FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2011] FCA 1254

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| Citation: | | Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2011] FCA 1254 |
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| Parties: | | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TPG INTERNET PTY LTD** |
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| File number: | | VID 1099 of 2010 |
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| Judge: | | **MURPHY J** |
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| Date of judgment: | | 4 November 2011 |
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| Legislation: | | *Trade Practices Act 1974* (Cth), ss 52, 53(e),  53(g), 53C  *Trade Practices Amendment (Clarity in Pricing) Act* *2008* (Cth)  *Australian Consumer Law* *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* s 18 *Competition and Consumer Act 2010* (Cth) |
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| Cases cited: | | *ACCC v Boost Tel Pty Ltd* [2010] FCA 701  *ACCC v Dell Computers Pty Ltd* [2002] FCA 847  *ACCC v Dell Computers Pty Ltd* (2002) 126 FCR 170  *ACCC v Dukemaster Pty Ltd* [2009] FCA 682  *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393  *ACCC v Signature Security Group* [2003] FCA 3  *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177  *ACCC v Telstra* (2004) 208 ALR 459  *ACCC v Yellow Page Marketing BV (No 2)* [2011] FCA 352  *Campomar Sociedad Limidada v Nike International Ltd* (2000) 202 CLR 45  *Colgate Palmolive v SmithKline Beecham* (1997) 39 IPR 147  *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586; [2007] FCAFC 170  *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1;[2003] FCAFC 289  *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90  *Singtel Optus Pty Ltd v Telstra* [2004] FCA 859  *St Lukes Health Insurance v Medical Benefits Fund of Australia Ltd* (1995) 17 ATPR 41-428  *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177  *Telstra Corp Ltd v Cable and Wireless Optus Ltd* [2001] FCA 1478  *Telstra Corporation v Optus Communications Pty Ltd* (1996) 36 IPR 515  *Tobacco Institute of Australia v Australasian Federation of Consumer Organisations Inc* (1992) 38 FCR 1  *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 1099 of 2010 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | TPG INTERNET PTY LTD  Respondent |

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| JUDGE: | MURPHY J |
| DATE: | 4 November 2011 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# INTRODUCTION

1 This case concerns whether representations made by TPG Internet Pty Ltd in a national advertising campaign for a broadband internet service named “Unlimited ADSL2+” constitute misleading or deceptive conduct or conduct which is likely to mislead or deceive, and whether they are also false and misleading representations, in breach of the *Trade Practices Act 1974* (Cth) (“the Act”). It also concerns whether the total minimum charge was prominently specified as required by the Act.

2 TPG is an internet and network service provider that provides a range of telephony and internet products and services to residential customers across Australia, including the Unlimited ADSL2+ service. This service utilises the home telephone line of the consumer to provide the internet connection and has no data download limit.

3 TPG used various different mediums in its advertising campaign which ran in two phases. The initial advertisements were published in the first phase between 25 September 2010 and about 7 October 2010 on three national television stations, seven capital city radio stations, in a number of national and capital city newspapers, and on the TPG and two third party websites.

4 On 4 October 2010 the Australian Competition and Consumer Commission wrote to TPG expressing concerns regarding the advertisements. Whilst not accepting the legitimacy of those concerns, TPG amended the advertisements with effect from about 7 October 2010.

5 The current advertisements were published in the second phase of the campaign from 7 October 2010 and were continuing at the date of hearing. TPG also expanded its advertising campaign and published these advertisements on or in four national television stations, the same seven radio stations as previously, a wider range of national and capital city newspapers, its website and further third party websites, national cinema screens, national magazines, coupon booklets left in letter boxes, brochures, public transport, billboards and notice boards.

6 The ACCC alleges that TPG represents in each of the advertisements that the Unlimited ADSL2+ broadband internet service could be acquired at a cost of $29.99 per month:

(a) without obligation to acquire any additional service;

(b) without obligation to pay any additional monthly charge; and

(c) without obligation to pay any up front charges.

I will call the first two alleged representations the “no additional service or monthly charge representation” as the obligations to acquire another service and to pay for it operate together. I will call the third alleged representation the “no setup fee representation”.

7 The ACCC contends that these representations are misleading and deceptive because in fact Unlimited ADSL2+ is only offered by TPG at a cost of $29.99 per month with an obligation to also:

(a) rent a home telephone line from TPG to be “bundled” with the broadband internet service;

(b) pay an additional $30 per month for the home telephone line rental; and

(c) pay upfront charges comprising a setup fee on a 6 month contract of $129.95 (or $79.95 on an 18 month contract) and a $20 deposit (as a pre-payment for telephone call charges).

8 I will call the obligation to rent a home telephone line from TPG and pay an additional $30 per month to do so the “bundling condition”. I will call the obligation to pay a setup fee and a deposit the “setup fee condition”. I refer only to the setup fee rather than to upfront charges because in the conduct of the case no real significance has been attributed by either party to the $20 telephone deposit. This is appropriate given its small amount and the fact that it is a prepayment for telephone calls to be later charged, rather than itself a charge. It is the setup fee of $129.95 which is of significance.

9 That Unlimited ADSL2+ is offered only upon the basis that these further obligations would be met is agreed by TPG. It contends that these obligations are made abundantly clear in the advertisements.

10 The ACCC also alleges that in the initial television, newspaper and internet advertisements TPG did not specify in a prominent way the minimum total charge or “single price” of $509.89 for the broadband service as required by the Act.

11 I have found that:

(a) all of the advertisements, except for the brochure advertisement, convey the no additional service or monthly charge representation;

(b) all of the initial advertisements convey the no setup fee representation, but none of the current advertisements do so;

(c) these representations are false and their publication constitutes misleading and deceptive conduct or conduct which is likely to mislead or deceive in breach of s 52 of the Act when the advertisements were published before 1 January 2011, and in breach of s 18 of the *Australian Consumer Law* (“ACL”) when published after that date;

(d) these representations are also false and misleading representations in relation to the price of a service in breach of s 53(e) of the Act,and in relation to the existence of a condition in breach of s 53(g) of the Act, when the advertisements were published before 1 January 2011, and in breach of ss 29(1)(i) and (m) of the ACL when published after that date;

(e) the initial television, newspaper and internet advertisements do not prominently specify the single price of $509.89 in contravention of s 53C of the Act*.*

# LEGISLATION AND PRINCIPLES REGARDING SECTIONS 52 AND 53 OF THE TPA (AND SUCCESSOR PROVISIONS)

## Transitional Arrangements

12 The title of the Act, and certain of its provisions, were amended by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (No 103, 2010)* and its short title became the *Competition and Consumer Act 2010* (Cth). The transitional arrangements relevantly operate to ensure that the Act in its form prior to 1 January 2011 applies to this matter in relation to advertisements published before that date and that the ACLapplies to advertisements published after 1 January 2011.

