



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT

Case: S ECI 2018 01963  
S ECI 2018 01963  
Filed on: 16/06/2020 10:17 AM

ALSEL GROUP PTY LTD (ACN 126 074 673)  
(as trustee for the ALSEL GROUP TRUST)  
AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE

Plaintiffs

and

BUSINESS SERVICE BROKERS PTY LTD (ACN 069 049 994)  
(trading as TELECHOICE)  
AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE

Defendants

### STATEMENT OF CLAIM

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Filed on behalf of The Plaintiffs

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### Group Proceedings and Common Questions

1. The Plaintiffs bring this group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic).
2. This proceeding is commenced by the Plaintiffs on their own behalf and on behalf of all persons who were:
  - (a) Private companies that as at 1 January 2006 had entered into franchise agreements with the First Defendant (including renewals of franchise agreements), and private companies that entered into franchise agreements with the First Defendant between 15 August 2008 and 22 October 2012 (including renewals of franchise agreements) (each an ***Independent Franchisee***, and together, the ***Independent Franchisee Group Members***).

(b) Persons who gave personal guarantees guaranteeing specified obligations of an Independent Franchisee or Independent Franchisees pursuant to franchise agreements entered into with the First Defendant (the **Guarantor Group Members**).

(Together, with the **Independent Franchisee Group Members**, the **Group Members**.)

3. There are more than seven Group Members with claims against the First Defendant, Second Defendant, Third Defendant, and Fourth Defendant and whose claims are in respect of, or arise out of, the same, similar, or related circumstances.
4. The claims of the Group Members give rise to a substantial common question of law or fact, being:
  - (a) Are the Independent Franchisee Group Members entitled to have TeleChoice hold funds being the portion of commissions claimed in the TeleChoice v Optus litigation on trust?
  - (b) Does TeleChoice owe the Independent Franchisee Group Members an obligation of indemnity and contribution?
  - (c) Are the Independent Franchisee Group Members owed fiduciary or other duties by reason of the relationship of franchisor/franchisee?
  - (d) Has the franchisor been involved in breaches of the Franchise Code of Conduct?
  - (e) Did the First Defendant's replacement on 1 April 2013 of Optus as its supplier of telecommunications products and services with a Telstra reseller called 'New World' constitute a breach of the franchise agreements because New World products and services were not similar or comparable to those products and services supplied by the First Defendant as an Optus Premium Dealer?
  - (f) Did the First Defendant's failure to provide telecommunications products and services not similar or comparable to those products and services supplied by the First Defendant as an Optus Premium Dealer for the balance of the Term or for any term of renewal constitute a breach of the franchise agreements?
  - (g) Did the First Defendant engage in unconscionable conduct?

- (h) Due to any unconscionable conduct by the First Defendant, are the Independent Franchisees Group Members entitled to orders under the ACL, including orders for compensation for possible loss?
- (i) Are the Guarantor Group Members bound by the personal guarantees?

## **Parties**

### 5. The First Plaintiff:

- (a) was at all material times an Independent Franchisee of the First Defendant pursuant to a franchise agreement dated 16 August 2007 (the **2007 Franchise Agreement**);

#### **Particulars**

The 2007 Franchise Agreement was comprised of:

- (i) a disclosure document (the **2007 Disclosure Document**);
- (ii) a franchise deed, that included a guarantee (the **2007 Franchise Deed**);
- (iii) an Agreement to Issue Recipient Created Tax Invoice;  
and
- (iv) a premises licence agreement, that included a  
guarantee and indemnity (the **2007 Premises Licence Agreement**).

- (b) from 16 August 2007 to early July 2013 was the licensee of Shop K34, Northland Shopping Centre, 2 – 50 Murray Road, East Preston, Victoria, 3072 (the **Shop**);  
and
- (c) is and was at all material times a company duly incorporated and is capable of suing and being sued.

### 6. The Second Plaintiff:

- (a) was at all material times an Independent Franchisee of the First Defendant pursuant to a franchise agreement dated 7 October 2009 (the **2009 Franchise Agreement**);

## Particulars

The 2009 Franchise Agreement was comprised of:

- (i) a disclosure document (the 2009 Disclosure Document);
- (ii) a franchise deed, that included a guarantee (the 2009 Franchise Deed);
- (iii) an Agreement to Issue Recipient Created Tax Invoice; and
- (iv) a premises licence agreement, that included a guarantee and indemnity (the **2009 Premises Licence Agreement**).

(b) was from 7 October 2009 to early July 2013 the licensee of Shop KK50, Northland Shopping Centre, 2 - 50 Murray Road, East Preston, Victoria, 3072 (the **Kiosk**); and

(c) is and was at all material times a company duly incorporated and is capable of suing and being sued.

7. The Third Plaintiff at all material times:

- (a) was a guarantor of the First Plaintiff's and the Second Plaintiff's obligations under clause 24 of the 2007 Franchise Deed and clause 24 of the 2009 Franchise Deed; and
- (b) a guarantor under the guarantee and indemnity attached to the 2007 Premises Licence Agreement and the guarantee and indemnity attached to the 2009 Premises Licence Agreement; and
- (c) was and is a director of the First Plaintiff and Second Plaintiff.

8. The First Defendant (the **First Defendant** or **TeleChoice**) is and was at all material times:

- (a) traded, and continues to trade, under the business name "TeleChoice";
- (b) was engaged in the business of providing mobile phone and Internet options to individual and business customers as a retail dealer exclusively for products and services offered by:

- (i) Optus Mobile Pty Ltd (ACN 054 365 696);
- (ii) Optus Internet Pty Ltd (ACN 083 164 532);
- (iii) Optus Networks Pty Ltd (ACN 008 570 330); and
- (iv) Optus Vision Pty Ltd (ACN 066518 821)

(together, ***Optus*** or the ***Optus Entities***)

- (c) carried on a franchise system as franchisor selling franchises operating out of retail shops, and kiosks in shopping centres, using the TeleChoice corporate style and brand, until 31 March 2013, as an Optus Premium Dealer;
- (d) is duly incorporated and is capable of being suing and being sued.

9. The Second Defendant was from 16 March 1999 and is currently:

- (a) the Chief Executive Officer of the First Defendant; and
- (b) a director and officer of the First Defendant within the meaning of section 9 of the *Corporations Act 2001* (Cth).

10. The Third Defendant was from 12 April 1995 and is currently:

- (a) the Managing Director of the First Defendant; and
- (b) a director and officer of the First Defendant within the meaning of section 9 of the *Corporations Act 2001* (Cth).

### **Terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement**

11. There were express terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement that:

- (a) the Franchisor within five business days of receiving any of the Connection commission and Airtime commission from any approved service providers pay to the Franchisee the percentage or portion thereof as has been prescribed by the Franchisor from time to time;

**Particulars**

Sub-clauses 13(a)(i) and 13(a)(ii) of the 2007 Franchise Deed and the 2009 Franchise Deed.

(b) in the event that the Franchisee's percentage or portion of the Connection commission and Airtime commission has not been otherwise prescribed by the Franchisor, the Franchisee's Connection commission and Airtime commission shall be that percentage or portion specified in Item 21(a) of the Schedule (in the case of Connection commission) and in Item 21(b) of the Schedule (in the case of Airtime commission);

**Particulars**

Clause 13(b) and clause 13(c) of the 2007 Franchise Deed and the 2009 Franchise Deed.

