Welcome to Piper Alderman’s bulletin looking at competition and consumer law. In this bulletin we seek to inform on developments in these areas of law and trade practices generally.

April 2014

Telstra succeeds in stopping Optus’ comparative advertisements
Telstra successfully obtained an injunction against Optus in relation to Optus’ advertisements, which made specific comparisons regarding network coverage. Telstra alleged that the representations as to network coverage were false, misleading or deceptive. Senior Associate, Bill Fragos, discusses the proceedings and the risks associated with comparative advertising.

Amendments to the Franchising Code of Conduct
The Government has released for public consultation an exposure draft of amendments to the Franchising Code of Conduct. Partner, George Raitt and Lawyer, Jennifer McGarvie, consider the Amendments.

More success for the ACCC in actions against breast imaging service providers
Hot on the heels of the ACCC’s successful case against Breast Check Pty Limited (reported in the March edition of CCN), the Federal Court has found that another breast imaging service provider engaged in misleading or deceptive conduct, as Partner, Anne Freeman, reports.

Birdsville and predatory pricing: What were they drinking?
With the upcoming review of Australia’s competition laws under way, Professor Fred Hilmer was recently reported as urging the review not to be blindsided by politics advocating ‘protecting small business from big business’. Australia has traditionally protected inefficient producers that lack the scale to compete in world markets. The jewel in the crown of politically inspired competition law is the ‘Birdsville amendment’ concerning predatory pricing. Partner, George Raitt, explains the implications.
Telstra succeeds in stopping Optus’ comparative advertisements

Telstra successfully obtained an injunction against Optus in relation to Optus’ advertisements, which made specific comparisons regarding network coverage. Telstra alleged that the representations as to network coverage were false, misleading or deceptive. Senior Associate, Bill Fragos, discusses the proceedings and the risks associated with comparative advertising.

Background

From November 2013, Optus ran specific advertisements containing representations with respect to its network coverage. However, commencing 29 January 2014, Optus advertised on television and on its website an update that its network reaches 98.5 per cent of Australians, while Telstra’s network reaches 99.3 per cent. An image – a map of Australia – was displayed when making this representation. In the television advertisement, the image was accompanied by a voice over “When it comes to the percentage of Australians the Optus mobile network reaches, there isn’t much difference between us and Telstra. In fact, it’s less than 1%.”

Within two weeks, Telstra sought an injunction in relation to the advertisement alleging that Optus’ representations with respect to coverage were false or likely to mislead and/or deceive.

Representations

Telstra suggested that the advertisement effectively contained three representations:

1. The Optus mobile network and the Telstra mobile network cover 98.5% and 99.3% of the Australian land mass respectively (“the First Representation”).

2. The Geographic Coverage of the Telstra mobile network is less than 1% greater than the Geographic Coverage of the Optus mobile network (“the Second Representation”).

3. The difference between the coverage (alternatively the Geographic Coverage) of the Telstra mobile network and that of the Optus mobile network is minimal and insignificant (“the Third Representation”).

Issues

The central issue was the concept of coverage, which could be understood with reference to population (“Population Coverage”) as well as Geographic Coverage. Telstra’s problem with the advertisement was that by using the map of Australia together with the percentages and the voiceover, Optus was making representations with respect to Geographic Coverage which were likely to mislead or deceive. Telstra claimed its network is 2.3 million square kilometres in geographic area, covering 28 per cent the Australian landmass, while the Optus network is about 1 million square kilometres.

Telstra did not lead evidence that any consumer was misled. Hence, its case was put to the Court on the basis that consumers were likely to be misled or deceived. This was especially the case given that consumers place significant reliance on coverage in choosing a carrier.

In response, Optus focused on the fact that the voiceover made reference to “Australians”, as opposed to “Australia”, and that, in turn, the representation was with respect to Population Coverage and not Geographic Coverage.
The Court had to consider the relevant concepts and the effect of the representations in the absence of any evidence from consumers. As part of this process, the Court considered the representations both objectively and with reference to the class of consumer likely to constitute the target audience.

Decision

The Court agreed with Telstra that the three representations were made, and that the dominant message and effect of the representations were that consumers would have understood them with reference to Geographic Coverage. Emphasis was placed on the fact that percentages were incorporated into the image of a map of Australia.

The Court noted that no imagery was used to signify people, and that no clarification was made with respect to Geographic Coverage.

Optus had submitted that there was very little substantive difference between the advertisements run in November 2013 as opposed to the January advertisements. For example, the voiceover was identical. However, the crucial difference was that no image of a map of Australia was present in the original advertisements.