13 The relevant provisions in the Act and the ACL are essentially the same and I shall usually refer only to the TPA provision*.* For conduct occurring after 1 January 2011 this should be taken as a reference to the successor provision in the ACL.

## Legislation and Principles regarding s 52 of the TPA

14 Section 52 of the Act provides:

Misleading or deceptive conduct

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or likely to mislead or deceive.

Section 18 of the ACL is the same as s 52 of the Actexcept for the substitution of the word “must” for the word “shall” which makes no difference to its effect.

15 The relevant principles are uncontroversial. I am required to determine the following two issues:

(a) whether the pleaded representations are conveyed by the events described; and

(b) whether, as a matter of fact, the representations conveyed are misleading or deceptive or likely to mislead or deceive.

16 Because the conduct was not directed at a specific person, both of these issues must be considered by reference to the class of consumers likely to be members of the target audience. It is necessary to isolate the ordinary or reasonable member of the target audience and consider the characteristics of this person. The Court must consider what meaning the ordinary or reasonable consumer would ascribe to the advertisement, excluding possible reactions to the representation that are extreme or fanciful. To consider the reaction of the ordinary or reasonable consumer is to consider the reaction of a significant proportion of the target audience: *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90at [23] and [70] (“*National Exchange*”). The Court must then determine whether the meaning conveyed is the same as the pleaded meaning, and whether that meaning is misleading or deceptive or likely to mislead or deceive.

17 Whether an advertisement is misleading or deceptive is a matter of fact to be decided in the particular circumstances of the case, which should not be complicated or over intellectualised: *ACCC v Telstra Corporation Ltd* (2004) 208 ALR 459 at [49] (“*ACCC v Telstra*”). The test is an objective one: *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202-203.

## Legislation and Principles regarding ss 53(e) and (g) of the TPA

18 Section 53 of the Act relevantly provides:

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

…

(e) make a false or misleading representation with respect to the price of goods or services;

… or

(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

…

Subsections 29(1)(i) and (m) of the ACL are the same as ss 53(e) and (g) of the Actexcept for the substitution of the word “must” for the word “shall” which makes no difference to the effect of the provisions.

19 The legal principles relevant to a finding that a representation is false or misleading in contravention of ss 53(e) and (g) of the Act are the same as those relevant to a finding that a representation is misleading or deceptive conduct in contravention of s 52. There is no material difference between the terms “false or misleading” and “misleading or deceptive”: *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 at [14] and [15] in relation to s 53(e), and *ACCC v Yellow Page Marketing BV (No 2)* (2011) 195 FCR 1 at [27]-[28] in relation to ss 53(c) and (d).

20 The representations in this matter that are alleged to constitute misleading and deceptive conduct in contravention of s 52 of the Act are also representations:

(a) as to the price of Unlimited ADSL2+ which is covered by s 53(e) of the Act; and

(b) as to the existence of the bundling condition or the setup fee condition which is covered by s 53(g) of the Act.

21 Accordingly, if TPG’s representations in the advertisements constitute misleading and deceptive conduct in breach of s 52of the Act*,* then those representations will also be false and misleading representations in breach of ss 53(e) and (g) of the Act.

# THE TARGET AUDIENCE

22 Both the initial and current advertisements are part of a broad national advertising campaign not directed at any specific individual. The advertisements had a geographical dissemination at least across Australia. TPG agrees that the campaign is very extensive and would have been seen by “hundreds of thousands, if not millions, of people”. TPG’s broadband network though is restricted essentially to the mainland capital cities, and the service is only offered to people residing in these locations.

23 The advertisements are intended to promote sales of Unlimited ADSL2+. It is described by advertising consultants to the campaign as a “call to action” for consumers. The sales effort is directed at the broad class of Australian consumers around mainland capital cities who were users or potential users of broadband internet services. This is the target audience.

## Knowledge to be Imputed to the Target Audience

24 The Court must take into account that an advertisement published to the world at large is designed and calculated to be seen and read by a wide range of persons, including the shrewd and the ingenuous, the educated and the uneducated, the experienced and inexperienced in commercial transactions. It will include the astute, the informed, those who are sceptical and read the small print, those who are intelligent and those who are well informed. It will also cover many who do not possess those characteristics, those who are less informed and those with average intelligence: *Telstra Corp Ltd v Cable and Wireless Optus Ltd* [2001] FCA 1478 at [21]–[25] (“ *Cable and Wireless*”).

25 The parties made various submissions as to the knowledge of the target audience with regard to broadband internet services. The degree of knowledge to be imputed to the class, and thus to the ordinary or reasonable consumer, is a matter of inference from the evidence, including the advertisements and the broad reach of the campaign.

26 Evidence was given by Craig Linton Levy, General Manager, Consumer Products, Marketing and Sales of the TPG Group. The ACCC submits that alleged deficiencies of Mr Levy’s evidence - that it was speculative, and opinion evidence with its basis unclear and without Mr Levy’s experience being established - go to its weight. Although Mr Levy has relevant experience in marketing internet services the evidence is that TPG does not conduct formal surveys, market research or other investigations as to its products, and Mr Levy did not himself speak to consumers about broadband offerings. TPG concedes that Mr Levy is not expert in what broadband users know about available broadband internet services. Mr Levy is though knowledgeable about the broadband internet offerings of TPG’s competitors. I do not accord his evidence much weight in relation to the knowledge of the target audience about broadband internet services.

27 TPG submits that because the advertisements only had a purposeful meaning to those who knew that ADSL2+ was a broadband internet service, the class did not include people who knew little or nothing about such services. I accept this, but note that TPG concedes that this still includes most adults in Australia.

28 Because its advertisements were aimed at those consumers who knew at least enough about broadband internet services to know that ADSL2+ was a faster and more desirable form of service than ADSL1 or dial-up internet, TPG contends that the class was more knowledgeable about such services than the general class of users or potential users of internet services. I accept this, but this does not impute a high level of knowledge about broadband internet to the ordinary or reasonable consumer.

