

**Case reference: 39410**  
**Case: Prohibition of an associated individual**

**THIS CASE WAS BROUGHT AGAINST THE ASSOCIATED INDIVIDUAL  
UNDER PARAGRAPH 4.8.6 OF THE CODE**

**BACKGROUND**

**i) Summary relating to Mr Dale Saul Carr**

The Tribunal was asked to consider imposing a prohibition against Mr Dale Saul Carr pursuant to paragraph 4.8.2(g) of the 12<sup>th</sup> edition of the PhonepayPlus Code of Practice (the “**Code**”).

The case related to an adjudication against the Level 2 provider (the “**Level 2 provider**”) CommandM PTY. Limited (11 July 2013, case reference 18062), which concerned a virus and malware facts subscription service (the “**Service**”).

Following an adjudication against the Level 2 provider (23 January 2014, case reference: 30361), which concerned a breach of the sanctions imposed by the Tribunal of 11 July 2013 and non-payment of the associated administrative charges, a Tribunal instructed the Executive to initiate the process which may lead to the prohibition of Mr Dale Saul Carr, (an associated individual) pursuant to paragraph 4.8.2(g) of the Code.

The Tribunal considered the following evidence in full:

- The Tribunal decision against the Level 2 provider dated 11 July 2013;
- The current and historical company extract for the Level 2 provider from the Australian Securities and Investment Commission;
- An agreement between the Level 2 provider and the Level 1 provider dated 12 November 2010;
- An amended agreement between the Level 2 provider and the Level 1 provider dated 13 September 2012;
- Documentation provided by the Level 1 provider in relation to its due diligence and risk assessment of the Level 2 provider and the Service.
- PhonepayPlus registration database screenshots for the Level 2 provider;
- Correspondence with the Level 1 provider;
- Correspondence with the Level 2 provider;
- Notification of potential prohibition of 14 July 2014; and
- Mr Dale Saul Carr’s response to the notification of potential prohibition provided by his legal representatives dated 8 August 2014.

The Executive conducted this matter in accordance with paragraph 4.8.6 of the Code. The Executive sent the notification of a potential prohibition to Mr Dale Saul Carr and the Level 2 provider on 14 July 2014 and Mr Dale Saul Carr’s legal representatives provided a response on his behalf on 8 August 2014. On 21 August 2014, the Tribunal reached a decision regarding the imposition of a prohibition on Mr Dale Saul Carr.

**ii) Relevant Code provisions**

- Paragraph 4.8.2(g) of the Code states:

“The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach:

“(g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any premium rate service or promotion for a defined period.”

- Paragraph 5.3.9 of the Code states:

“‘Associated individual’ is any sole trader, partner or director or manager of a premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus”.

- Paragraph 4.8.6 of the Code states:

“If a Tribunal considers that it may wish to make a prohibition under subparagraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing”.

## **SUBMISSIONS AND CONCLUSIONS**

1. The Executive submitted that the following evidence indicated that Mr Dale Saul Carr was an associated individual knowingly involved in a series of breaches of the Code, two of which were serious and very serious, in respect of the adjudication dated 11 July 2013.

### **Adjudication dated 11 July 2013, case reference: 18062**

On 11 July 2013, the Tribunal adjudicated against the Level 2 provider. The adjudication concerned a virus and malware facts premium rate subscription Service that operated at a cost of £4.50 per week for one virus fact to be sent to consumers. Consumers subscribed to the Service as part of an upgrade to the Level 2 provider’s “Battery Booster application”, which was available free of charge on App stores. The Service operated between December 2011 and 29 May 2013.

Generally complainants stated that they had received unsolicited, reverse-billed SMS messages and that they had not engaged with the Service. Other complainants acknowledged downloading the application but stated that they believed the Service was free.

The Tribunal upheld the following breaches of the Code:

- Rule 2.3.2 - Misleading

- Rule 2.2.5 – Pricing prominence and proximity
- Paragraph 4.2.5 – Failure to disclose information

The Tribunal concluded that the breach of rule 2.3.2 of the Code was very serious, the breach of rule 2.2.5 of the Code was serious and the breach of paragraph 4.2.5 of the Code was significant. The Tribunal determined that the seriousness of the case overall was very serious and imposed the following sanctions:

- a formal reprimand;
- a fine of £250,000;
- a requirement that access to the Service is barred until compliance advice is sought and implemented to the satisfaction of the Executive; and
- a requirement to refund all consumers who claim a refund, for the full amount spent by them on the Service, within 28 days of their claim, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made.