Item 21(a) of the Schedule to the 2007 Franchise Deed and the 2009 Franchise Deed states that the Connection commission is to "be advised by the Franchisor to the Franchisee from time to time".

Item 21(b) of the Schedule to the 2007 Franchise Deed and the 2009 Franchise Deed states that the Connection commission is "6% or such other rate as is advised to the Franchisor to the Franchisee in writing from time to time".

(c) the obligation of the Franchisor to pay commission to the Franchisee shall in no event, or for no reason, arise, until such time as the Franchisor has first received payment of such commission from the service provider;

**Particulars**

Clause 13(d) of the 2007 Franchise Deed and the 2009 Franchise Deed.

(d) the covenants, conditions, provisions and warranties contained in the 2007 Franchise Deed and the 2009 Franchise Deed shall not merge or terminate upon the completion of the transactions contemplated herein but to the extent that they

have not been fulfilled and satisfied or are capable of having effect they shall remain in full force and effect.

### **Particulars**

Clause 37 of the 2007 Franchise Deed and the 2009 Franchise Deed.

12. There were implied terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement that:

- (a) each Franchise Agreement would be renewed for a further term with the First Defendant being an Optus Premium Dealer (the ***Renewal Implied Term***);

### **Particulars**

The Renewal Implied Term is to be inferred by the wording and proper construction of the 2007 Franchise Deed, the 2009 Franchise Deed, and the 2009 Disclosure Document.

- (b) the First Defendant would only enter into a dealer agreement with another supplier of similar telecommunications products and services as that offered by the First Defendant as an Optus Premium Dealer and that had comparable consumer demand to the products and services the First Defendant offered as an Optus Premium Dealer (the ***Premium Dealer Implied Term***); and

### **Particulars**

The Premium Dealer Implied Term is to be inferred by the wording and proper construction of the 2007 Franchise Deed and the 2009 Franchise Deed.

- (c) the First Defendant has an obligation to the First Plaintiff, the Second Plaintiff and the Independent Franchisee Group Members to account for commissions.

### **Particulars**

The First Defendant's obligation to account for commissions is implied by law and by the nature of the franchisor/franchisee relationship.

## **The TeleChoice v Optus Litigation**

13. In 2017, the First Defendant commenced a proceeding against the Optus Entities.

### **Particulars**

Supreme Court of Victoria proceeding ECI 2017 00289 (the ***TeleChoice v Optus Litigation***).

14. In the TeleChoice v Optus Litigation, TeleChoice makes the following claims against Optus in its Second Further Amended Statement of Claim (**SFASOC**):

- (a) that in July 2007 Optus engaged in misleading and deceptive conduct by representing that under a new appointment with Optus TeleChoice's revenue would be the same as revenue that would be earned by TeleChoice under an intended dealer agreement with Telstra that TeleChoice had been negotiating (the Revenue Representation). Subsequently, during the term of the agreement between TeleChoice and Optus beginning 1 April 2008 and ending 31 March 2013 (the Final Dealer Agreement) TeleChoice claims it earned approximately \$100,724,095.00 less than it would have earned under the intended dealer agreement with Telstra based on the procurement by TeleChoice of approximately 767,147 post-paid GSM Service connections on the Optus Mobile network;
- (b) that the Revenue Representation was an oral and express term of a document entitled "TeleChoice Contract Financial Summary" (the **Revenue Term**) that Optus has breached causing the loss or damage referred to in paragraph 14(a), above;
- (c) that the Revenue Representation was part of a collateral contract entered into between TeleChoice and Optus. Optus has breached the collateral contract by failing to pay the sum referred to in paragraph 14(a), above, causing loss or damage.
- (d) that the Revenue Representation gives rise to an equitable estoppel as it would be unconscionable for Optus to fail to fulfil the Revenue Representation and TeleChoice will suffer detriment if the Revenue Representation is not fulfilled by Optus. Therefore, TeleChoice is entitled to equitable relief in the sum referred to in paragraph 14(a), above;

- (e) that in or around July 2007, TeleChoice told the Optus Entities that the intended dealer agreement with Telstra was to include terms by which the TeleChoice business would be purchased by Telstra for a purchase price of up to \$100,000,000.00 at the conclusion of the term of the dealer agreement. TeleChoice claims that prior to the entry by TeleChoice into a further dealer agreement with Optus, the Optus Entities engaged in misleading and deceptive conduct by representing that they would match the purchase term offered by Telstra and purchase the TeleChoice business at a future date (the **Purchase Representation**). The Optus Entities did not purchase the TeleChoice business from TeleChoice and TeleChoice claims loss and damage;
- (f) that Optus breached an implied term in the Final Dealer Agreement by carrying out Digital Advances that changed the dealer codes of customers of TeleChoice on 24 months plans from a TeleChoice associated dealer code to an Optus associated dealer code thereby directing Airtime commissions away from TeleChoice to Optus thereby causing TeleChoice loss and damage in the form of loss commissions;
- (g) that Optus breached an implied term in the Final Dealer Agreement the disassociation of customers from TeleChoice by changing the dealer codes of TeleChoice customers on eligible rate plans from a TeleChoice associated dealer code to an Optus associated dealer code thereby directing Airtime commissions away from TeleChoice to Optus thereby causing TeleChoice loss and damage in the form of loss commissions;
- (h) that Optus breached an implied term in the Final Dealer Agreement by recontracting TeleChoice customers that had been on a TeleChoice contract for more than 21 months but less than the full 24 month period without charging those customers an exit fee in circumstances where TeleChoice was contractually prohibited from recontracting such customers without charging an exit fee, thereby diverting customers away from TeleChoice and causing loss and damage in the form of lost commissions;
- (i) that during the term of the Final Dealer Agreement Optus caused loss and damage to TeleChoice by being in breach of contract in relation to clawbacks: by breaching of clause 11.4 of the Master Dealer Agreement; or a general implied term of good faith; or an implied term of good faith in relation to compliance procedures for clawbacks;

- (i) by making alleged clawbacks that did not conform with Optus' policies;
- (ii) by making alleged clawbacks for alleged bad debts that were not written off by Optus or were subsequently paid (in whole or in part);
- (iii) by not providing compliance training in breach of contract; and/or
- (iv) because clause 11.4 of the Master Dealer Agreement is unenforceable as a penalty.