29 The campaign targeted consumers who wanted to purchase a broadband internet service with no data download limit. TPG contends that the class was therefore unlikely to include first time users of internet services as they could access cheaper plans which had download limits. I do not accept this. The class includes first-time as well as more experienced users. There is a tendency in some consumers to purchase the biggest, the best, or the highest quality product or service, seemingly regardless of whether that service is appropriate to their needs. Some first time users are likely to purchase Unlimited ADSL2+ even if unsure as to how much download capacity they need. Similar observations were made by Perram J in *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 at [28] (“*ACCC v Singtel*”). Further when unlimited download capacity is offered at a comparatively low price, as it was in this case, first time users might purchase the service simply because of its price.

30 An ordinary or reasonable consumer can be expected to do some research before purchasing a broadband internet plan as it is a substantial rather than an impulse purchase. He or she will have a higher degree of knowledge as a result. Consumers must be taken to have a certain degree of background knowledge about basic internet usage: *ACCC v Singtel* at [28].

31 TPG also contends that the knowledge of the ordinary or reasonable consumer about the bundling of internet services with telephony services is such that he or she would not assume that the advertisements referred to a separate (as distinct from bundled) service, even if the requirement for bundling was not prominent in the advertisement. In my view, whilst bundling is one available option, the array of available internet options is such that the ordinary or reasonable consumer would not have a starting assumption about the service. He or she can be expected to simply rely on the advertisement for relevant information as to the type of service offered.

32 In this regard I note that the evidence is that ADSL2+ is available from TPG or its competitors in a variety of different forms. It is available “bundled” with a home telephone line as it is in this case, “naked” which requires a landline to be physically present but not connected, and “stand alone” which means that it is provided using a telephone line rented from another provider. Various different download limits also apply. A plethora of other internet options such as ADSL1, cable, and wireless broadband are also available, with a bewildering range of alternatives in terms of download limits, speed and pricing. This range means that the ordinary or reasonable consumer is likely to look to the advertisement for information about the service rather than start with assumptions about which of these many variables may apply.

33 The evidence also indicates that a percentage of the target audience is likely to have a lower level of interest in a broadband internet deal which is bundled with home telephone line rental. The agreed facts illustrate that the percentage of consumers with a fixed line telephone at home has been dropping since 2005. In 2010 a fixed line telephone at home was only held by about 41-42% of 18 to 24 year old consumers living out of home, and about 32% of all 18 to 24 year old mobile phone subscribers did not have a fixed line telephone at home.

34 The evidence is that TPG and its competitors always require payment of setup fees for ADSL2+ services when the contract length is for less than 24 months. TPG contends that the ordinary or reasonable consumer would therefore know that setup fees are usually charged. I accept this.

# CONSIDERATION REGARDING SECTION 52 CLAIM

## The Representations Alleged

35 As noted above at [6], the ACCC alleges that three representations are conveyed by the advertisements. As I have already said, I have treated them as two separate representations as the first two alleged representations operate together. The representations are:

(a) the no additional service or monthly charge representation; and

(b) the no setup fee representation.

## Were the Alleged Representations Conveyed by the Advertisements?

36 The advertisements must be considered individually as well as collectively. Such was the campaign’s reach it is likely that consumers around mainland capital cities saw the advertisements in more than one form and on more than one occasion. The impression conveyed to a consumer by one advertisement is likely to have a continuing effect on that consumer viewing another version of the advertisement.

37 The principles that the Court must apply are well established. Advertisements in different media will be seen or read by consumers differently. Each advertisement must be considered in the context of the medium in which it appears taking account of the different consumer viewing experiences with each form of advertisement: *ACCC v Singtel* at [5]; *ACCC v Telstra* at [52].

38 The Court must take into account that many readers may not study advertisements closely but will absorb the general thrust. It is the impression or thrust conveyed to a viewer, particularly the first impression, rather than an analysis of the cleverly crafted constituent parts of an advertisement that will be determinative of the message conveyed: *Tobacco Institute of Australia v Australasian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 4; *Telstra Corporation v Optus Communications Pty Ltd* (1996) 36 IPR 515 at 523-524 (“*Telstra v Optus*”); *Singtel Optus Pty Ltd v Telstra* [2004] FCA 859at [38] (“*Singtel v Telstra*”).

39 Section 52 is not intended to protect people who fail to take reasonable care to protect their own interests: *Campomar Sociedad Limidada v Nike International Ltd* (2000) 202 CLR 45 at [102] (“*Nike*”). A degree of robustness is required when determining whether an advertisement conveys a misleading impression. The public is accustomed to some puffery of products and benefits in mass advertising: *Singtel v Telstra* at [66]; *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393 at [50] (“*Global One*”).

40 An advertisement may be misleading despite it failing to deceive more wary readers: *Cable and Wireless* at [23]; *Global One* at [49]. Even though every sentence considered separately is true, an advertisement may be misleading because a message is composed to highlight the appealing aspects: *Telstra v Optus* at 523.

41 In this matter a decision as to whether the alleged representations are conveyed by the advertisements requires close consideration of each advertisement. In particular it involves consideration as to whether the advertisements have a dominant message.

42 There are hundreds of different types of advertisements in the campaign, but many of the differences between them are not substantive. I have treated the advertisements in the tender bundle as representative.

## Is There a Dominant Message?

43 A review of each advertisement reveals that each has the same dominant message. This is unsurprising in a national advertising campaign using various different media to sell a service to a large and diverse target audience. Identifying the dominant message is an important first step in determining what representations are made by an advertisement, as a consumer may take in only this general thrust.

### Television and cinema advertisements

44 The initial television advertisement is only 15 seconds in duration. Its main thrust is conveyed in the first 10 seconds and the rest of the advertisement is spent identifying and promoting TPG and its website. In the first 10 seconds there is a voiceover by an excited young female voice which informs:

TPG gives you Unlimited ADSL2+ for $29.99 a month. Yep, unlimited ADSL2+ for $29.99 a month.

45 During this voiceover the message “Unlimited ADSL2+ $29.99 per month” appears in large white, yellow and red graphics that are outlined in contrasting red or white so as to stand out against a strong purple background. The large, coloured graphics of this message fill most of the screen and rapidly change size and position so as to attract the eye.

46 All other on-screen information is static and is in much smaller font. The voiceover gets the attention of the viewer, repeating the message and focussing viewer attention on the same message in the large, coloured and changing graphics on-screen. In combination these factors take the viewer’s eye away from the other information. Annexure A is the three main screens of this advertisement and the voiceover script, although it is important to note that the advertisement must be watched to discern the impression conveyed.

47 The message of the voiceover, reiterated on-screen, is clear and prominent - “Unlimited ADSL2+ for $29.99 per month”. This is plainly the dominant message.