In addition to the above sanctions, the Tribunal recommended that the Level 2 provider pay 100% of the administrative costs incurred by PhonepayPlus.

### **Associated individual knowingly involved in a serious or series of breaches of the Code**

The Executive submitted that Mr Dale Carr was an associated individual at the time breaches of the Code occurred, as he was a director of the Level 2 provider's company. The current and historical extract for the Level 2 provider from the Australian Securities and Investment Commission revealed that between 14 November 2006 and 3 May 2013, Mr Carr was a director of the Level 2 provider and he was the sole director between 20 October 2010 and 3 May 2013.

The Executive submitted that Mr Dale Carr was knowingly involved in a series of breaches of the code, two of which were serious or very serious, that were upheld by the Tribunal on 11 July 2013 as a result of the following:

- As a director of the Level 2 provider, Mr Carr was up until 3 May 2013 and for the majority of the time the breaches of the Code occurred, responsible for the oversight of the Level 2 provider's affairs and ensuring that it was properly managed. For a significant period of his directorship, Mr Carr was the sole director and therefore it was highly likely that he was aware of the non-compliant manner in which the Service operated.
- As a director, Mr Carr had a fiduciary duty to ensure that all commercial activities, including the operation of the Service were conducted in accordance with the law and the regulatory obligations.
- Mr Carr was a shareholder in the Level 2 provider and as such had a personal interest in the Level 2 provider's affairs.

- During Mr Carr directorship key business decisions and actions occurred, which related to the breaches of the Code and he was likely to have been aware of them. They were:
  - The Level 2 provider signed an agreement on 12 November 2010 with the Level 1 provider for the operation of the Service. An addendum agreement was signed by the Level 2 provider on 13 September 2012.
  - Compliance advice from PhonepayPlus and the Level 1 provider was provided to the Level 2 provider between September and December 2011.
  - Following a planning period, the launch of the Service by the Level 2 provider took place on 20 December 2011.
  - PhonepayPlus received 63 complaints regarding the Service between 18 July 2012 and 3 May 2013.
  - The Executive's decision to progress the case against the Level 2 provider to a Track 2 procedure was communicated to the Level 2 provider on 30 April 2013.

Consequently, the Executive submitted that Mr Dale Saul Carr was an associated individual who was knowingly involved in a series of breaches, two of which were serious or very serious.

2. Mr Dale Carr strongly contested the evidence presented by the Executive in support of a prohibition and provided written submissions via his legal representative. Mr Carr accepted that he was a director of the Level 2 provider for some of the relevant period but stated that he was not knowingly involved in the actions that resulted in the breaches of the Code upheld in the adjudication of 11 July 2013.

Mr Carr explained that the original format of the Service's software and design was the subject of extensive correspondence between the Level 2 provider and PhonepayPlus during September to November 2011 before the Service was made available to consumers in December 2011. He stated that PhonepayPlus had approved the final format of the Service before it was launched. He submitted that changes were made to the graphical layout, which resulted in the breaches of the Code being raised. Mr Carr stated that he was not aware of the changes and not involved, knowingly or otherwise, in the actions that resulted in the breaches of the Code. He added that shortly after the board of the Level 2 provider became aware of the issues with the Service, the Level 2 provider suspended the operation of the Service.

Mr Carr explained that it was standard practice in the industry to outsource the design and management to various software developers. The Level 2 provider followed this model and the software developers were permitted to make small graphical changes to the Service in an effort to improve efficiency and profitability, without reference to the Level 2 provider or its director(s). In this case, the software developers responsible for managing the Service made a series of small incremental changes to its design and appearance during 2012, which had the combined effect of the Service being deemed non-compliant with the Code. Accordingly, as the developers were not required to seek Mr Carr's approval they did not and he submitted that he was not aware of the non-compliance with the Code. When the Service was originally designed, Mr Carr stated that he had

given the software developers clear guidelines to ensure the Service was compliant and he expected the guidelines to be adhered to when any changes were made. Mr Carr accepted that on this occasion unfortunately the software developers had not followed his guidance.

Mr Carr submitted that he first became aware of an issue with the Service when PhonepayPlus began a preliminary investigation of the Service in April 2013. When it became clear that the Service may not have been operating in a compliant fashion, the Level 2 provider made the decision to voluntarily suspend the Service on 29 May 2013, shortly after he ceased to be a director.