Optus also complained that Telstra had run similar advertisements in the past, including with reference to an image of a map of Australia. The Court considered those advertisements and was able to distinguish them on the basis that Telstra had made representations as to both Population Coverage and Geographic Coverage, and had used the map when discussing Geographic Coverage. The Telstra advertisements were also confined to the internet, with exposure to a different class of consumers.

In imposing its decision, the Court noted that Telstra ran advertisements drawing attention to the issue and specifically compared Telstra’s Geographic Coverage to Optus’ Geographic Coverage. Optus altered its advertisement, with the image of the map replaced with imagery with respect to population.

The Court ordered corrective advertising in order to address the false and incorrect impression which has created an ongoing misapprehension amongst the target audience. Interestingly, corrective advertisements weren’t required to run on television (where the advertisement had aired). Rather, Optus was ordered to display corrective notices in newspapers, at Optus stores and on its websites for a month.

Summary

When considering advertisements and marketing campaigns and whether they are misleading or deceptive, it is important to remember that the alleged conduct should be considered as a whole and in its full context. Whilst the script in the Optus advertisement specifically referred to “Australians”, it was accompanied by an image of a map of Australia, creating an impression relating to Geographic Coverage.

There are inherent risks when making claims about a competitor’s goods and services, unless of course such claims can be substantiated or are of a very broad nature. As this case demonstrates, a business can be held responsible for their advertising campaigns, whether by a competitor or a by regulator, including the ACCC. Those risks also extend to advertising agencies. Timely advice should be sought on advertising campaigns both at early concept development stages and also at near final production stages. Getting advice before the campaign goes live assists in minimising risk and avoiding liability.

For further information contact:

Bill Fragos, Senior Associate
+61 8 8205 3446
bfragos@piperalderman.com.au
More success for the ACCC in actions against breast imaging service providers

Hot on the heels of the ACCC’s successful case against Breast Check Pty Limited (reported in the March edition of CCN), the Federal Court in Western Australia has found that another breast imaging service provider engaged in misleading and deceptive conduct, as Partner, Anne Freeman, reports.

There were many similarities between the conduct of Safe Breast Imaging Pty Limited (SBI) and Breast Check.

SBI, in the period between April 2009 and August 2011, conducted breast imaging using a multi-frequency electrical impedance mammograph (MEM). The company promoted its business by:

- Google AdWords.
- A website.
- A video published at various locations on the internet, including YouTube.
- A double sided pamphlet.

The ACCC alleged that this promotional material conveyed the following representations which were false or misleading:

- That breast imaging using MEM could provide an adequate scientific medical basis for assuring a customer that she does not have breast cancer.

- That breast imaging using MEM could provide an adequate scientific medical basis for assessing whether a customer may be at risk of breast cancer.

- That there was an adequate scientific medical basis for breast imaging using MEM as a substitute for mammography.

- That Australian registered medical doctors were involved in (a) providing the breast imaging service, particularly in the interpretation of images, and (b) preparing breast health reports.
The sole director, shareholder and business manager of SBI, who was not a doctor, was alleged to have been knowingly concerned in or a party to SBI’s contravening conduct.

Like the Breast Check case, there was an issue about the class of the public to whom the representations were made. The respondents suggested that the target audience were informed women interested in breast health, who were aware of the limitation and dangers of mammography and would not or could not have mammograms, and actively sought out alternatives to mammograms. That was rejected by Justice Barker, who stated that the respondents could not control the range of people who might access the promotional materials and thus well-informed as well as the poorly educated consumer all needed to be considered.

This was particularly so because Google AdWords directed those simply searching for “breast cancer screening” to the SBI site.

The Court was satisfied that each of the representations were made, and, having regard to expert evidence led by the ACCC, found that they were false or misleading. There was insufficient evidence to support that the MEM can reliably identify persons at risk from having breast cancer, nor to accurately differentiate between those whose breasts are likely to contain breast cancer and those whose don’t. In contrast, there was evidence that mammography detects early-stage breast cancer.

The second respondent was responsible for publishing material on the SBI website, had approved, narrated and caused the video to be published and drafted and organised the distribution of the pamphlet. She also instigated the use of the Google AdWords advertising. Further, she told customers they would receive a report produced by a doctor, when they were not.

The Court found that the second respondent had no reason to believe there was a factual basis for the representations, and indeed that she had knowledge of the falsity of the fourth representation above. She was therefore found liable as an accessory for SBI’s contraventions.