48 The voiceover and the main words and graphics in the current television and the cinema advertisements are the same or very similar to the initial television advertisement, although with larger font for the information about the bundling condition. They have the same dominant message. Annexure B is three screens of this advertisement and the voiceover script.

### Radio advertisements

49 The same dominant message is also clear in the initial radio advertisement. It has two distinct parts. In the first part, the same excited young female voice as in the television advertisement provides the same voiceover:

TPG gives you Unlimited ADSL2+ for $29.99 a month. Yep, unlimited ADSL2+ for $29.99 a month.

No other message in the advertisement is given the same prominence or is reiterated.

50 The second part of the advertisement is a rapid-fire recounting of other terms with the clear impression given by the speed and manner of delivery that this is less important information. Annexure C is the script with the rapid–fire section marked.

51 The current radio advertisement is similar to the initial one and the dominant message is the same. In the first part it has the same voiceover, although it includes more prominent information about the bundling condition. The second part of the advertisement is again a rapid-fire recounting of apparently less important terms. Annexure D is the script with the rapid–fire section marked.

### Newspaper and other print advertisements – magazines, coupon booklets and brochures

52 The advertisements in the initial and current newspaper and other print advertisements in magazines, coupon booklets, and brochures all contain the same or very similar main words and graphics. They also strongly state “Unlimited ADSL2+ $29.99 per month” using the same large white, yellow and red graphics, outlined in contrasting red or white against a strong purple background, as in the television advertisements. These large, coloured graphics occupy most of the space in the advertisements and take the reader’s attention. Any other information is secondary. They convey the same dominant message. Annexure E and F are sample initial and current newspaper advertisements respectively.

### Internet, public transport, billboard and noticeboard advertisements

53 The internet, public transport, billboard and noticeboard advertisements have the same or very similar main words and graphics as the initial and current newspaper and other print advertisements. While they vary slightly from each other and some different sizes and formats are used, in each advertisement any information other than the main message is much less prominent or conspicuous. The dominant message is the same: “Unlimited ADSL2+ $29.99 per month”. The internet advertisements cycle through different pages. The main page, where the cycle stops the longest, is attached as Annexure G and H for the initial and current internet advertisements respectively.

### Conclusion regarding dominant message

54 The main thrust of each advertisement in the campaign is “Unlimited ADSL2+ for $29.99 per month”. The requirements to also rent a home telephone line from TPG, to pay $30 per month to do so, and to pay the setup fee, are not part of this dominant message.

55 This message leaves the strong impression that the acquisition of Unlimited ADSL2+ does not involve an obligation to acquire any other service or an obligation to pay any monthly charge additional to $29.99 per month. The thrust of the message is directed squarely at the monthly charge being only $29.99. It also conveys the impression that the acquisition of Unlimited ADSL2+ does not involve an obligation to pay any one-off charge. The ordinary or reasonable consumer taking in only the dominant message would have the impression that the entire cost of the service is $29.99 per month, with no other charges and no obligation to acquire another service.

56 This message is false because – as TPG concedes – to acquire Unlimited ADSL2+ for $29.99 per month a consumer is also obliged to rent a home telephone line from TPG and to pay an additional $30 per month for it. The consumer must also pay a setup fee of $129.95.

## Qualification of the Dominant Message

**57**  It may be misleading to offer a product or service at a particular price without making clear that a prerequisite to acquiring it at that price is that some other unexpressed charge must be paid: *ACCC v Dell Computers Pty Ltd* (2002) 126 FCR 170 at [70]. TPG’s case is that the advertisements make clear the obligation to rent a home telephone line from TPG for $30 per month, and to pay a setup fee, so that the representations alleged are not conveyed. Given the Court’s finding as to the dominant message, the question as to whether the false impression is corrected or qualified by other information in the advertisements is of particular importance.

58 Any purported corrective or qualifying information must be sufficiently clear and sufficiently prominent if it is to prevent an inaccurate primary message from being misleading or likely to mislead: *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at [37] (“*MBF*”); *National Exchange* at [51]; *Singtel v Telstra* at [41]; *Global One* at [50].

59 The degree of prominence required to dispel a false dominant message increases with its potential to mislead: *ACCC v Signature Security Group* [2003] FCA 3 at [27]; *National Exchange* at [55]; *ACCC v Boost Tel Pty Ltd* [2010] FCA 701 at [77] to [81] (“*Boost Tel*”). Where the disparity between the primary message and the true position is great, attention must be drawn to the true position in the clearest possible way: *National Exchange* at [55]. In *Boost Tel* at [77] to [81] the Court made a distinction between information which operates to fairly qualify a primary message, and information which undermines the substance and integrity of the primary message*.* The latter requires greater prominence if it is to be corrective. The question is one of degree and impression. First impressions are important: *MBF* at [41].

60 In this matter the dominant message of “Unlimited ADSL2+ for $29.99 per month” is very prominent. The disparity between this message and the true position, particularly in relation to the monthly price to acquire the service which is actually $59.99 is significant. The disparity is not as great in relation to the setup fee condition.

61 TPG contends that other information in the advertisements fairly qualifies the availability of the service, by providing that it is available for $29.99 per month as long as the consumer also rents a telephone line from TPG for $30 a month, and pays a setup fee of $129.95. It argues that these advertisements are not ones in which “the main message was giving what the qualifications were taking away”.

62 I do not agree that the information in the advertisements about the bundling condition – particularly the requirement to pay an extra $30 per month – operates to qualify the dominant message of $29.99 per month. In my view the qualifying information about the bundling condition tends to seriously undermine the integrity of the dominant message, contradicting rather than fairly qualifying it. It operates to double the headline advertised monthly charge which is likely to make it much less attractive for some consumers. For many consumers it will involve the acquisition of a service extra to the broadband service that they are interested in acquiring. For many young people that no longer use landline telephones and rely instead on mobile telephones, the additional landline telephone rental is likely to be a service that they do not want. It therefore must be quite clear and prominent if it is to correct the misleading impression of the message.

63 In relation to the setup fee condition the situation is different. The thrust of the dominant message is aimed more at the monthly charge than at any one-off charge. Further, the ordinary or reasonable consumer is taken to understand that setup fees are usually charged, and he or she is therefore alert to that likelihood. Information that brings the existence of the setup fee to the consumer’s attention will operate to fairly qualify the impression conveyed by the dominant message, even if not particularly prominent.

64 I will now consider the qualifying or corrective information provided by each advertisement by reference to the two representations alleged.

