

the ACN case

Adverse Impacts on the MLM Industry.

By Andrew Hamilton, counsel for ACN

ACN is the Australian subsidiary of the world's largest direct selling telecommunications provider. ACN utilises multi-level marketing (MLM) to sell local, long distance, international fixed line and soon mobile telephone services to residential and small business customers.

In less than six months since launch ACN has acquired tens of thousands of telephone customers through its network of thousands of Australian Independent Representatives. ACN's compensation plan provides immediate incentives for customer sign-up and ongoing commissions on the telephone bills of customers signed up by Independent Representatives and their downlines.

It is not often that a legal judgment endorses any company's business as "viable and competitive" and states that its "offering to customers is competitive and may even be attractive." It is rarer still for a MLM company, to be given the benefit of judicial statements that: "There is no suggestion that its marketing strategies are a sham or that its financial projections cannot be realised" and "returns from recruitment payments are ultimately based upon actual business in real products and services provided to actual customers".

Yet what is even more surprising is that having made these findings of legitimacy about ACN, the Australian Federal Court Judge ultimately ruled that, at a participation fee of \$548.90, ACN's multi-level marketing scheme breached the new pyramid selling provisions of the Trade Practices Act 1974 (TPA).

While ACN quickly moved to make itself legal in conformity with the judgment by reducing its participation fee to \$220, a level the Judge indicated was likely to be acceptable, and is intending to appeal, the case may have implications for the MLM industry as a whole.

The case represents the first time that a legitimate MLM company, which has operated legally for many years in the USA and across Europe, has fallen foul of the TPA's pyramid selling provisions. The case confirms that the new TPA provisions substantially remove important points of differentiation between multi-level marketing schemes selling real products and pyramid schemes.

What may most concern other MLMs is the legal finding that "recruitment payments" should be defined to include not just a payment for introducing another person to the scheme but any "benefits paid as a result of the subsequent activities of the members introduced."

My interpretation of this is that any money a MLMer ever receives as a result of the sales activities of people in their downline is considered a "recruitment payment". This includes commissions on sales of goods or services to end-customers. If people are predominantly induced to pay to join a MLM scheme because of these very broadly defined "recruitment payments" then, under the new TPA provisions, the MLM scheme is deemed to be a pyramid scheme. According to the judgment, this will occur if the "average" returns from the scheme, excluding the returns



from downline activity (recruitment payments) don't bear a reasonable relationship to the joining fee.

The Judge also made it clear that the new provisions were completely different from the ones they replaced and "would catch schemes that were not caught by the previous provisions". This is a completely contrary result to the government's stated intention that the 2002 changes to the law were a "plain english" rewrite only and were not intended to make substantive changes to the coverage of the previous provisions.

It is clear from the ACN Case that Australia's anti-pyramid selling laws have become detached from their policy rationale and from the government's intentions and may have unintended consequences for legitimate MLM companies. ACN and the Direct Selling Association of Australia are both working with government to ensure that legislative changes are made to protect the interests of legitimate direct selling organisations and their 640,000 independent distributors and salespersons in Australia. [MLM](#)

Andrew Hamilton joined ACN as its General Counsel on the day of the ACN Case court hearing.

¹ Australian Competition and Consumer Commission v Australian Communications Network Pty Ltd [2005] FCA 276 (23 March 2005).

² Ibid, at page 18, paragraph 25(b).

³ Ibid, at page 21, paragraph 33.

⁴ Ibid, at page 11.

⁵ Ibid, at page 24, paragraph 41.

⁶ Trade Practices Amendment Bill (No 1) 2002, passed in late 2002.

⁷ ACN at page 16, paragraph 17.

⁸ Ibid, at page 19, paragraphs 25(c) & 26.

⁹ Ibid, at page 16, paragraph 17.

¹⁰ Explanatory Memorandum to Trade Practices Amendment Bill (No 1) 2002 at section 1.1, paragraph 4.