The matter was adjourned for further submissions as to the appropriate relief. The ACCC is taking the serious step of seeking an order that the second respondent be disqualified from managing corporations.

The lessons to be learned from the conduct of the respondents in this case include:

- Individuals and corporations should ensure promotional material is accurate, and there is a factual basis for all representations made.
- If it is intended to market to a select class of the public, publishing of promotional material must be carefully planned. A broad range of Google AdWords search terms will naturally broaden the audience.
- Those involved in the preparation of promotional material must be vigilant to ensure they are not aware of any evidence which may call into double the accuracy of the contents of that material.

For further information contact:
Anne Freeman, Partner
t +61 2 9253 9934
afreeman@piperalderman.com.au
Amendments to the Franchising Code of Conduct

The Government has released for public consultation an exposure draft of amendments to the Franchising Code of Conduct. Partner, George Raitt and Lawyer, Jennifer McGarvie, consider the Amendments.

On 2 April 2014, the Government published its “Future of Franchising” statement outlining the specific changes it will make to the Franchising Code of Conduct (Code). The Government also released exposure draft legislation to give effect to the proposed reforms. The proposed implementation date for the revised Code is 1 January 2015. Prior to that date, franchisors will need to update their disclosure document, review their franchise agreement and prepare information statements to provide to prospective franchisees.

The exposure draft contemplates important reforms to the Code, including:

- **Introducing a statutory duty of good faith on franchisors and franchisees during their dealings with each other.** Acting in good faith includes an obligation to act honestly and not arbitrarily and to co-operate to achieve the purpose of the franchise agreement. The obligation will apply in all dealings that the franchisor and franchisee will have with one another, including during negotiations, the term of the agreement, in resolving disputes and as part of renewal discussions. This obligation does not prevent a party to a franchise agreement from acting in its legitimate commercial interests.

- **Introducing civil pecuniary penalties.** The ACCC can now seek civil penalties of up to $51,000 from the court for breaches of the Code. These penalties can be issued for offences such as not acting in good faith, not following the correct form of disclosure document, not giving the disclosure document 14 days before signing, not giving a copy of the lease to the franchisee within 1 month of signing the lease, not giving a copy of the audit of the marketing fund to franchisees within 1 month, not notifying a franchisee of whether a franchise will be renewed, not refunding money in the event a franchisee terminates during the cooling off period, not giving required notices for breach, disclosing a former franchisee’s details contrary to its request and failing to attend mediation.

- **Increased enforcement powers of the ACCC.** The ACCC can now issue infringement notices of up to $8,500 without seeking a court order, for breaches of civil penalty provisions of the Code. The ACCC will also be allowed to use its audit powers to obtain documents that the franchisor has relied upon to support statements made in the disclosure document.

- **Introduction of Information Statements.** In addition to the existing disclosures required under the Code, franchisors must provide franchisees with an information statement in prescribed form containing an overview of the risks and rewards of franchising. This will include information on unforeseen capital expenditure, the importance of education and conducting due diligence and the prospect of franchisor failure.

- **Restrictions on forcing franchisees to undertake significant capital expenditure.** Franchisors are prevented from imposing ‘significant capital expenditure’ on franchisees unless: the expenditure was disclosed in the disclosure document; or a majority of franchisees in a system agree to the expenditure; or the expense is considered necessary capital investment by the franchisor and can be justified by a statement which provides the rationale, costs and anticipated benefits associated with making the investment.
• **Restrictions on imposing restraints of trade on former franchisees.** Franchisees may avoid restraint clauses in circumstances where the franchisor elects not to renew a franchise agreement but the franchisee was not in breach of the agreement and the franchisor did not genuinely compensate the franchisee.

• **Online Trading Disclosure.** If the franchisor supplies goods or services online, the new form of disclosure document requires disclosure of the extent to which those goods or services may be supplied in the territory of the franchisee or made available via a third party’s website. Disclosure is also required in relation to the details of any profit sharing arrangements that apply in relation to goods or services made available online.

The Government has sought comments on technical aspects of implementing the legislation by 30 April 2014. It has expressly indicated that it has no intention to reconsider the underlying policy on which the legislation is based.

**For further information contact:**

George Raitt, Partner  
t +61 3 8665 5532  
graitt@piperalderman.com.au

Jennifer McGarvie, Lawyer  
t +61 3 8665 5594  
jmcgarvie@piperalderman.com.au
Birdsville and predatory pricing: What were they drinking?