## The No Additional Service or Monthly Charge Representation

### Initial television advertisement

65 Television advertisements should be treated by the Court as being seen by a casual but not overly attentive viewer with only a marginal interest in the advertisements shown between the segments of the television program being watched. They are transient, and consumers frequently pay them low attention: *Telstra v Optus* at 523-524; *Global One* at [53].

66 I have already described how the dominant message is conveyed in the initial television advertisement. TPG contends in response that the entire time that the dominant message of “$29.99 per month” is on-screen it is accompanied by the qualifying information:

When bundled with TPG home phone line rental ($30 per month)

It argues that this is not a case of a false dominant message being conveyed with the truth being hidden amongst detailed terms and conditions. It says that the circumstances under which the service can be purchased are explained in easily readable on-screen conditions, which are few in number and sufficiently clear in delivery.

67 However, the corrective information is insufficiently prominent to dispel the false dominant message. The voiceover, which is a very important part of the advertisement, does not mention at all the requirement to bundle Unlimited ADSL2+ with a home telephone line rental from TPG, or the requirement to pay $30 per month for this. The corrective information on-screen is much smaller, it is static rather than moving, it is at the bottom of the screen, and it comes on-screen while the viewer’s attention is taken elsewhere by large, eye catching graphics and the voiceover which reiterates the dominant message. In summary, the corrective information is not spoken and it appears in a visual context that means it is unlikely to be noticed by a casual but not overly attentive viewer. Both the voiceover and the main on-screen words and graphics state the dominant message with a prominence that far outweighs the corrective information.

68 Another problem with the corrective information is its lack of clarity. The advertisement is plainly composed to highlight as an appealing aspect of the service, a low monthly price of $29.99. It does so by strongly emphasising that component of the price and de-emphasising the other component of the price which is the $30 home telephone rental. It does not state the total monthly charge at all. Given the strong message of “only $29.99 per month” the ordinary or reasonable consumer is unlikely to understand from the corrective information that the real charge is $59.99 per month.

69 To be clear in the circumstances the advertisement needed to use words such as “extra” or “additional $30 per month”, or to specify the actual total charge of $59.99 per month. By way of an example, TPG did advertise the monthly charge as $59.99 in its brochure and in letters to potential customers who were moving house. Also in evidence is a draft advertisement considered but not used by TPG in December 2010 setting out the monthly charge as $59.99. Its failure to use words such as “extra” or “additional” or to refer to $59.99 as the monthly charge, in any of the advertisements complained of, is an important factor in the impression conveyed. The letter to potential customers and the draft revised advertisement are Annexures I and J respectively.

70 TPG contends that the ordinary or reasonable consumer must understand from the corrective information that the $30 per month referred to is an additional amount, because otherwise bundling would cost only one cent extra per month. In my view the corrective information is unlikely to be taken in by the consumer at all. However if it is taken in, the reference to “$30 per month” might be construed as TPG suggests or in other ways. For example, it might be seen as a special offer of one cent more to attract new customers to a bundled service as this offer is only made to new customers. What the advertisement does not clearly provide is that the $30 per month is additional or extra to the strongly reiterated “only $29.99 per month”, and it is the impression of the advertisement that is important rather than a careful analysis of its constituent parts.

71 TPG argues in the alternative that a consumer would likely find the discrepancy between the two possible charges, $29.99 and $59.99 per month, confusing. It is established that an advertisement that does no more than confuse a reasonable member of the target class may not amount to misleading conduct: *Nike* at [103]-[106]. However in this case there is a strong yet false dominant message, and any confusion relates to the clarity of the corrective information. If the qualification of the dominant message is confusing it fails to correct the false message. I consider that the ordinary or reasonable consumer is unlikely to be left confused by the advertisement in relation to price, but rather with the impression that the service can be acquired for $29.99 per month.

### Current television and cinema advertisements

72 I have already described how the dominant message is conveyed in the current television and cinema advertisements. The voiceover and the main on-screen words and graphics of the advertisements are essentially the same as in the initial one, except that the corrective information is in larger font which makes it more noticeable. The content of the corrective information is the same.

73 I do not accept that the corrective information ameliorates the misleading impression of the dominant message. The voiceover again does not mention the bundling condition, which is an important omission. The voiceover which states and reiterates the dominant message, and the large, coloured, changing on-screen graphics with the same message, again take the viewer’s attention away from the smaller white static font of the corrective information. Although it is now in larger font, it needs to be more clear and prominent if it is to correct the false impression of the dominant message.

74 The words “Min Charge = $509.89” and advice of the six month contract term also appear on-screen in small white font. TPG argues that by simple arithmetic a consumer could ascertain that $29.99 is not the monthly charge because that amount multiplied by the six month contract term is nowhere near the minimum charge of $509.89. In my view the ordinary or reasonable consumer is quite unlikely to attempt such a calculation. He or she is more likely to read and rely on the strong representation of $29.99 per month. In any event, the six month contract term is only stated in very small font amidst the other distractions of the advertisement. It is quite unlikely to be noticed by a casual but not overly attentive viewer. The suggested calculation cannot be performed without it.

75 The corrective information again lacks clarity for the same reasons I set out at [68] to [69]. Again, I do not accept that a consumer watching this advertisement would be merely confused rather than misled, for the same reasons as I set out at [71].

76 I have carefully watched the initial and current television and cinema advertisements in the calm of chambers taking a special interest in noting the features. Each time that I viewed one of these advertisements the representation of “Unlimited ADSL2+ for only $29.99 a month” – without any requirement to rent and pay for a home telephone line – came through strongly. It was conveyed even though I was carefully looking for any corrective information. The ordinary or reasonable consumer watching one of these advertisements casually but not overly attentively at home between program segments, or while waiting for the main feature in the cinema, is very unlikely to notice or take in the corrective information. Even if noticed the corrective information is insufficiently clear or prominent to dispel the misleading effect of the dominant message.

### Common issues arising

77 There are many features of the television advertisements which are repeated in the other advertisements. The on-screen words, graphics and colours are the same or similar in the newspaper, print, internet, billboard and noticeboard advertisements, although of course the images are static in these other advertisements. The relative prominence given to the dominant message and to any corrective information is also similar within the initial phase advertisements, and within the second phase advertisements. Accordingly many common issues arise in terms of the representations conveyed by them.

