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Advertising and the ACL: Fine print couldn't save TPG Internet in the High Court

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The "dominant message" of an advertisement is of crucial importance in determining whether it is misleading or deceptive.

On 12 December 2013, the High Court by a 4-1 majority overturned the Full Federal Court's decision and reinstated the \$2 million pecuniary penalty initially imposed on TPG Internet Pty Ltd for a misleading advertising campaign about its Unlimited ADSL2+ broadband bundle (ACCC v TPG Internet Pty Ltd [2013] HCA 54).

The key messages for advertisers from the High Court's decision are that:

- the "dominant message" test is central to any assessment of whether advertisements are misleading or deceptive; and
- qualifying statements accompanying headline representations must be sufficiently clear and prominent so as not mislead consumers, particularly where the representation is about price.

The High Court's decision is an important one for advertisers in understanding the nature and extent of their obligations under the Australian Consumer Law (**ACL**). It will also inform the ACCC's enforcement strategy in this area.

The TPG "Unlimited ADSL2+ " campaign

TPG ran an \$8.9 million multi-media advertising campaign from September 2010 until November 2011 with the headline representation "Unlimited ADSL2+ for \$29.95 per month". This price was only available where consumers bundled the broadband service with a TPG home phone service for a total of \$59.95 per month. This bundling condition, setup charges and the total cost over the life of the contract were displayed less prominently than the headline representation.

On 16 December 2010, the ACCC commenced proceedings against TPG in the Federal Court alleging that:

- the advertisements were misleading or deceptive (in contravention of sections 18 and 29 of the ACL); and
- the total price of the broadband service was not specified in a prominent way and as a single figure (in contravention of section 48 of the ACL).

The trial judge agreed with the ACCC and fined TPG \$2 million (ACCC v TPG Internet Pty Ltd (2011) ATPR 42-383).

TPG appealed to the Full Federal Court, which agreed that TPG's advertisements did not display the total price in a prominent way and as a single figure but held that most of TPG's advertisements were **not** misleading or deceptive. The Full Court reduced the pecuniary penalty to \$50,000 and set aside the other orders imposed by the trial judge (TPG Internet Pty Ltd v ACCC [2012] FCAFC 190 and (No. 2) [2013] FCAFC 37).

Full Federal Court's decision: advertisement must be considered in its full context

The Full Federal Court said that whilst many consumers will only absorb the "general thrust" or "dominant message" in the advertisement, "this is not a mandate for ignoring the rule that the whole of the advertisement must be considered in its full context". The Full Court said that the ACL does not operate for the benefit of consumers who fail to take care of their own interests, including those who do not pay attention to the whole advertisement.

The Full Federal Court focused on the impact of the advertisements and found that they were not misleading because the "ordinary or reasonable consumer" had knowledge about "the "bundling" method of sale commonly employed with this type of service, as well as knowledge that setup charges are often applied".

High Court's decisions: the "general thrust" of the advertisement

The trial judge, Full Federal Court and the High Court all accepted that most consumers would only absorb the "general thrust" of the advertisement.

The High Court however held that "the Full Court erred in failing to appreciate that the tendency of TPG's advertisements to mislead was not neutralised by the Full Court's attribution of knowledge to members of the target audience that ADSL2+ services may be offered as a 'bundle'".

The High Court's decision mentioned a number of important statements of principles, including that:

- the **target audience cannot be expected to pay close attention to the advertisement** and many will only absorb the "general thrust";
- the attention given to the advertisement by an ordinary and reasonable person may well be "perfunctory" without being equated with a failure on the part of that person to take reasonable care of their own interests;
- there **must be a tendency to lead into error**, that is, a sufficient causal link between the advertisement and error on the part of persons exposed to it;
- **subsequent conduct is not sufficient to cure an earlier breach**. The High Court stated that misleading or deceptive conduct can occur "at the point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded";

The High Court said that the tendency of the advertisements to mislead was to be determined by asking whether they caused consumers to contact TPG rather than one of its competitors on the basis of "an erroneous belief engendered by the general thrust of TPG's message".

The High Court found that TPG's advertisements were misleading because:

- they were an "unbidden intrusion" on the consciousness of the target audience;
- they had the tendency to "lead consumers into error because the advertisements themselves selected some words for emphasis and relegated the balance to relative obscurity";
- consumers knowledge about the bundling practices used in the industry "was not apt to defuse the tendency of the advertisements to mislead, especially where the target audience is left only with the general thrust or dominant message after the evanescence of the advertisement"; and
- it was an "unremarkable consequence" of TPG's advertising strategy that a consumer might absorb only the general thrust or dominant message and not due to selective attention on the part of that consumer.

The High Court reinstated the \$2 million pecuniary penalty accepting that the trial judge was entitled to find nine separate contraventions, having regard to the different media used by TPG to deploy its message.

Implications of the High Court's decision

The High Court's decision reinforces the importance of the "dominant message" test in determining whether an advertisement is misleading or deceptive.

The TPG case will have important precedent value for the ACCC and will be factored into the Commission's process for deciding whether to pursue other businesses over advertisements that the ACCC considers to be misleading or deceptive.

You might also be interested in...

- [Making advertising comply with the Australian Consumer Law: Court finds answers in TPG's fine print](#)

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