 of the ACL; and/or
 - (iii) the consumer would face large fees if they terminated the Agreement, when in fact the consumer had an unqualified right to terminate the Agreement within the statutory cooling off period without incurring any fee, and any provision to the contrary in the Agreement was void under s 89 of the ACL; and
- (d) did not, before each Agreement was made:
- (i) give the consumer information as to the consumer's right to terminate the Agreement during the statutory cooling off period, or the way in which the consumer could exercise that right; and
 - (ii) inform the consumer that Superfone was prohibited from supplying the Services or accepting or requiring any payment or other consideration in connection with them, until after 10 business days had passed after the consumer was given the Documents.
5. Consumers were not given documents evidencing the Agreement within 5 business days after the Agreement, or – in many cases – at all.
6. Where Documents were subsequently provided to consumers which purported to be 'agreement documents' for the purpose of s 78(2) of the ACL, the Documents were not transparent, in that they did not:
- (a) conspicuously and prominently inform the consumer of their right to terminate the Agreement, or how that right is exercised, in text that is the most prominent text in the document, other than the text setting out Superfone's logo;
 - (b) include a notice that could be used by the consumer to terminate the Agreement;
 - (c) include a notice that conspicuously and prominently set out the following text:

- (i) *“You have a right to cancel this agreement within 10 business days from and including the day after you signed or received this agreement”* on the front page;
 - (ii) *“Important Notice to the Consumer”* on the front page; and
 - (iii) *“Details about your additional rights to cancel this agreement are set out in the information attached to this agreement”*;
- (d) conspicuously and prominently set out Superfone’s business address (not being a post office); and
 - (e) set out in full all of the terms of the Agreement, including the total consideration to be paid by the consumer.

7. Superfone proceeded to supply Services to consumers, and required and accepted payment for Services from consumers for Services, without waiting at least until after 10 business days had passed from when the Documents (if any) had been given to the consumer.

B. RELIEF SOUGHT FROM THE COURT

8. The ACCC seeks the relief set out in the Originating Application, which includes declarations, injunctions, pecuniary penalties, a corrective publication order, and orders for consumer redress.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

9. The conduct of the Sales Representatives was engaged in on behalf of Superfone and within the scope of those agents’ actual or apparent authority and, by reason of s 139B(2) of the CCA, the Sales Representatives’ conduct was also engaged in by Superfone.
10. As the telephone calls were with consumers in Australia, the conduct occurred in Australia. Alternatively, to the extent that the conduct occurred outside Australia, it was engaged in by Superfone, an Australian corporation, so s 5 of the CCA applies.
11. The Agreements constituted ‘unsolicited consumer agreements’ within the meaning of s 69(1) of the ACL, which were ‘negotiated by telephone’ within the meaning of s 78(3) of the ACL. The Sales Representatives were ‘dealers’ within the meaning of s 71 of the ACL.
12. By engaging in the conduct described in paragraphs 4(d), 5 and 6 above, the Sales Representatives failed to give consumers information about the Agreements, in contravention of ss 76(a), (c) and (d) of the ACL (as affected by regs 83 and 84 of the *Competition and Consumer Regulations 2010* (Cth) (**Regulations**)). Under s 77 of the ACL, Superfone is also taken to have contravened those provisions.
13. By engaging in the conduct described in paragraph 5 above, the Sales Representatives failed to give the consumers ‘agreement documents’ within 5 business days after the agreement was made or at all, in contravention of s 78(2) of the ACL. Under s 77 of the ACL, Superfone is also taken to have contravened that provision.

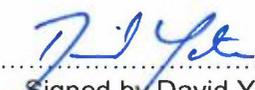
This Concise Statement was prepared by David Yates, solicitor, and settled by Oren Bigos of Senior Counsel and Caryn van Proctor of Counsel.

14. By engaging in the conduct described in paragraph 6 above, Superfone failed to ensure that the Agreements or the Documents complied with the requirements in s 79 of the ACL, in contravention of that provision (as affected by regs 85 and 87 of the Regulations).
15. By engaging in the conduct described in paragraph 7 above, Superfone supplied Services to consumers, and required and accepted payment for Services from consumers for Services, without waiting at least until after 10 business days had passed from when the Documents (if any) had been given to the consumer, in contravention of s 86(1) of the ACL.
16. By engaging in the conduct described in paragraphs 4(a) and 4(b) above, Superfone, in trade or commerce, engaged in conduct which was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL. In addition, Superfone, in trade or commerce, made false or misleading representations in connection with the supply of the Services to consumers – by the conduct described in paragraphs 4(b)(i) and (ii) above, that Superfone or the Sales Representatives had an affiliation with the consumer's existing provider, in contravention of s 29(1)(h) of the ACL; and by the conduct described in paragraph 4(b)(iii) above, that the Services had the approval of the consumer's existing provider, in contravention of s 29(1)(g) of the ACL.
17. By engaging in the conduct described in paragraph 4(c) above, Superfone, in trade or commerce, engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL; and further, or alternatively, made false or misleading representations in connection with the supply of the Services to consumers regarding the existence, exclusion or effect of any condition or right, in contravention of s 29(1)(m) of the ACL.

D. ALLEGED HARM

18. The above conduct resulted in:
 - (a) consumers incurring fees that were charged by their existing provider for changing to Superfone in the belief that they were 'locked in' to the Agreement they had made with Superfone;
 - (b) consumers, who had an unqualified right to terminate their Agreement with Superfone but were not informed of that right, paying termination fees to Superfone, in the mistaken belief that they were contractually bound to pay them to Superfone;
 - (c) consumers entering into Agreements with Superfone without being informed of the statutory cooling off period, and therefore without knowing that they could reconsider during that period whether to continue with the Agreements; and
 - (d) business being directed away from competing telecommunications providers.

Date: 9 December 2019


Signed by David Yates
Corrs Chambers Westgarth
Lawyers for the Applicant

Certificate of lawyer

I, David Yates, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in it.

Date: 9 December 2019



Signed by David Yates
Lawyer for the Applicant