78 The same main corrective information about the bundling condition which states – “when bundled with TPG home phone line rental $30 per month” – is used in all advertisements, except for the radio advertisements. As I have found in relation to the initial television advertisement at [68] to [69] I consider that these words are not sufficiently clear to dispel the false impression conveyed by the dominant message that the monthly charge is only $29.99.

79 Another contention common to most advertisements is that the consumer must understand that $29.99 is not the correct monthly charge by performing the arithmetic to multiply it by the six month contract term. I reject this for the same reason as I do in relation to the current television advertisement at [74]. It is unlikely that the ordinary or reasonable consumer will perform this calculation when the $29.99 monthly charge is apparently clear. In the initial advertisements the six month contract term is not mentioned which makes the suggested calculation impossible in any event.

80 The contention that the ordinary or reasonable consumer would be merely confused rather than misled in relation to whether the monthly charge is $29.99 or $59.99 is also made with regard to each of the advertisements. I reject it in each case for the same reason that I do so for the initial television advertisement at [71]. The ordinary or reasonable consumer is unlikely to be left confused by the advertisements.

### Initial radio advertisement

81 The initial radio advertisement involves two distinct parts. I have already described how the dominant message is strongly conveyed in the first part. The only corrective information is delivered in the rapid-fire second part of the advertisement when the announcer states “Unlimited ADSL2+ available only when you bundle with TPG’s home phone line rental for $30 per month”. In reliance on this TPG contends that the advertisement clearly states the bundling condition and that no complaint can be fairly made about it.

82 However, the corrective information is delivered at a rapid-fire pace which – while not garbled by the speed of its delivery – means that it is unlikely to be noticed by a casual but not overly attentive listener. The advertisement also plainly treats this information as less important both by its rapid delivery and the voice used. If noticed by the listener it is unlikely to be taken in as a listener is likely to pay it less regard. It is also insufficiently clear as I describe at [68] to [69]. The misleading impression of the dominant message is not ameliorated by the corrective information.

### Current radio advertisement

83 The current radio advertisement is similar to the initial one, but there is a significant improvement in the prominence of the corrective information. Immediately following the making and reiteration of the dominant message the announcer continues “When you bundle TPG’s home phone line rental for $30 a month”. These words are not rushed and are spoken in the same part of the advertisement and in the same voice as the dominant message. The information is likely to be noticed by a listener.

84 However, as I set out at [68] to [69], this purported corrective information is not sufficiently clear to dispel the misleading effect of the dominant message. In particular it is not clear that the $30 per month is additional or extra to the strongly reiterated “only $29.99 per month”. It is also insufficiently prominent. The impression conveyed by the dominant message of “only $29.99 per month” overrides the effect of the corrective information.

85 I listened to the initial and current radio advertisements in chambers carefully noting their features. Each time I did so, the no additional service or monthly charge representation came through. The strength and clarity of the dominant message compared to that of the corrective information means that the ordinary or reasonable consumer, listening casually but not overly attentively to the radio, will be left with a false impression.

### Initial newspaper advertisement

86 I have already described how in the initial newspaper advertisements, the dominant message of “Unlimited ADSL2+ $29.99 per month” is conveyed in large white, yellow and red outlined graphics and words. Below it appears the usual corrective information in small white capital font. This is the only corrective information in the main body of the advertisement, but a compendious fine print section at the bottom of the advertisement also states “Only available in selected TPG ADSL2+ coverage areas to new customers when ADSL2+ and Home Phone Line Rental are purchased as a bundle.” TPG relies on this information as sufficient advice to a consumer taking care of his or her own interests.

87 I do not accept that it is sufficient. The corrective information in the main body of the advertisement is in a font which is much smaller than, and is overshadowed by, the large coloured words and graphics of the dominant message. While readable it is much less conspicuous, and a reader that does not read the advertisement closely is unlikely to notice it. Even if he or she does notice it, because it tends to contradict rather than qualify, it is unlikely to be taken in by the reader so as to correct the false impression of the dominant message. The corrective information in the fine print section is even more unlikely to come to the attention of the ordinary or reasonable consumer, as he or she will not read the advertisement like a contract.

### Current newspaper advertisements and other print advertisements - magazines, coupon booklet

88 This category encompasses the current newspaper advertisements as well as the national magazine, and letterbox drop coupon booklet advertisements.

89 The print advertisements in the second phase of the advertising campaign all have the same main words and graphics and all contain the same dominant message. They are all the same or very similar although they appear in some different sizes and formats. The same corrective information is provided as in the initial newspaper advertisements except that the font is larger, making it much more noticeable. The fine print section also states “Only available in selected TPG ADSL2+ coverage areas to customers when ADSL2+ and Home Phone Line Rental are purchased as a bundle.” TPG contends that this information about the bundling condition is sufficient advice to a consumer taking care of his or her own interests.

90 While the increased font of the corrective information in the main body of the advertisement is a real improvement and a consumer is likely to notice it. I do not accept that the false impression of the dominant message is dispelled. I do not consider that it is sufficiently clear that the $30 per month is “additional” or “extra”, for the reasons I have already set out. The consumer is unlikely to read the fine print, and would legitimately expect that such important information would be in the main body of the advertisement. It is the impression conveyed to the ordinary or reasonable consumer which is important rather than a careful analysis of each part of the advertisement. The strength and clarity of the dominant message, together with the lack of clarity and lesser prominence of the corrective information, means that the false impression is not corrected. In particular, the impression that the service is available for $29.99 per month remains.

### Internet advertisements

91 I have already described how the dominant message is conveyed in the initial and the current internet advertisements. Although some of the internet advertisements move through several screens on a cycle, the on-screen graphics do not move and there is no sound. They can be looked at in a similar way to print advertisements, and the words and graphics are the same or very similar to the corresponding initial and current newspaper advertisements. They have the same corrective information regarding the bundling condition, except that there is no fine print section. The same considerations apply to these advertisements as to the initial and current newspaper advertisements.

92 Neither the initial or current internet advertisements provide the corrective information with sufficient prominence or clarity to dispel the false dominant message.

### Current public transport, billboard and noticeboard advertisements

93 I have already set out how the dominant message is conveyed in these advertisements. They are indoor or outdoor notices of different sizes, with the same or similar content and format as the current newspaper and other print advertisements. The public transport advertisements are displayed on the sides and rear of buses, and on the sides of trams. The billboard advertisements are located indoors at places such as Adelaide railway station, and outdoors at places such as the Qantas domestic terminal taxi ranks in Melbourne and Sydney. The noticeboard advertisements are smaller and are located above hand drying machines and urinals in the men’s washrooms of shopping centres.