- (j) that on or about 30 April 2013 the Optus Entities deducted the sum of \$2,227,739.89 (including GST) without notice to TeleChoice from commission due to TeleChoice of \$5,396,625.88 (the Wrongful Deduction) which was commission that the Optus Entities admitted was due and payable to TeleChoice for March 2013 and as a result TeleChoice has suffered loss and damage;
- (k) that on or about 3 October 2012 TeleChoice sought payment of \$550,000.00 (including GST) for an annual branding fund (the **Annual Branding Fund**) that it had received payments for from Optus for the previous four years. TeleChoice alleges that in breach of Schedule 7, clause 3.1 of the Master Dealer Agreement Optus failed to pay the 3 October 2012 invoice;
- (l) that Optus engaged in unconscionable conduct with respect to: the breaches of the Revenue Term; the making of Digital Advances, the disassociation of customers from TeleChoice; diverting customers away from TeleChoice; by being in breach of contract in relation to clawbacks; and the Wrongful Deduction, which caused TeleChoice to suffer loss and damage;
- (m) that Optus engaged in misleading and deceptive conduct in relation to a settlement agreement with TeleChoice whereby TeleChoice released Optus from an outcome payment (Outcome Payment) for 2011/2012 for \$4.2 million (including GST) for reduced outcome payment targets for 2012/2013, and Optus' conduct in relation to the settlement agreement caused TeleChoice loss and damage;
- (n) that Optus breached the settlement agreement with TeleChoice by breaching the best endeavours term in the settlement agreement by making public on 30 October 2012 to terminate TeleChoice as an Optus retailer;
- (o) that Optus engaged in unlawful conduct after its 30 October 2012 public announcement to terminate TeleChoice as an Optus retailer, including:

clawback of commissions from TeleChoice; failing to supply TeleChoice with approximately 4500 iPhone 5 mobile telephone handsets the launch of that handset in late 2012, some of which were presold, with the result that TeleChoice lost approximately 4500 activations (while at the same time accepting and fulfilling customer orders for iPhone 5 mobile telephone handsets which the Optus Entities received online. TeleChoice alleges this conduct caused TeleChoice to fail to meet its reduced outcome payment targets in the settlement agreement and therefore not receive an outcome payment for 2012/2013 thus causing loss and damage. TeleChoice brings claims for unconscionable conduct, breach of a term of good faith, and breach of the best endeavours term in the settlement agreement;

- (p) from about early 2013 that Optus induced breach of contract by some TeleChoice franchisees (the ***Solicited Franchisees***) causing TeleChoice loss and damage;
- (q) that on or about 21 July 2011, Optus Mobile, Optus Internet and Optus Networks appointed TeleChoice as an Optus business channel partner for the provision of mobile services, fixed voice services, fixed data services and wireless services to small and medium-sized businesses in Australia (the Business Channel Partner Agreement or BCPA). TeleChoice alleges that Optus has admitted that under the Business Channel Partner Agreement it has underpaid commissions; that Optus diverted TeleChoice's BCPA customers to Optus and that such conduct was unconscionable; Optus deducted purported overpaid BCPA commission from TeleChoice; that one or more of the Optus Entities in about mid-March 2013 purported to sell or otherwise transfer the dealer codes and monthly trailing commission in respect of the Business Channel Partner Agreement to third parties without informing TeleChoice; and that the above conduct has caused TeleChoice loss and damage.
- (r) that Optus breached the Final Dealer Agreement by not purchasing or unsold stock (the ***Unsold Stock***) at close business on 31 March 2013 causing loss of \$176,314.41 (including GST).

15. In the Prayer for Relief in the SFASOC the primary relief TeleChoice seeks is:

- (a) damages for breach of contract;
- (b) damages pursuant to section 82 of the *Trade Practices Act 1974* (Cth) (***TPA***) or section 236 of the Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the ***Australian Consumer Law*** or ***ACL***);

- (c) compensation pursuant to section 87 of the TPA or section 237 of the ACL;
- (d) further all alternatively, equitable compensation; and
- (e) damages in respect of tort of inducing breach of contract.

16. TeleChoice at paragraph [155] of the SFASOC pleads what its loss and damage comprises, being:

- (a) the underpayment of call commission;
- (b) the monies clawed back or otherwise set-off or deducted from TeleChoice by Optus Mobile in respect of the clawback of commission;
- (c) Optus' clawback of commission in respect of Wrongful Deduction;
- (d) the underpayment of the Annual Branding Fund;
- (e) the Outcome Payment for 2011/2012;
- (f) the Outcome Payment for 2012/2013;
- (g) if the Settlement Agreement is enforceable (which is denied), the non-payment of the Outcome Payment for 2012/2013;
- (h) loss sales in the period 30 October 2012 to 31 March 2013, including the management fee, activation commission and call commission on the sales;
- (i) the Quarter 1, 2011/2012 clawback;
- (j) unpaid trading account debts of the purported Solicited Franchisees together with interest on those debts and recovery costs in respect of those debts calculated and payable by the Solicited Franchisees under the terms of the franchise agreements;
- (k) loss of revenue forgone because the Revenue Representation was not adhered to by the Optus Entities;
- (l) loss of the value of the TeleChoice business because the Purchase Representation was not adhered to by the Optus Entities;
- (m) unpaid monies in respect of Unsold Stock;

- (n) the monies clawed back by the Optus Entities in respect of the purported BCPA overpaid commission; and
- (o) the loss of opportunity to sell the Business Channel Partner Agreement business.

**The First and Second Plaintiff's entitlement to commissions claimed by TeleChoice**

17. By reason of express and implied terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement TeleChoice are bound to pay the First Plaintiff and the Second Plaintiff a portion of the sums received by TeleChoice for commissions claimed by it in the TeleChoice v Optus Litigation.

**Particulars**

Insofar as the terms are express terms they are express terms of the 2007 Franchise Deed and the 2009 Franchise Deed enumerated in sub-paragraphs 11(a); 11(b); 11(c); 11(d), above.

Insofar as the terms are implied terms they are contained in the 2007 Franchise Agreement and the 2009 Franchise Agreement and pleaded at sub-paragraph 12(c), above.

18. In the premises, the First Plaintiff and the Second Plaintiff seek a declaration that by reason of the express terms and implied terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement TeleChoice are bound to pay the First Plaintiff, the Second Plaintiff, and the Independent Franchisee Group Members, a portion of the sums received by TeleChoice for commissions in the TeleChoice v Optus Litigation.

**Unconscionable Conduct**

19. Further, the First Defendant was and is engaged in trade and commerce within the meaning of section 2(1) of the ACL.
20. By the claiming and retaining the commissions claimed in the TeleChoice v Optus Litigation for itself, the First Defendant has engaged in conduct which is, in all the circumstances, unconscionable, in breach of section 21 of the ACL.

**Particulars**

The First Plaintiff and the Second Plaintiff refer to and repeat sub-paragraphs 11(a); 11(b); 11(c); 11(d); paragraph 14; and sub-paragraphs 16(a); 16(b); 16(c); 16(h); 16(i); 16(k); and 16(n), above.

21. By virtue of TeleChoice's unconscionable conduct the First Plaintiff and the Second Plaintiff are entitled to:

- (a) a compensation order as persons who have suffered, or are likely to suffer, loss and damage because of TeleChoice's conduct; and

**Particulars**

Section 237 of the ACL.

- (b) an order varying the 2007 Franchise Agreement and the 2009 Franchise Agreement to include a provision that TeleChoice indemnify the First Plaintiff and Second Plaintiff for claims for commission made in the TeleChoice v Optus Litigation or such other order as the court deems appropriate.

**Particulars**

Section 243(b) of the ACL.

22. Alternatively, to paragraph the First Plaintiff and the Second Plaintiff claim damages pursuant to section 236 of the ACL.

