FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)

[2021] FCA 956

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding given the length and complexity of the judgment (over 500 pages) and given the orders deferring publication of the reasons for a short time in order to permit the parties the opportunity to consider whether any parts of the reasons contain confidential information which, in their submission, should be redacted.

This summary is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment. These will be available on the internet at the Court's website after any submissions addressing confidentiality concerns have been addressed, together with this summary which will be placed on the website today.

The applicants, the Australian Competition and Consumer Commission (the **ACCC**) and the Commonwealth, seek declarations, pecuniary penalties, and orders for non-party redress pursuant to s 239 of the *Australian Consumer Law* (**ACL**), being Sch 2 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), against the respondents, Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement) (**Phoenix**) and Community Training Initiatives Pty Ltd (Subject to Deed of Company Arrangement) (**CTI**).

The applicants allege that from around 13 January 2015 until around 23 November 2015, Phoenix and CTI engaged in conduct in connection with the supply of vocational education and training (**VET**) courses to consumers that was unconscionable in contravention of s 21 of the ACL. Contraventions of the ACL are also alleged with respect to four individual consumers. Leave was granted to proceed against the respondents after they went into administration on condition that any pecuniary penalties, orders to refund monies and orders for costs would not be enforced without further leave of the Court.

While the respondents initially defended the proceeding, prior to trial they filed a notice submitting to any order of the Court save as to costs. Nonetheless, it remained necessary for the applicants to prove their case on the balance of probabilities, having regard to the seriousness of the matters alleged. In order to discharge that onus, the applicants relied upon a voluminous body of evidence deriving from different sources. This included the evidence of 47 witnesses including an educational expert, ex-employees, consumers, and ACCC investigators, as well as expert evidence analysing data from the

respondents' operations and from student surveys. It is important to acknowledge the considerable courage exhibited by the ex-employees in giving evidence in this proceeding. The applicants also relied upon extensive business records such as enrolment and student activity records and data, enrolment forms, complaints, records of complaint handling, policies, and internal correspondence. As such, the applicants' case was not only circumstantial but included important direct evidence of the internal workings of the respondents.

Phoenix was an approved VET provider with 378 enrolled students in face-to-face courses before it was purchased by the Australian Careers Network (**ACN**) Group in January 2015. Following its acquisition, the key officers of Phoenix and CTI (and the parent company, ACN), Mr Ivan Robert Brown and Mr Harry Kochhar (also known as Harpreet Singh), radically reorientated Phoenix's operating model so as to offer online diplomas nationally to many thousands of consumers under the banner of "myTime Learning". Central to the respondents' plans for rapid growth was the deployment of hundreds of sales agents marketing Phoenix online courses across the country through contracts with Brokers. The consumers targeted included Indigenous Australians, and people from non-English speaking backgrounds, with a disability, from regional and remote areas, from low socio-economic backgrounds and/or who were unemployed at the relevant time.

These target groups corresponded with the demographic groups to which reforms to the Commonwealth's VET FEE-HELP loan scheme were directed in order to increase the participation of these groups in vocational education and training. While in itself the targeting of consumers from these groups was not necessarily unconscionable, a not insignificant proportion of such consumers were likely to be vulnerable. Conscionable marketing and enrolment systems therefore needed to incorporate measures to mitigate the inherently higher risk that members of these demographic groups may be unsuitable for an online diploma, or require additional support.

Safeguards under VET FEE-HELP assistance scheme for students included ensuring that students did not incur any liability for a debt to the Commonwealth for their studies until the census date had passed. This key element of the scheme was intended to afford each student a "cooling off" or "trial" period within which the student could assess whether the unit of study or course was suitable for them. However, once the census date had passed, neither the student's liability for the debt nor the making of payments to the VET provider depended upon the student embarking on the course in which they were enrolled. Furthermore, VET FEE-HELP payments could be made to the VET provider in advance.

These features of the VET FEE-HELP assistance scheme rendered it ripe for ruthless exploitation, as Mr Brown candidly explained in a radio interview in April 2016. Hundreds of millions of dollars in revenue under the scheme were potentially available to a VET provider, without the provider actually affording any meaningful educational service to its "students".

That is precisely what occurred in this case. The figures are telling.

(1) Between mid-January and mid-November 2015, at least 11,393 consumers were enrolled in 21,413 online courses with Phoenix, with most being enrolled in two diplomas concurrently despite each diploma involving a full-time study load.