Mr Carr further submitted that although the Level 2 provider had been receiving complaints from around July 2012 onwards, staff from consulting companies had been responsible for providing customer service support and dealing with the complaints. Accordingly, Mr Carr was not aware of the complaints about the Service, as the numbers of complaints received were unremarkable.

Mr Carr stated that the evidence presented by the Executive to establish knowing involvement was remarkably thin. He addressed some of the Executive's assertions and stated the following;

- That he accepted that as a director of the Level 2 provider he owed fiduciary duties to the Level 2 provider's shareholders, including a duty to ensure its compliance with the law and regulatory obligations. However, he stated that he was satisfied that he took the appropriate steps to ensure that the Level 2 provider complied with its regulatory and other obligations. For example, he had given guidance to the software developers regarding the regulatory requirements relevant to the Service. He did not accept that at any time he fell short in his duties as a director.
- That it was unclear what relevance his position as a shareholder had to the case. He submitted that whether he was a shareholder did not appear to support the Executive's assertion that he was knowingly involved in any wrongdoing.
- That the Executive had stated that it was highly unlikely that he would have been unaware of the non-compliant manner in which the Service was operating. Yet, Mr Carr stated that he had made his position clear. He did not know about the small changes that were implemented and resulted in breaches of the Code occurring.
- He noted that the Executive referred to "key business actions and decisions" but stated that it had not identified how he had been aware of those decisions.
- He accepted that the key decisions that had been identified by the Executive had taken place during his directorship and were matters that he was aware of, but being aware of the matters, did not automatically mean that he was knowingly involved in the changes to the Service which led to the Service being deemed non-compliant.

Mr Carr submitted for all the reasons detailed above that, the Executive had not satisfied the burden of proof which it needed to satisfy to demonstrate that he was knowingly involved in the breaches of the Code

upheld against the Level 2 provider. Accordingly, he invited the Tribunal not to impose a prohibition against him.

3. The Tribunal considered all the evidence presented to it, including Mr Dale Saul Carr's written submissions. The Tribunal found that, in accordance with paragraph 5.3.9 of the Code, Mr Dale Carr was an associated individual as the evidence presented by the Executive demonstrated that he was a director of the Level 2 provider at the time the breaches of the Code occurred.

Further, the Tribunal found that Mr Dale Saul Carr was knowingly involved in a serious and/or a series of breaches of the Code upheld against the Level 2 provider on 11 July 2013. The Tribunal reached this conclusion on the basis that, Mr Carr, as a director, had responsibility for the oversight of the Level 2 provider's affairs and to ensure it was properly managed. The Tribunal noted that Mr Carr had stated that the design and management of the Service had been outsourced to software developers and he had issued them with compliance guidelines but not specifically, reviewed their work. The Tribunal concluded that outsourcing functions to a third party did not absolve the director of any responsibility, nor did it mean that the director could claim he was not knowingly involved in those outsourced activities. As a director in charge of the Level 2 provider he was responsible for ensuring adequate controls were placed on the third party conducting functions on behalf of the Level 2 provider. Mr Carr was knowingly involved in the failure to exercise proper controls which directly resulted in breaches of the Code. In addition, Mr Carr acknowledged in his response that he was aware of complaints about the Service to PhonepayPlus and clearly should have taken steps to intervene in any non-compliance of the Code. The Tribunal found all these factors indicated that Mr Carr was knowingly involved in the activities of the Level 2 provider that led to breaches of the Code.

Accordingly, for all the reasons outlined above, the Tribunal found that Mr Dale Saul Carr was an associated individual knowingly involved in a serious or series of breaches of the Code upheld against the Level 2 provider on 11 July 2013.

## **Sanction**

The Tribunal decided to prohibit Mr Dale Saul Carr from providing, or having any involvement in, any premium rate service for a period of three years from the date of publication of this decision.

In making this decision, the Tribunal found that there had been fundamental non-compliance with Code obligations. The Tribunal commented that Mr Carr appeared to cease his directorship at a time when it was clear that the Level 2 provider was in regulatory trouble. As a director, Mr Carr was one of the most senior individuals within the Level 2 provider's company and, had overall responsibility for ensuring its affairs were conducted in accordance with its legal and regulatory obligations.

Accordingly, the Tribunal was satisfied that, given the need to protect consumers from similar conduct three years' prohibition was an appropriate period, taking into consideration all the circumstances of the case including the seriousness of the underlying case.