**Fiduciary Duties**

23. Alternatively, by reason of the relationship between TeleChoice and the First Plaintiff and the Second Plaintiff as franchisor/franchisee and the terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement, TeleChoice owes the First Plaintiff and the Second Plaintiff fiduciary duties:

- (a) not to profit from its relationships with the First Plaintiff and the Second Plaintiff;
- (b) to avoid a conflict of interest; and
- (c) to hold any commissions received by it on trust.

24. In the premises, the First Plaintiff and the Second Plaintiff seek a declaration that to the extent that TeleChoice recovers any sums for commissions in the TeleChoice v Optus Litigation, TeleChoice holds such sums on trust for the First and Second Plaintiffs and the Independent Franchisee Group Members.

### **First Defendant's Breaches of Contract**

#### *Express Terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement*

25. There were further express terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement that:

(a) in consideration for the performance and observance of the covenants contained in each Deed and on the part of the Franchisee to be observed and performed, the Franchisor hereby grants to the Franchisee a franchise and licence: to operate and conduct the Business at and from the Site as the franchisee of and under licence from the Franchisor and for the term which is specified in item 9 of the Schedule (Item 9 states: The duration of the demised term of the Lease (which is referred to in clause 4 of each Deed) between the Franchisor and the Lessor of the Premises from which the Business is to be conducted, commencing on the later of the commencement date which is specified in the Lease, and the date of this Franchise Agreement, and ending one day prior to the expiration or earlier termination of the Lease);

### **Particulars**

Clause 1(a) and Item 9 of the Schedule of the 2007  
Franchise Deed and the 2009 Franchise Deed.

(b) The Franchisee agrees, acknowledges, declares, and covenants with the Franchisor that:

(i) for the purposes of maintaining uniformity in the conduct of the Business, the said Business and the businesses which are conducted by all other franchisees, and for the purposes of ensuring the quality of the Products and services offered for sale by the said Business, and for the purposes of optimising volume purchasing opportunities for products and services, and for the purposes of obtaining the maximum benefit of all promotional

activities carried on by or on behalf of the Franchisor, the Franchisee shall at all times during the Term:

1. not display or offer for sale at the Premises or in the said Business, any Products other than those Products which have been purchased by the Franchisee from the Franchisor or from any of the approved suppliers;
2. only promote the telecommunications services which are offered and provided by the telephone service providers who:
  - a. are specified in Item 15 of the Schedule (Optus Mobile Pty. Ltd. ACN 054 365 696 and Virgin Mobile (Australia) Pty. Ltd. ACN 092 726 442); and/or
  - b. may from time to time be approved in writing by the Franchisor (“approved service providers”);

#### **Particulars**

Clauses 8(m)(ii) and (iii), and Item 15 to the Schedule of the 2007 and 2009 Franchise Deeds.

(c) the Franchisor may at any time during the Term review the quality of Products produced and supplied by approved suppliers; and review the quality of services offered and provided by approved service providers; and following upon any such review, the Franchisor shall be entitled to:

- (i) revoke any person’s status as an approved supplier or an approved service provider; and/or
- (ii) appoint any other person or persons as approved suppliers or approved service providers, by giving written notice to that effect to the Franchisee.

#### **Particulars**

Clause 8(n) of the 2007 and 2009 Franchise Deeds.

(d) the Franchisee shall, at all times after the execution of this Deed, observe and perform all of the covenants and obligations which are imposed upon and to be observed and performed by the Franchisor under:

- (i) the Lease; and
- (ii) the Master Dealer Agreement, the Master Agency Agreement and any other Agreement between the Franchisor, Optus Mobile Pty. Ltd and any other Optus contracting party, as referred to in Clause 8 (rr) hereof.
- (iii) Any agreement between the Franchisor and Virgin Mobile (Australia) Pty. Ltd. (if applicable), as referred to in Clause 8 (rr) hereof,

in the same way as if those covenants and obligations were set out in this Deed of Franchise and Licence as personal covenants on the part of the Franchisee. The Franchisee acknowledges that this sub-Clause 8(x) is an essential term of this Deed of Franchise and Licence and that a breach by the Franchisee of any of the covenants and obligations in the Dealer Agreements as referred to in Clause 8(rr) hereof, shall constitute a breach of this Deed of Franchise and Licence and which may result in termination pursuant to Clauses 18 and 19 of this Deed.

### **Particulars**

Clause 8(x) of the 2007 and 2009 Franchise Deeds.

- (e) it is aware that the Franchisor:
  - (i) is a duly appointed dealer of the telephone service providers who are specified in Item 15 of the Schedule;
  - (ii) has executed and entered into the dealer agreements which may, but not necessarily, be annexed to this Deed and if so annexed, marked with the letters "A" and "B" respectively (**the Dealer Agreements**) with the telephone service providers who are specified in Item 15 of the Schedule;
  - (iii) may, during the Term:
    1. become a duly appointed dealer for other telephone service providers;
    2. in order to become a duly appointed dealer of such other telephone service providers, execute and enter into agreements similar to the Dealer Agreements;

3. nominate and approve such other telephone service providers pursuant to clause 9(m)(iii)(y) of this Deed;
- (iv) will, in respect of each the Connections which are procured by the Franchisee, receive from the relevant approved service providers:
  1. a one-off connection commission; and
  2. ongoing airtime commission based on the customer's airtime usage following the Connection;

### **Particulars**

Clause 8(rr) of the 2007 and 2009 Franchise Deeds.

- (f) Provided that the Franchisee serves a request in writing on the Franchisor, not less than 3 months prior to the end of the term of the licence hereby granted, and is not then in breach of any of the terms and conditions of this Franchise Agreement, then the Franchisor and the Franchisee may by mutual agreement in writing renew the Licence to the Franchisee on the terms and conditions on which Licenses are granted by the Franchisor at the relevant time, provided that:
  - (i) the Franchisor is able to negotiate with the Lessor of the premises, a further term of the Lease;
  - (ii) the new Licence shall be for the term of the new Lease; and

### **Particulars**

Sub-clauses 29(a) and (b) of the 2007 and 2009 Franchise Deeds.

- (g) sub-clause 1(c)(i) of the 2007 Premises Licence Agreement provided that the Licence fees shall be paid by the Licensee directly to the Landlord as required pursuant to the Lease, or as otherwise directed by the Lessor from time to time.

#### *First Defendant's breaches of 2007 Franchise Agreement*

26. In breach the 2007 Franchise Agreement:

(a) on 16 August 2007 the First Defendant granted to the First Plaintiff a franchise and licence to operate and conduct the business at the Shop in the knowledge that the agreed term was for a period longer than TeleChoice's Final Dealer Agreement with Optus as an Optus Premium Dealer;

### **Particulars**

Sub-clause 1(a) of the 2007 Franchise Deed and Item 9 of the Schedule to the 2007 Franchise Deed.

The 2007 Franchise Agreement was for a six year period (ending about 15 August 2013). The First Defendant had been negotiating with Telstra from about June 2006 until July 2007 and on 1 October 2006 entered into a heads of agreement with Telstra and thereafter worked on a draft Telstra Dealership Agreement to be appointed a Telstra dealer for a five year term commencing on or around 15 April 2008 and further as part of its agreement with Telstra the TeleChoice business would be purchased by Telstra. These facts are alleged by TeleChoice in paragraphs 9 and 10 and the particulars subjoined thereto of the SFASOC.

