

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TPG INTERNET PTY LTD (M98/2013)

Court appealed from: Full Federal Court of Australia
[2012] FCAFC 190 & [2013] FCAFC 37

Date of judgment: 20 December 2012 & 4 April 2013

Date special leave granted: 16 August 2013

The respondent ('TPG') carries on business as a provider of telephone and internet services to residential customers throughout Australia. In September 2010 TPG launched a national advertising campaign, which ran for over 13 months, in which it highlighted an offer to provide customers with unlimited ADSL2+ broadband for \$29.99 per month. The advertisements went on to say, although in a less prominent manner, that the advertised rate of \$29.99 per month was only available to persons who bundled the ADSL2+ service with a home telephone line from TPG at an additional \$30 per month. In early October 2010, the appellant ('ACCC') wrote to TPG expressing concern that the bundling condition was stated in small, difficult to read print, which was insufficient to qualify the "dominant headline representation" in the advertisements. The ACCC therefore considered that TPG's advertisements amounted to misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act (1974)* (Cth) ('the Act'). Shortly after it received notice of the ACCC's concerns, but without accepting the correctness of them, TPG amended the form of all of the advertisements used in the first three weeks of its advertising campaign.

The primary judge (Murphy J) found that all of the initial advertisements and most of the revised advertisements conveyed a representation to the relevant class of consumers that they could purchase unlimited ADSL2+ from TPG without being obliged to acquire any additional service and without the need to pay any additional charge. Thus, his Honour found that all of those advertisements constituted conduct by TPG that was misleading and deceptive in breach of s 52 of the Act (when published before 1 January 2011) and s 18 of Sch. 2 Australian Consumer Law (ACL) of the *Competition and Consumer Act (2010)* (Cth) (when published after 1 January 2011). His Honour also found that all of those advertisements contained false representations in breach of ss 53(e) and (g) of the Act and ss 29(1)(i) and (m) of the ACL. His Honour ordered a number of forms of relief including declarations, injunctions, corrective advertising and pecuniary penalties totalling \$2 million.

TPG appealed to the Full Federal Court of Appeal (Jacobson, Bennett and Gilmour JJ). The Court noted that, in determining whether an advertisement is misleading or deceptive it is necessary to look at the whole of the advertisement in its full context. Where, as in the present case, the advertisements were directed at members of a class in a general sense, the enquiry is concerned with the impact of each advertisement on the hypothetical reasonable member of the class of persons to whom the advertisement was directed. The Court held that in this case consumers to whom the advertisements were directed must be taken to have some familiarity with the market for the provision of broadband services: in particular, they would know that services such as ADSL2+ are offered for sale as either "bundled" or "stand alone".

The primary judge answered the critical question by finding that the dominant message in each of the relevant advertisements was that the reader or viewer could acquire ADSL2+ for \$29.99 per month without incurring an obligation to acquire any additional service or to pay any further charges. On that approach, the ordinary or reasonable reader would be misled unless the misleading dominant message was corrected by a sufficiently clear and prominent statement which prevented the inaccurate dominant message from being misleading, or likely to mislead or deceive. The Full Court considered that was not the correct approach. While many people would have only absorbed the general thrust of the advertisements, this was not a mandate for ignoring the rule that the whole of the advertisement must be considered in its full context. The approach of the primary judge did not take into account the need to have regard to the attributes of the hypothetical reader or viewer, which included knowledge of the “bundling” method of sale commonly employed with this type of service, as well as knowledge that setup charges are often applied. When seen through that prism, the Full Court found that the advertisements were not misleading.

The Full Court could, however, see no appellable error in the primary judge’s finding that the initial print and initial online advertisements contravened s 53C of the Act, on the basis that the specification of the minimum charge did not stand out so as to be conspicuous or strike the attention and was not easily seen or very noticeable in the advertisements. TPG was ordered to pay a pecuniary penalty of \$50,000 in respect of that contravention of the Act.

The grounds of appeal include:

- The Full Court erred in making a finding that was not properly open to it as a matter of fact and law to the effect that the consumers to whom the TPG advertisements were directed would have known that the respondent’s internet services were bundled with telephony services;
- The Full Court erred in failing to adequately consider the issue of deterrence, both specific and general, resulting in a manifestly inadequate penalty of \$50,000 being ordered.