94 The corrective information in the body of the advertisements has the same content as in the newspaper advertisements. While much less prominent than the dominant message, it is in large font and likely to be noticeable to a viewer reading the advertisement, although there is no evidence as to the distance from which it is visible. TPG made the corrective information larger because it concedes these advertisements are “just viewed in glancing”. This was an appropriate concession related to the more difficult viewing circumstances in which a consumer will read such advertisements.

95 Consumers are likely to pay less detailed attention to a billboard than they do to other print advertisements because of the viewing circumstances: *ACCC v Singtel* at [5]. The circumstances in which these billboards are likely to be viewed means that the ordinary or reasonable consumer is unlikely to take in the corrective information and will receive only the main thrust of the advertisement. For example, advertisements on the outside of public transport are often moving. The viewer will often be moving too, either walking or driving in a car and preoccupied with negotiating traffic or a walkway. The view of the advertisement may also be reduced or intermittently obscured by moving traffic or pedestrians.

96 The viewing experience of consumers in relation to the billboard and noticeboard advertisements is also likely to be compromised. For example, the billboards at the Adelaide railway station are situated overhead the passenger concourse. They are viewed by train travellers who are likely to be preoccupied with getting to or from their work or other destination. The smaller billboards situated on the barriers at Qantas domestic terminal taxi ranks are fixed at and below waist height. Many travellers will see them as they walk past to go into or out of the airport on the way to their destination. They are unlikely to pay close attention to such a billboard and unlikely to take in more than the main thrust in the circumstances. Even though the small notice boards located in men’s washrooms are viewed from close-up, they too are likely to be read by people otherwise occupied and preoccupied with getting to or from their destination.

97 In each case the viewing circumstances are such that it is only the false dominant message that is likely to be conveyed. The corrective information is neither sufficiently clear nor sufficiently prominent in the circumstances to correct the dominant message.

### Current brochure advertisement

98 The brochure advertisement is the same or very similar to the current newspaper advertisements. The same considerations apply to it in terms of the dominant message, and the prominence and clarity of the qualifying information. Accordingly, if considering the advertisement alone I would find that the false impression was not ameliorated.

99 However, I accept that a consumer that goes to the trouble of reading a brochure will do so more carefully than he or she would read a newspaper advertisement: *ACCC v Telstra* at [52]. If a consumer reads this brochure, and reads past the advertisement itself to a later page, it very clearly sets out the requirement to pay $59.99 per month and to rent a home telephone line from TPG. Any misleading impression conveyed by the advertisement is corrected by this clear information.

## The No Setup Fee Representation

100 TPG contends that because setup fees are always charged for broadband contracts for less than a 24 month term, there is no reasonable basis for a consumer to assume that no setup fee will apply. I accept this, and accept that he or she will be alert to the possibility of such charges. However, because the dominant message gives the impression that there are no further charges, some information or indication of the existence of any further fee is necessary to fairly qualify this message.

### Initial television advertisement

101 I have already described how the dominant message is conveyed in this advertisement. Neither the voiceover or the on-screen information advise of the setup fee condition – that is, that the service is only available for $29.99 per month if the consumer also pays $129.95 in a setup fee. This is a significant omission. TPG relies on the on-screen words “Min Charge = $509.89” which appear in small white font throughout the advertisement. It says that through its disclosure of the minimum charge, the monthly charge, and the contract term, a reasonable consumer will work out that some other charge must be payable, because $509.89 is not divisible by $59.99. It contends that this provides sufficient advice of the upfront charges.

102 I do not accept this as in fact it provides next to no advice. First, the minimum charge is on screen in small white font while the viewer’s attention is taken by the much larger, coloured and moving graphics and voiceover, which make and reiterate the dominant message. The viewer is unlikely to notice it. Second, I do not accept that the ordinary or reasonable consumer is likely to perform the suggested calculation. He or she is more likely to rely on the complete absence of any advice or indication regarding any upfront charge to conclude that there are none. Further, the six month contract term is so fleetingly on-screen it is quite unlikely to be noticed, and utilised in the suggested calculation. Without knowing the contract term length the calculation is impossible. Finally, I do not accept that a consumer would use $59.99 as the basis for the suggested calculation, given the prominence of $29.99 in the advertisement.

103 The absence of words such as – “Minimum charge includes setup fees” – which appears in the current advertisement, is a real shortcoming in the qualifying information.

104 TPG submits that even if a consumer cannot ascertain the existence of the setup fee by the suggested calculation he or she would be merely confused rather than misled. I do not agree, on the same basis as I have already set out in relation to the bundling condition at [71]. The ordinary or reasonable consumer is likely to gain a misleading impression, rather than be merely confused.

### Initial radio advertisement

105 I have already set out how the dominant message is conveyed in the initial radio advertisement. This advertisement again does not advise of the setup fee at all. In the rapid-fire second part of the advertisement the announcer specifies the minimum charge of $509.89, but does not mention the six month contract term. It again does not use words like “Minimum charge includes a setup fee and deposit”. TPG makes the same contentions as to calculating the existence of the setup fee by arithmetic, and in the alternative that the advertisement is merely confusing. I do not accept these arguments. The impression left by the advertisement is that the service is available for $29.99 per month without requirement to pay other charges.

### Initial newspaper advertisement

106 The initial newspaper advertisement also provides no express information about the existence of the setup fee. There is no mention of the $129.95 setup fee in the main body of the advertisement or even in the fine print.

107 Nevertheless TPG again contends that by specifying in small white font “Min Charge = $509.89” and also by referring to the $20 telephone deposit in the fine print, the existence of the setup fee is sufficiently plain to the ordinary or reasonable consumer. I do not agree for the reasons I have already set out. The impression left by the advertisement is that the service can be acquired for $29.99 per month without requirement to pay any other charge.

108 This advertisement actually tends to confirm that there is no setup fee. In a lengthy fine print section it purports to specify all terms and conditions of commercial significance outside the central terms by specifying the restriction to TPG coverage areas, the restriction to new customers only, the bundling requirement, the restriction to some telephone call types, the home phone deposit, and early termination and relocation fees. However it does not mention the setup fee at all. Because the setup fee is not mentioned, a consumer is likely to think that there is no fee.

### Initial internet advertisement

109 The initial internet advertisements are essentially the same as the initial newspaper advertisements and the same considerations apply except that there is no fine print section. They fail to qualify the dominant message and convey the same misleading impression that there are no other charges as the initial newspaper advertisements.

### Current advertisements

110 All advertisements in the second phase of the campaign, except for the current radio advertisement, provide some information about the setup fee.