From 5 July 2007 the First Defendant understood that it had a further dealer appointment with Optus only until 31 March 2013 and that at that time Optus would purchase the TeleChoice business and that understanding continued until 28 September 2012 when the Optus Entities informed TeleChoice that they did not intend to enter into a new dealer appointment with TeleChoice or purchase the TeleChoice business. These facts are alleged by TeleChoice in paragraphs 12 to 18, 20, 21 and 25, and the particulars subjoined thereto, of the SFASOC.

(b) on 16 August 2007 the First Defendant granted to the First Plaintiff a franchise and licence to operate and conduct the business at the Shop in the knowledge that it had no capacity or intention to grant a renewal to the First Plaintiff;

**Particulars**

Sub-clauses 29(a) and (b) of the 2007 Franchise Deed.

The First Plaintiff refers to and repeats the second and third paragraphs of the particulars subjoined to paragraph 26(a), above.

(c) on 1 April 2013 the First Defendant replaced its Optus Premium Dealership with a dealership from a Telstra reseller called 'New World', which did not offer the similar or comparable premium products and services, such as rates and plans, as Optus;

**Particulars**

Sub-clause 8(rr)(iii)(y) of the 2007 Franchise Deed when interpreted in the context of the 2007 Franchise Agreement as a whole, including sub-clauses 8(m)(i), 8(m)(iii), 8(n), 9(m)(iii)(y), and Item 15 to the Schedule of the 2007 Franchise Deed.

The New World dealer agreement(s) were not similar to the dealer agreements entered into with Optus because the products and services supplied under the agreement with New World were inferior to those products and services supplied by the First Defendant to the First Plaintiff as an Optus Premium Dealer in that, based on the number of monthly connections performed by the First Plaintiff, the New World products and services were uncompetitive in the market for mobile phone connections.

Further particulars will be provided after discovery.

(d) from 1 April 2013 until on or around 7 July 2013, being the date on which the First Plaintiff stopped trading at the Shop, the First Defendant failed to undertake a review of the New World products and services;

**Particulars**

Subclause 8(n) of the 2007 Franchise Deed.

The New World products and services were not comparable to the products and services of an Optus Premium Dealer.

As a result, the First Plaintiff and the Second Plaintiff procured on average 12 connections per month between them from the Shop and the Kiosk. In comparison, when the First Plaintiff and the Second Plaintiff sold Optus products and services they procured on average 180 connections per month between them.

Further particulars will be provided after discovery.

- (e) from about October 2012 to early July 2013 the First Defendant failed or neglected to pay the monthly rent due pursuant to sub-clause 1(c)(i) of the 2007 Premises Licence Agreement for the Shop to the Landlord pursuant to the Lease thus breaching the Shop's Lease.

### **Particulars**

The First Plaintiff never paid the Landlord directly for rent due under the Shop Lease entered into by the First Defendant. At all times from 16 August 2007 to on or around 22 October 2012 the First Defendant paid the rent due under the Shop Lease by deducting licence fees (which were the same sum as the rent) from the First Plaintiff's trading account with the First Defendant. The trading account was made up of credits from connection commissions and airtime commissions and debits for such things as franchise fees, licence fees and product purchases.

Despite not paying the Shop's rent, the First Defendant continued to deduct licence fees from the First Plaintiff's trading account and kept such sums for its own use.

At no stage during the period was the First Plaintiff told by the First Defendant that it had stopped paying the Shop's rent.

27. As a result of the First Defendant's breaches of the 2007 Franchise Agreement the First Plaintiff has suffered loss and damage.

**Particulars**

- (i) Loss of earnings as a provider of Optus Premium products and services from 31 March 2013 until the end of the 2007 Franchise Agreement's term.
- (ii) Alternatively to (i), loss of earnings being the difference between the sales secured and commissions paid as a seller of Optus products and services and the sales secured and commissions paid as a seller of New World products and services.
- (iii) Licence Fees deducted from trading account but not passed on to the Shop's Landlord as rent from on or around 22 October 2012 to on or around 7 July 2013.
- (iv) Loss of start-up costs of \$245,000.00 being the purchase price for the Shop and fit-out costs.
- (v) Loss of Airtime commissions for 24 months.
- (vi) Loss of opportunity to sell a profitable business as a going concern.
- (vii) Loss of a chance to renew franchise agreement.

*First Defendant's breaches of 2009 Franchise Agreement*

28. In breach the 2009 Franchise Agreement:

- (a) on 7 October 2009 the First Defendant granted to the Second Plaintiff a franchise and licence to operate in conduct business at the Kiosk in the knowledge that the agreed term was for a period longer than TeleChoice's Final Dealer Agreement with Optus as an Optus Premium Dealer;

**Particulars**

Sub-clause 1(a) of the 2009 Franchise Deed and Item 9 of the Schedule to the 2009 Franchise Deed.

The 2009 Franchise Agreement was for a five year six month period (ending on about 6 April 2015). The First Defendant had been negotiating with Telstra from about June 2006 until July 2007 and on 1 October 2006 entered into a heads of agreement with Telstra and thereafter worked on a draft Telstra Dealership Agreement to be a Telstra dealer for a five year term commencing on or around 15 April 2008 and further as part of its agreement with Telstra the TeleChoice business would be purchased by Telstra. These facts are alleged by TeleChoice in paragraphs 9 and 10 and the particulars subjoined thereto of the SFASOC.

From 5 July 2007 the First Defendant understood that it had a further dealer appointment with Optus only until 31 March 2013 and that at that time Optus would purchase the TeleChoice business and that understanding continued until 28 September 2012 when the Optus Entities informed TeleChoice that they did not intend to enter into a new dealer appointment with TeleChoice or purchase the TeleChoice business. These facts are alleged by TeleChoice in paragraphs 12 to 18, 20, 21 and 25, and the particulars subjoined thereto, of the SFASOC.

- (b) on 7 October 2009 the First Defendant granted to the Second Plaintiff a franchise and licence to operate in conduct business at the Kiosk in the knowledge that it had no capacity or intention to grant a renewal to the Second Plaintiff;

### **Particulars**

Sub-clauses 29(a) and (b) of the 2009 Franchise Deed.

The Second Plaintiff refers to and repeats the second and third paragraphs of the particulars subjoined to paragraph 26(a), above

- (c) on 1 April 2013 the First Defendant replaced its Optus Premium Dealership with a dealership from a Telstra reseller called 'New World', which did not offer the similar or comparable premium products and services, such as rates and plans, as Optus and did not pay airtime commission at all;

### **Particulars**

Sub-clause 8(rr)(iii)(y) of the 2009 Franchise Deed when interpreted in the context of the 2009 Franchise Agreement as a whole, including sub-clauses 8(m)(i), 8(m)(iii), 8(n), 9(m)(iii)(y), and Item 15 to the Schedule of the 2009 Franchise Deed.