(2) Phoenix was paid over $106 million by the Commonwealth under the VET FEE-HELP assistance scheme in advance payments, and claimed to be entitled to a further amount of approximately $250 million in payments from the Commonwealth.

(3) Only ***nine*** of the 11,393 enrolled consumers formally completed an online course with Phoenix. Indeed, only a very small number of the enrolled consumers attempted a unit of study, while some were unaware that they were enrolled and many remained enrolled after requesting cancellation.

This was achieved ***first*** by the deployment without any effective training, monitoring or control, of a veritable army of at least 548 Agents engaged by the Brokers with whom the respondents contracted to market Phoenix's Online Courses. The Brokers and Agents were highly incentivised by substantial commissions payable only after the census date to prey on vulnerable consumers likely to sign up unaware that an offer presented to them as a great deal to obtain a free laptop or other inducement, was in fact a very bad deal under which they would incur substantial debts. In particular, the Agents and Brokers (and respondents on whose behalf they acted) targeted vulnerable consumers whose general attributes meant they were less likely to understand their rights and obligations under the VET FEE-HELP scheme, to interrogate the misinformation they were given, and to resist the inducements offered to them for signing up. Far from reining in the unethical conduct of the Brokers and Agents or responding with a "root and branch" reappraisal of their operating model, among other things the respondents actively sought and rewarded the submission of hundreds and even thousands of enrolment forms weekly by Brokers and increased the commission payable to the worst offending Broker.

Secondly, despite being aware from the outset of the risks (duly realised) of ineligible and unsuitable candidates applying for enrolment by deploying this marketing system, the respondents engaged in conduct which included enrolling consumers without verifying their eligibility or suitability for the course, their capacity to speak English, or even whether they intended to undertake the course. Directions were regularly given by Mr Brown and Mr Kochhar to bypass measures intended to protect against such risks, such as instructing staff not to undertake telephone verifications of enrolment applications, to overlook "red flags" when telephone verifications were in fact conducted, and not to check for suspicious patterns in enrolment forms indicating that they may have been forged. Moreover, many consumers were enrolled after the commencement date of their online course(s) without any extension to the relevant census date, or were enrolled on, shortly before, or after the census date so as to deprive them of the statutorily mandated "cooling off" period. Furthermore, staff who repeatedly raised concerns with Mr Brown and Mr Kochhar about these and other issues, including suspected

Broker and Agent misconduct, and endeavoured to address them, were undermined, sidelined, bullied, subjected to verbal abuse, and directed to ignore the problems and to act against their conscience.

It is not surprising that the flow of complaints by consumers and consumer advocates throughout the relevant period was unrelenting. Furthermore, as the respondents' conduct increasingly came to the regulators' attention, they sought to conceal what was truly occurring by, among other measures, statements of compliant policies which they knew were not in fact observed, the impersonation of student activity on Phoenix's learning management system, and the backdating and falsification of student records on an industrial scale.

This conduct, together with other evidence, established that the focus of key officers of Phoenix and CTI was upon attaining the highest possible levels of enrolment so as to generate and retain revenue derived from VET FEE-HELP payments, rather than genuinely attempting to provide education and training to those ostensibly enrolled in Phoenix's online courses. It was both an accepted and anticipated part of the respondents' business model that a very high proportion of students would pass the census date and incur a VET FEE-HELP debt in circumstances where it was predictable that they would never require training and support. This was a highly profitable outcome for the respondents who therefore were not required to, and did not, invest in the staff and resources which would have been required to train and support over 11,000 genuine students enrolled in over 21,000 full-time diplomas.

The Court concluded that in all of the circumstances, the respondents engaged in a marketing system and an enrolment system which were separately "*unconscionable*" within the meaning of s 21 of the ACL. Both systems were informed by the desire to maximise profit over even modest levels of engagement by consumers with their courses, and by a callous indifference, among other things, to the suitability and eligibility of consumers to undertake the courses in which they enrolled. The Court found that the respondents' conduct was grossly exploitative and at times dishonest, and lacked any respect for the dignity and autonomy of the vulnerable consumers who were targeted. The Court also found that Phoenix, through its Brokers and Agents, engaged in conduct with respect to the four individual consumers that was false or misleading or deceptive in breach of ss 18 and 29(1)(i) of the ACL and in conduct that was unconscionable, thereby contravening s 21 of the ACL. Declarations of the contraventions of the ACL by the respondents were made accordingly by the Court. Any further relief, including as to the civil penalties to be imposed, will be determined in the second stage of the trial.

JUSTICE MELISSA PERRY

13 August 2021