

ACCC reins in misleading pricing

Partner, Tom Griffith, discusses the High Court's decision in ACCC v TPG - a significant win for the ACCC in its efforts to rein in the misleading pricing of products and services.

In 2010 and 2011 TPG Internet Pty Ltd (TPG) had run a series of advertisements which prominently offered an unlimited ADSL2+ service for \$29.99 per month. Far less prominently, the advertisements displayed the requirement that customers bundle that service with a home telephone service provided by TPG for an additional \$30.00 per month (with a minimum commitment of six months). In addition TPG required the consumer to pay a set up fee of \$129.95 plus a deposit of \$20.00 for telephone charges.

A majority of the High Court restored the primary Judge's findings and pecuniary penalties against TPG, that it had engaged in misleading and deceptive conduct in contravention of the Trade Practices Act 1974 (Cth) (TPA) and the Australian Consumer Law (ACL).

The ACCC brought proceedings claiming that TPG's advertisements were misleading and deceptive because of the disparity between the prominent headline offering TPG's ADSL2+ service at an attractive price and the less prominent terms qualifying that offer.

The primary judge upheld the ACCC's claim and made a number of orders against TPG, including a pecuniary penalty of \$2m. On appeal, the full Federal Court set aside all but 3 of the primary judge's findings and reduced the pecuniary penalty to \$50,000.

On further appeal, the High Court restored the findings of the primary judge including the pecuniary penalty of \$2m.

One of the key differences between the findings of the primary judge and High Court on the one hand, and the full Federal Court on the other, was in relation to whether the advertisements were misleading.

The Full Federal Court had overturned the primary judge's finding that the ordinary and reasonable consumer taking in only the dominant message of the advertisement would have the impression that the entire cost of the service was \$29.99 per month with no other charges and no obligation to acquire another service. The Full Federal Court did not regard the "dominant message" of the advertisements as of critical importance.

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The Full Federal Court had reasoned that the dominant message approach did not take into account the need to have regard to the attributes of the hypothetical reader or viewer, who in this case was likely to have been aware of the bundling method of sale commonly adopted with this type of service.

The High Court agreed with the Full Federal Court that many of those viewing the advertisements would have only absorbed the general thrust, but went on to find that the Full Federal Court failed to appreciate the implication of that finding.

The High Court found that the Full Federal Court did not recognise that the tendency to mislead was to be determined not by asking whether the advertisements were apt to induce customers to enter into contracts with TPG, but by asking whether they were apt to bring them into negotiation with 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's decision is a reminder to businesses to ensure that their messages about pricing are accurate and shows that the ACCC will be vigilant in this area, and will receive support from the Australian Courts in appropriate cases.

For further information contact:



Tom Griffith, Partner
t +61 2 9253 9913
tgriffith@piperalderman.com.au