The New World dealer agreement(s) were not similar to the dealer agreements entered into with Optus because the products and services supplied under the agreement with New World were inferior to those products and services supplied by the First Defendant to the Second Plaintiff as an Optus Premium Dealer in that, based on the number of monthly connections performed by the Second Plaintiff, the New World products and services were uncompetitive in the market for mobile phone connections.

Further particulars will be provided after discovery.

- (d) from 1 April 2013 until on or around 7 July 2013, being the date on which the First Plaintiff stopped trading at the Shop, the First Defendant failed to undertake a review of the New World products and services;

### **Particulars**

Subclause 8(n) of the 2009 Franchise Deed.

The New World products and services were not comparable to the products and services of an Optus Premium Dealer. As a result, the First Plaintiff and the Second Plaintiff procured on average 12 connections per month between them from the Shop and the Kiosk. In comparison, when the First Plaintiff and the Second Plaintiff sold Optus products and services they procured on average 180 connections per month between them.

Further particulars will be provided after discovery.

(e) from about October 2012 to early July 2013 the First Defendant failed or neglected to pay the monthly rent due pursuant to sub-clause 1(c)(i) of the 2009 Premises Licence Agreement for the Kiosk to the Landlord pursuant to the Lease thus breaching the Kiosk's Lease.

### **Particulars**

The Second Plaintiff never paid the Landlord directly for rent due under the Kiosk Lease entered into by the First Defendant. At all times from 16 August 2007 to on or around 22 October 2012 the First Defendant paid the rent due under the Kiosk Lease by deducting licence fees (which were the same sum as the rent) from the Second Plaintiff's trading account with the First Defendant. The trading account was made up of credits from connection commissions and airtime commissions and debits for such things as franchise fees, licence fees and product purchases.

Despite not paying the Shop's rent, the First Defendant continued to deduct licence fees from the Second Plaintiff's trading account and kept such sums for its own use.

At no stage during the period was the Second Plaintiff told by the First Defendant that it had stopped paying the Kiosk's rent.

29. As a result of the First Defendant's breaches of the 2009 Franchise Agreement the Second Plaintiff has suffered loss and damage.

### **Particulars**

- (i) Loss of earnings as a provider of Optus Premium products and services from 31 March 2013 until the end of the 2007 Franchise Agreement's term.
- (ii) Alternatively to (i), loss of earnings being the difference between the sales secured and commissions paid as a seller of Optus products and

services and the sales secured and commissions paid as a seller of New World products and services.

- (iii) Licence Fees deducted from trading account but not passed on to the Shop's Landlord as rent from on or around 22 October 2012 to on or around 7 July 2013.
- (iv) Loss of purchase price for the Kiosk.
- (v) Loss of airtime commissions.
- (vi) Loss of opportunity to sell a profitable business as a going concern.
- (vii) Loss of the chance to renew franchise agreement.

### **Misleading and Deceptive Conduct**

30. Further, at all relevant times until 31 December 2010, the First Defendant was engaged in trade and commerce within the meaning of section 4 of the TPA.
31. At all relevant times after 1 January 2011, the First Defendant was engaged in trade and commerce within the meaning of section 2(1) of the ACL.

#### *The First Defendant's misleading conduct to the First Plaintiff*

32. The First Defendant on or around 16 August 2007 represented to the First Plaintiff that:
  - (a) it was willing to grant to the First Plaintiff a franchise and licence to operate and conduct business at the Shop for a six year period (the **2007 Franchise Representation**); and

### **Particulars**

The 2007 Franchise Representation was partly oral and partly in writing. Insofar as it is oral it was made by the Third Defendant to the First Plaintiff and Third Plaintiff at the First Defendant's head office just prior to the First Defendant entering into the 2007 Franchise Agreement. Insofar as the 2007 Franchise Representation is in writing it is contained in sub-clause 1(a) of the 2007 Franchise Deed.

(b) the grant to the First Plaintiff of the franchise and licence to operate and conduct business at the Shop came with an option for the First Plaintiff to renew the 2007 Franchise Agreement (the **2007 Renewal Representation**).

#### **Particulars**

The 2007 Renewal Representation was partly oral and partly in writing. Insofar as it was oral, the 2007 Renewal Representation was made by Mr Paul Reeves, a director of the First Defendant on 16 August 2007. Mr Reeves on behalf of the First Defendant told Mr Selek, just prior to Mr Selek, on behalf of himself and the First Plaintiff, signing the documents constituting the 2007 Franchise Agreement that under the 2007 Franchise Agreement he had a 6x5x5, meaning a six year term with two five year options. Insofar as the 2007 Renewal Representation was in writing it was in sub-clause 29(a) and (b) of the 2007 Franchise Deed.

33. Insofar as the 2007 Franchise Representation and the 2007 Renewal Representation are in writing they are continuing representations.
34. The 2007 Renewal Representation is with respect to future matters and the First Plaintiff relies on section 51A of the TPA and section 4(1) of the ACL.
35. The 2007 Franchise Representation and the 2007 Renewal Representation are misleading and deceptive or are likely to mislead and deceive pursuant to section 52 of the TPA or, after 31 December 2010, section 18 of the ACL.

#### **Particulars**

In respect of the 2007 Franchise Representation the First Defendant had knowledge that the term of the 2007 Franchise Agreement was longer than the term of its appointment as a premium Optus dealer with Optus. In respect of the 2007 Renewal Representation the First Defendant had knowledge that it would not be in a position to grant the First Plaintiff a renewal of the 2007 Franchise Agreement because, at that stage, it was planning to sell the TeleChoice business to Optus.

The First Defendant had been negotiating with Telstra from about June 2006 until July 2007 and on 1 October 2006 entered into a heads of agreement with Telstra and thereafter worked on a draft Telstra Dealership Agreement to be a Telstra dealer for a five year term commencing on or around 15 April 2008 and as part of its agreement with Telstra the TeleChoice business would be purchased by Telstra. These facts are alleged by TeleChoice in paragraphs 9 and 10 and the particulars subjoined thereto of the SFASOC.

From 5 July 2007 the First Defendant understood that it had a further dealer appointment with Optus only until 31 March 2013 and Optus would purchase the TeleChoice business and that understanding continued until 28 September 2012 when the Optus Entities informed TeleChoice that they did not intend to enter into a new dealer appointment with TeleChoice or to purchase the TeleChoice business. These facts are alleged by TeleChoice in paragraphs 12 to 18, 20, 21 and 25, and the particulars subjoined thereto, of the SFASOC.

In the circumstances the First Plaintiff had a reasonable expectation that the First Defendant would disclose the fact that its appointment with Optus as an Optus Premium dealer would end on 31 March 2013 and that the First Defendant was in no position to offer any renewal of the 2007 Franchise Agreement.

36. In reliance on the 2007 Franchise Representation and the 2007 Renewal Representation the First Plaintiff entered into the 2007 Franchise Agreement.

#### **Particulars**

But for the 2007 Franchise Representation and the 2007 Renewal Representation, the First Plaintiff would not have entered into the 2007 Franchise Agreement, especially given

the upfront costs, being the purchase price and fit-out costs, totalling \$245,000.00

37. The First Plaintiff has suffered loss and damage due to the 2007 Franchise Representation and the 2007 Revenue Representation.

**Particulars**

Section 236 of the ACL

\$245,000.00 being the total of the purchase price and fit-out costs.