With the upcoming review of Australia’s competition laws under way, Professor Fred Hilmer was recently reported as urging the review not to be blindsided by politics advocating ‘protecting small business from big business’. Australia has traditionally protected inefficient producers that lack the scale to compete in world markets. The jewel in the crown of politically inspired competition law is the ‘Birdsville amendment’ concerning predatory pricing. Partner, George Raitt, explains the implications.

It is hard for our international trading partners to grasp that this important area of competition law was drafted in a pub, and bears every hallmark of its genesis. This seriously adds to the problem, already underlying Australian (and overseas) competition law, that it is difficult to distinguish price cutting which may be justified as a normal incident of competition (e.g. “meeting competition”) from exclusionary conduct that contravenes the legislation.

Section 46 of the Competition and Consumer Act 2010 (CCA) prohibits a corporation with a substantial degree of market power from taking advantage of that power for purposes that include a substantial purpose of eliminating or substantially damaging a competitor or deterring or preventing a person from engaging in competitive conduct. There has been ongoing debate whether the law should be changed to encompass an “effects” test, however, at present, proof of a proscribed anti-competitive purpose is the key element once market power is proven.

The concept of market power has been judicially defined to be the ability to “give less and charge more” without being constrained by the response of competitors or customers. The legislation makes clear that a corporation can have market power without necessarily being in a position to control the market, and it is possible for more than one corporation to have a substantial degree of power in the market. Market power is not the same as market share, as “power” depends on the response of competitors and customers, i.e. a corporation can have a high market share without necessarily having market power if it is constrained by the conduct of its competitors and customers.
It is judicially recognised that a corporation fighting to retain its market share in a buyer’s market, i.e. when supply capacity exceeds demand, may not have the required threshold “market power”. Further, the words “taking advantage” are open to interpretation, i.e. they suggest that the corporation would not be able to act the way it does if it did not have market power, but also have been construed to require consideration of what the corporation could be expected to do in a more competitive market. Both these counterfactuals are problematic in distinguishing permitted from prohibited price-cutting: you don’t need market power to be able to cut prices.

The ACCC has not successfully prosecuted a case of predatory pricing. Following a failed case in 2003, the CCA was amended in two relevant respects. First, a provision was inserted which permits the court to have regard to conduct of the corporation supplying goods “for a sustained period at a price which was less than the relevant cost to the corporation” and the corporation’s reasons for so doing. A further amendment makes clear that it is unnecessary to consider whether the corporation might ever be able to recoup any losses arising from that conduct. This side-steps an important debate under the corresponding US law. Second, the Birdsville amendment prohibits a corporation that has a substantial share of a market from offering to supply goods for a sustained period at a price less than the relevant cost for any of the prohibited purposes mentioned above. This prohibition is based on market share and lowers the bar for predatory pricing allegations.

Amazingly, the expression “relevant cost” in the provisions above is not defined. In economic theory, the relevant cost is “marginal cost” being the additional cost incurred as a result of producing one more unit (which includes allowance for “normal profits”). As this is generally indeterminable, case law supports “average variable cost” as the relevant benchmark, i.e. in theory a supplier would cease production if it could not cover the variable costs of producing a product. The High Court has cautiously endorsed “average variable cost” as a relevant benchmark (without deciding the point). It is conceivable that in a buyer’s market, where supply exceeds demand, prices may fall below average variable cost due to competitive market forces. There is inconclusive discussion in the High Court of US concepts that would restrict predatory pricing to conduct which has the purpose of excluding from the market an equally or more efficient competitor. These laws add to the strategic armoury of competitors and so distract attention from real competition on products and prices.

There is also some inconclusive discussion by the High Court of intra-group transfer prices which leaves multinational groups in an uncertain position, i.e. you should exclude from a corporation’s “cost” the profit margin charged by related companies, but the point has not be clarified by the courts.

The Australian provisions are based on the corporation’s “purpose”, which includes one substantial purpose among many. This exposes corporations to what one Australian judge has called “metaphysical analysis of dual purposes”, i.e. in a zero sum world one competitor looking out for itself necessarily stands to harm competitors, so it is easy for competitors or the ACCC to characterise the “purpose” as including a prohibited one. Clearly, meeting competition, preserving market share from aggressive competitor price-cutting, competitive tendering, etc should be defensible, but the position under our law is unclear. Much will depend on the way corporations manage and communicate (both internally and externally) their strategies during periods of intense price competition. Careful advice is required to avoid inadvertently opening the corporation to an allegation that its purposes included a prohibited purpose of harming competitors.

For further information contact:

George Raitt, Partner
t +61 3 8665 5532
graitt@piperalderman.com.au