

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2011-004-020425**

**COMMERCE COMMISSION**  
Informant

v

**COMPASS COMMUNICATIONS LIMITED**  
Defendant

Hearing: 10 November 2011

Appearances: B Hamlin for the Crown  
T Walker for the Accused

Judgment: 10 November 2011

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**NOTES OF JUDGE P A CUNNINGHAM ON SENTENCING**

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[1] Compass Communications Limited appears for sentence today. There are five charges under the Fair Trading Act. In essence all of them are representative charges because they all cover the period 1 June 2008 to 30 September 2009.

[2] Compass Communications Limited is in the telecommunications business and these prosecutions concern phone cards they produce that are purchased by consumers, often at outlets such as a dairy. The cards enable people to make phone calls overseas.

[3] The charges are laid by the Commerce Commission and the Commission allege that Compass Communications made misleading representations in relation to five different phone cards because the cards represented a number of calling minutes available to the purchaser when the advertised number of minutes was not practically achievable to some destinations. The advertised number of minutes was only possible if the customer made one continuous call until all credit was consumed. An example is given in the summary of fact of a 576 minute call to the United Kingdom using the World phone card.

[4] If a person who had purchased one of these cards attempted to use it on more than one occasion then other charges took up some of the calling cards' credit. Those additional charges could have included calls being charged for the first 15 seconds then in five minute increments thereafter, surcharges for calls made to mobile phones, a daily service fee after the first use, total call costs being rounded up, all advertised rates being based on the cheaper, lower, access calling method, rates being subject to change without notice and rates and service charges excluding GST. It is not suggested that all of those charges applied to each of the five different cards but one or more of them may have applied.

[5] The represented per minute rate to the advertised destinations was misleading because it was based on all credit being consumed in a single continuous call and then the number of possible minutes being divided by the cost of the calling card.

[6] The summary of facts goes on to say that it was misleading for Compass to base its advertisements on consumers using all the credit in one continuous call and that it was unrealistic to expect consumers to use the cards on a single occasion.

[7] The additional costs and surcharges were included in what the Commission has described as the fine print of the advertising and the Commission complains that those additional costs and surcharges were not adequately disclosed to consumers, something that Compass Communications had accepted.

[8] The Commerce Commission has identified 11 customers who purchased Compass phone cards between November 2008 and February 2010. These cards were sold throughout New Zealand from an estimated 3000 authorised retailers and the target group of customers tended to be migrants and international students with international calling needs.

[9] A concern that arises there is that often these people who are purchasing the cards did not have English as their first language which just increased the potential for those persons to be misled. However the Commission acknowledges that efforts were made to translate aspects of the posters into the language of the consumer. For example, the Meihua card is partially translated into Mandarin.

[10] In essence Compass has acknowledged that there was inadequate disclosure however Compass Communications does not accept that it was deliberately misleading. That might sound like there is a dispute of fact as between the Commission and Compass Communications Limited but for the purposes of this sentencing a level of fine has been agreed. I will come to that again shortly but for that reason I do not see any need for there to be any further exploration by me about the extent to which the two parties are not in agreement.

[11] One of the matters that has been canvassed in submissions today is the question of a connection fee for each call. Compass say that there is nothing inherently wrong with earning revenue from additional fees, after all all the customer wants to know is that there is going to be a fee to make the connection. That is really in response to a concern that customers may have been misled that there was a fee

that Compass had to pay to a provider and it was not explained that that was not the case. Compass has pointed out that such charges are widely used in the phone card market.

[12] In submissions filed today Ms Walker has pointed out that approximately 69 percent of its revenue was generated from repeat customers, people who would have quickly understood exactly how long the phone card was going to last, or in other words, people who knew what value they were going to get from each of the cards that they purchased. Compass has also pointed out that 11 is a relatively small number of complaints. The summary of fact sets out that almost half a million of these cards were sold during the relevant period.

[13] It is agreed that the moment these matters were drawn to Compass' attention it not only cooperated with the Commerce Commission but took steps to put matters right. It is also agreed that Compass has entered a guilty plea at an early opportunity.

[14] It is clear that there has been cooperation by Compass, and ongoing discussions with the Commission about how to rectify its advertising, so that customers are not misled.

[15] I refer to the fact that there has been agreement about penalty. The Commission and Compass acknowledge that that is an appropriate thing to happen and that it is in accordance with what has happened in the past, for example, *Commerce Commission v New Zealand Milk Corporation* [1994] NZLR 730 and in cases which have followed.

[16] The agreed penalty is \$140,000 and that takes into account a discount for a guilty plea leading to an end result of \$28,000 for each of the five charges.

[17] The important principle of sentencing that applies here is deterrence. Clearly the Commission's job is to ensure that advertising carried out by commercial enterprises, such as Compass Communications, do not mislead consumers. Further aggravating features identified by the Commission is the number of retailers and the number of cards sold.

[18] Clearly the fine has to be at a level that meets the principle of deterrence. Mr Hamlin referred to the amount of revenue that has been generated from the sales and certainly that is a factor but not one that I need to go into given that there is some level of agreement in relation to the level of fine to be imposed.

[19] While on the one hand acknowledging that consumers were misled, and many more may have been misled, I am satisfied that Compass Communications has come to the party and done what it can to rectify the matter at an early opportunity and for doing that Compass is to be congratulated. However when I refer to deterrence it is not only Compass that must be deterred it is other people in this market, and indeed in any market, from doing likewise in the future.

[20] I am satisfied that I should impose a fine of \$28,000 on each of the charges and that is the sentence I impose in respect of all five informations.

A handwritten signature in cursive script, appearing to read "P A Cunningham", followed by a period.

P A Cunningham  
District Court Judge