Further particulars will be given after discovery.

38. Further, between 22 October 2012 to 7 July 2013 the First Defendant represented to the First Plaintiff that it was paying the rent due on the Shop by deducting licence fees from the total commissions credited to the First Plaintiff's trading account with the First Defendant (the **Shop Licence Fees Representation**).

**Particulars**

Insofar as the Shop Licence Fees Representation is in writing it is constituted by the monthly trading accounts in the period 22 October 2012 to 7 July 2013 provided to the First Plaintiff by the First Defendant. It is also constituted by the First Defendant's silence in not telling the First Plaintiff that it was not paying the rent for the Shop.

39. The Shop Licence Fees Representation is misleading and deceptive or likely to mislead and deceive in contravention of section 18 of the ACL.

**Particulars**

In circumstances where the rent for the Shop had since the signing of the 2007 Franchise Agreement had always been deducted from the First Plaintiff's trading account with the First Defendant as licence fees and the First Defendant until on or around 22 October 2012 had always paid the rent due under the lease for the Shop, the First Plaintiff would have a

reasonable expectation that if the First Defendant was no longer paying the rent for the Shop but still deducting the licence fees from the First Plaintiff's monthly trading account, that the First Defendant would disclose the fact that the rent for the Shop was not being paid.

40. In reliance on the Shop Licence Fees Representation the First Plaintiff continued to trade at the Shop until on or around 7 July 2013 when the First Plaintiff telephoned the landlord and was told that approximately \$107,000 in rent was owing between the Shop, licensed by the First Plaintiff and the Kiosk, licensed by the Second Plaintiff.

**Particulars**

Had the First Plaintiff known that the rent for the Shop was not being paid, the First Plaintiff would have ceased trading immediately as it did do on or around 7 July 2013 when the First Plaintiff spoke to the landlord.

41. The First Plaintiff has suffered loss and damage due to the Shop Licence Fee Representation.

**Particulars**

Section 236 of the ACL.

Loss of licence fees deducted from the First Plaintiff's trading account with the First Defendant and taken by the First Defendant for its own use.

*The First Defendant's misleading conduct to the Second Plaintiff*

42. The First Defendant on or around 7 October 2009 represented to the Second Plaintiff that:
  - (a) it was willing to grant to the Second Plaintiff a franchise and licence to operate and conduct business at the Kiosk for a 5 year 6 month period (the **2009 Franchise Representation**); and

**Particulars**

The 2009 Franchise Representation in writing and is contained in sub-clause 1(a) of the 2009 Franchise Deed.

(b) the grant to the Second Plaintiff of the franchise and licence to operate and conduct business at the Kiosk came with an option for the Second Plaintiff to renew the 2009 Franchise Agreement (the **2009 Renewal Representation**).

**Particulars**

The 2009 Renewal Representation in writing and it was contained in sub-clause 29(a) and (b) of the 2009 Franchise Deed.

43. As the 2009 Franchise Representation and the 2009 Renewal Representation are in writing, being contained in the 2009 Franchise Deed, they are continuing representations.
44. The 2009 Renewal Representation is with respect to future matters and the First Plaintiff relies on section 51A of the TPA and section 4(1) of the ACL.
45. The 2009 Franchise Representation and the 2009 Renewal Representation are misleading and deceptive or are likely to mislead and deceive pursuant to section 52 of the TPA or, after 31 December 2010, section 18 of the ACL.

**Particulars**

In respect of the 2009 Franchise Representation the First Defendant had knowledge that the term of the 2009 Franchise Agreement was longer than the term of its appointment with Optus. In respect of the 2009 Renewal Representation the First Defendant had knowledge that it would not be in a position to grant the Second Plaintiff a renewal of the 2007 Franchise Agreement because, at that stage, it was planning to sell the TeleChoice business to Optus.

The First Defendant had been negotiating with Telstra from about June 2006 until July 2007 and on 1 October 2006

entered into a heads of agreement with Telstra and thereafter worked on a draft Telstra Dealership Agreement to be a Telstra dealer for a five year term commencing on or around 15 April 2008 and as part of its agreement with Telstra the TeleChoice business would be purchased by Telstra. These facts are alleged by TeleChoice in paragraphs 9 and 10 and the particulars subjoined thereto of the SFASOC.

From 5 July 2007 the First Defendant understood that it had a further dealer appointment with Optus only until 31 March 2013 and Optus would purchase the TeleChoice business and that understanding continued until 28 September 2012 when the Optus Entities informed TeleChoice that they did not intend to enter into a new dealer appointment with TeleChoice or to purchase the Business. These facts are alleged by TeleChoice in paragraphs 12 to 18, 20, 21 and 25, and the particulars subjoined thereto, of the SFASOC.

In the circumstances the Second Plaintiff had a reasonable expectation that the First Defendant would disclose the fact that its appointment with Optus would end on 31 March 2013 and that the First Defendant was in no position to offer any renewal of the 2009 Franchise Agreement.

46. In reliance on the 2009 Franchise Representation and the 2009 Renewal Representation the Second Plaintiff entered into the 2009 Franchise Agreement.

### **Particulars**

But for the 2009 Franchise Representation and the 2009 Renewal Representation, the Second Plaintiff would not have entered into the 2009 Franchise Agreement as a term of 3 ½ years would not generate enough income in airtime commissions to justify the purchase price of the Kiosk franchise.

47. The Second Plaintiff has suffered loss and damage due to the 2009 Franchise Representation and the 2009 Revenue Representation.

**Particulars**

Section 236 of the ACL.

Purchase price of the Kiosk franchise.

Further particulars will be given after discovery.

48. Further, between 22 October 2012 to 7 July 2013 the First Defendant represented to the Second Plaintiff that it was paying the rent due on the Kiosk by deducting licence fees from the total commissions credited to the Second Plaintiff's trading account with the First Defendant (the **Kiosk Licence Fees Representation**).

**Particulars**

Insofar as the Kiosk Licence Fees Representation is in writing it is constituted by the monthly trading accounts in the period 22 October 2012 to 7 July 2013 provided to the Second Plaintiff by the First Defendant. It is also constituted by the First Defendant's silence in not telling the Second Plaintiff that it was not paying the rent for the Shop.

49. The Shop Licence Fees Representation is misleading and deceptive or likely to mislead and deceive in contravention of section 18 of the ACL.

**Particulars**

In circumstances where the rent for the Kiosk had since the signing of the 2009 Franchise Agreement had always been deducted from the Second Plaintiff's trading account with the First Defendant as licence fees and the First Defendant until on or around 22 October 2012 had always paid the rent due under the lease, the Second Plaintiff would have a reasonable expectation that if the First Defendant was no longer paying the rent for the Kiosk but still deducting the licence fees from the Second Plaintiff's monthly trading account, that the First Defendant would disclose the fact that the rent for the Kiosk was not being paid.

50. In reliance on the Kiosk Licence Fees Representation the Second Plaintiff continued to trade at the Kiosk until on or around 7 July 2013 when the Second Plaintiff telephoned the landlord and was told that approximately \$107,000 in rent was owing between the Shop licensed by the First Plaintiff and the Kiosk licensed by the Second Plaintiff.

**Particulars**

Had the Second Plaintiff known that the rent for the Kiosk was not being paid, the Second Plaintiff would have ceased trading immediately as it did do on or around 7 July 2013 when the Second Plaintiff spoke to the landlord.

51. The Second Plaintiff has suffered loss and damage due to the Kiosk Licence Fee Representation.

**Particulars**

Section 236 of the ACL.

Loss of licence fees deducted from the Second Plaintiff's trading account with the First Defendant and taken by the First Defendant for its own use.

*The Second Defendant and the Third Defendant - Knowingly Concerned Contraventions of the section 52 of the TPA or Involved in contraventions of section 18 of the ACL*

52. Further, in relation to the 2007 Franchise Representation, the 2007 Renewal Representation, the 2009 Franchise Representation, and the 2009 Renewal Representation, the Second Defendant and the Third Defendant aided and abetted, counselled and procured, and was directly or indirectly, knowingly concerned in or a party to the contravention of:

- (a) section 52 of the TPA by the First Defendant within the meaning of 'Knowingly Concerned' pursuant to section 75B of the TPA; and
- (b) section 18 of the ACL by the First Defendant within the meaning of 'Involved' in section 2 of the ACL.

### **Particulars**

The Second Defendant and the Third Defendant's knowledge and involvement is actual. With respect to the 2007 Franchise Representation and the 2007 Renewal Representation, the First Plaintiff and the Second Plaintiff refer to and repeat the second and third paragraphs of the particulars sub-joined to paragraph 35, above. With respect to the 2009 Franchise Representation and the 2009 Renewal representation, the First Plaintiff and the Second Plaintiff refer to and repeat the second and third paragraphs of the particulars sub-joined to paragraph 45, above. It also arises from the Second Defendant and the Third Defendant being in effective control of the First Defendant.

Further particulars may be provided after discovery.

### **Third Plaintiff's claim - enforceability of personal guarantee**

53. Further, the Third Plaintiff was a personal guarantor:

- (a) of the First Plaintiff's obligations pursuant to clause 24 of the 2007 Franchise Deed; and
- (b) of the Second Plaintiff's obligations pursuant to clause 24 of the 2009 Franchise Deed.

### **Particulars**

Pursuant to clause 24 of the 2007 Franchise Deed the Third Plaintiff guaranteed to the First Defendant due and punctual observance and performance by the First Plaintiff of the 2007 Franchise Deed, of the Covenant or any Deed which it is hereafter executed pursuant to clause 8(x) of, and of the Lease.

54. The First Plaintiff and the Second Plaintiff allege that by its conduct in breaching the:

- (a) 2007 Franchise Deed; and

**Particulars**

The Third Plaintiff refers to and repeats paragraphs 26(a), 26(b), 26(c), and 26(e) and the particulars sub-joined thereto, above.

(b) 2009 Franchise Deed,

**Particulars**

The Third Plaintiff refers to and repeats paragraphs 28(a), 28(b), 28(c), and 28(e).

the First Defendant significantly departed from the terms of the 2007 Franchise Deed and the 2009 Franchise Deed and such breaches preclude the existence or continued existence of the circumstances in which the Third Plaintiff agreed to be bound.

55. In the premises, the Third Plaintiff seeks a declaration that:

(a) the personal guarantee given to the First Defendant in clause 24 of the 2007 Franchise Deed; and

(b) the personal guarantee given to the First Defendant in clause 24 of the 2009 Franchise Deed,

are unenforceable.

**AND THE FIRST PLAINTIFFS, SECOND PLAINTIFF AND THE INDEPENDENT FRANCHISEE GROUP MEMBERS SEEK:**

A. A declaration that by reason of the express terms and implied terms of the 2007 Franchise Agreement and the 2009 Franchise Agreement TeleChoice are bound to pay the First Plaintiff, the Second Plaintiff, and the Independent Franchisee Group Members, a portion of the sums received by TeleChoice for commissions in the TeleChoice v Optus Litigation.

B. Compensation pursuant to section 237 of the ACL.

- C. An order varying the 2007 Franchise Agreement and the 2009 Franchise Agreement to include a provision that TeleChoice indemnify the First Plaintiff and Second Plaintiff for claims for commission made in the TeleChoice v Optus Litigation or such other order as the court deems appropriate.
- D. Alternatively to B and C, damages pursuant to section 236 of the ACL.
- E. A declaration that to the extent that TeleChoice recovers any sums for commissions in the TeleChoice v Optus Litigation, TeleChoice holds such sums on trust for the Group Members.
- F. Damages for breach of the 2007 Franchise Agreement.
- G. Damages for breach of the 2009 Franchise Agreement.
- H. Damages pursuant to section 236 of the ACL.
- I. A declaration that the Second Defendant aided and abetted, counselled and procured, induced and was directly or indirectly, knowingly concerned in or a party to:
  - (a) the contraventions of section 52 of the TPA by the First Defendant within the meaning of section 75B of the TPA; and
  - (b) the contraventions of section 18 of the ACL by the First Defendant within the meaning of 'Involved' in section 2 of the ACL.
- J. Interest.
- K. Costs.
- L. Such further or other orders as the Court deems appropriate.

**AND THE THIRD PLAINTIFF AND THE GUARANTOR GROUP MEMBERS SEEK:**

- M. A declaration that the personal guarantee given to the First Defendant in clause 24 of the 2007 Franchise Deed and the personal guarantee given to the First Defendant in clause 24 of the 2009 Franchise Deed are unenforceable.
- N. Interest.
- O. Costs.

P. Such further or other orders as the Court deems appropriate.

Dated: 15 June 2020

*marshalls+dent+wilmot*

.....  
Marshalls & Dent & Wilmoth  
Solicitors for the Plaintiffs

**M. P. GUTHRIE**

1. Place of trial—Melbourne
2. Mode of trial—Judge alone
3. This writ was filed for the plaintiffs by Marshalls & Dent & Wilmoth, solicitors, of Level 21, 570 Bourke Street, Melbourne, Victoria, 3000
4. The address of the First and Second Plaintiffs is Level 2/110-112 Wellington Parade, East Melbourne Victoria 3002

The address of the Third Plaintiff is: 110 Malmsbury Drive, Meadow Heights, Victoria 3048

5. The address for service of the plaintiffs is C/- Marshalls & Dent & Wilmoth, solicitors, of Level 21, 570 Bourke Street, Melbourne, Victoria, 3000
6. The email address for service of the Plaintiff is: jheeps@mdlaw.com.au
7. The address of the Defendants is 199 Fitzroy Street, St Kilda, Victoria, 3182

## **SCHEDULE OF PARTIES**

**ALSEL GROUP PTY LTD (ACN 126 074 673)**

**First Plaintiff**

**TELE WORLD GROUP PTY LTD (ACN 090 849 675)**

**Second Plaintiff**

**ALI SELEK**

**Third Plaintiff**

**and**

**BUSINESS SERVICE BROKERS PTY LTD  
(ACN 069 049 994) TRADING AS TELECHOICE**

**First Defendant**

**and**

**EHAB ABDOU**

**Second Defendant**

**and**

**PAUL REEVES**

**Third Defendant**