(a) The current television and cinema advertisements advise “Min Charge includes Deposit and Set up fees” in small on-screen font;

(b) The current newspaper and other print advertisements (magazines, coupon booklet and brochure) all provide in the fine print section “ADSL 2+ and Home Phone: Min Charge includes $20 Home Phone Deposit and $129.95 Setup”. The minimum charge and the six-month contract are also specified;

(c) The current internet advertisement provides “Min Charges include $20 home phone deposit and $129.95 setup”;

(d) The public transport and indoor billboards include the words “Min Charge $509.89 includes Deposit and Set up fees” in the main body of the advertisement. The outdoor billboards and the wash room noticeboards advise of the setup fees in a smaller print section.

Although the current radio advertisements do not mention the setup fee, many consumers hearing it are likely to have seen or read one or more of the other advertisements and are likely to be aware of the existence of the setup fee as a result.

111 Because the ordinary or reasonable consumer is alert to the likelihood that setup fees will be charged for ADSL2+ broadband internet contracts for less than 24 months, I consider that the prominence and clarity of this advice is sufficient to dispel the misleading dominant message.

## Conclusion Regarding Sections 52 and 53(e) and (g) of the TPA

### Submission regarding internet advertisements

112 TPG argues that its internet advertisements do not breach s 52 of the Act because a consumer viewing one of them could “click” on it and would be taken through to a detailed page of terms and conditions on TPG’s website. As these terms and conditions accurately set out the basis of its offer, TPG submits that any misleading impression conveyed by the advertisement is transitory only. It relies on *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586; [2007] FCAFC 170 at [53] to [56] (“*Knight*”) in support of this argument.

113 However, *Knight* is a passing off case about the name of a television program and not on all fours with this matter. In it the Court held at [57] to [59] that any misapprehension of association between a book written by Mr Knight, with a television program using the same name but with unrelated subject matter, was so insubstantial and impermanent as to justify the conclusion that the conduct was not in any significant way misleading. It is not the same question as under consideration in this matter.

114 It is well established that if an advertisement is misleading, the fact that the consumer will learn the true position prior to entering a contract does not mean that there has been no contravention of the Act. It is not to the point that any misleading impression created by an advertisement may or will be corrected before any contract is made. The misleading conduct occurs at the time of publication: *St Lukes Health Insurance v Medical Benefits Fund of Australia Ltd* (1995) 17 ATPR 41-428 at 40,823, [1995] FCA 615 at 6-7; *Singtel v Telstra* at [42]; *MBF* at [43]; *ACCC v Dell Computers Pty Ltd* [2002] FCA 847 at [33]. Further, the regime is concerned to proscribe conduct which is likely to mislead, not just with whether consumers have been misled. It is intended to also prevent the potential misleading of consumers: *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 at 340 and 344.

115 TPG’s argument that any misleading effect is transitory also relies on a consumer immediately “clicking” through to the next webpage. It is impossible for the Court to know whether a consumer misled by an online advertisement will immediately “click” through to the terms and conditions page, whether he or she will take a different step such as no longer proceeding with the purchase of an alternative service from a competitor, or whether he or she will take no immediate step but will go away under a false impression to act later. A false advertisement that may cause these actions is likely to mislead and is prohibited by s 52.

### Findings regarding ss 52 and 53 of the Act

116 TPG submits that the Court should be careful that it does not restrict competition unduly unless satisfied that the activities in question really do constitute unfair practices: *Colgate Palmolive v SmithKline Beecham* (1997) 39 IPR 147 at 153. I am satisfied that the choice TPG made in its advertisements – particularly its decision to strongly emphasise the component price of $29.99 and to de-emphasise the actual price of $59.99 and the requirement to also rent a home telephone line – is an unfair trade practice. It is an unfair trade practice to require consumers to find their way through to the truth past advertising stratagems which have the effect of misleading or being likely to mislead them.

117 I find that, except for the brochure advertisement, each of the initial and current advertisements convey the no additional service or monthly charge representation - namely a representation that Unlimited ADSL2+ could be acquired for $29.99 per month without obligation to acquire any other service or pay any other monthly charge. That this is a false picture of the basis upon which TPG offers the service is common ground. I find that the publication of these advertisements constitutes misleading or deceptive conduct or conduct which is likely to mislead or deceive in contravention of s 52 of the Act when the advertisements were published before 1 January 2011, and in relation to conduct after 1 January 2011 in contravention of s 18 of the ACL when published after that date.

118 I find that each of the initial advertisements convey the no setup fee representation - namely a representation that Unlimited ADSL2+ could be acquired for $29.99 per month without obligation to pay any upfront charges. That this is a false picture of the basis upon which TPG offers the service is common ground. I find that the publication of these advertisements constitutes misleading or deceptive conduct or conduct which is likely to mislead or deceive in contravention of s 52 of the Act. I find that the current advertisements do not convey this representation.

119 As I set out at [18] to [21], it follows that each advertisement that breaches s 52 also makes false and misleading representations under ss 53(e) and (g) of the Act*.* Ifind that each of the advertisements that convey the no additional service or monthly charge representation or the no setup fee representation also make false and misleading representations:

(a) in respect to the price of Unlimited ADSL2+ in contravention of s 53(e) of the Act when published before 1 January 2011 and in contravention of s 29(1)(i) of the ACL when published after that date;

(b) in respect to the existence of the bundling condition and/or the setup fee condition in contravention of s 53(g) of the Act when published before 1 January 2011, and in contravention of s 29(1)(m) of the ACL when published after that date.

# LEGISLATION AND PRINCIPLES REGARDING S 53C OF THE TPA

120 The ACCC contends that by not prominently specifying in the initial television, newspaper and internet advertisements the minimum total charge or “single price” under the contract, TPG has contravened s 53C of the Act*.* The section relevantly provides:

Single price to be stated in certain circumstances

(1) A corporation must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (the *relevant person*); or

(b) the promotion by any means of the supply of goods or services to a person (the *relevant person*) or of the use of goods or services by a person (the *relevant person*);

make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also:

(c) specifies, in a prominent way and as a single figure, the single price for the goods or services…

…

(4) For the purposes of paragraph (1)(c), the corporation is taken not to

have specified a single price for the goods or services in a

prominent way unless the single price is at least as prominent as

the most prominent of the parts of the consideration for the supply.

(5) Subsection (4) does not apply in relation to services to be supplied

under a contract if the following apply:

(a) the contract provides for the supply of the services for the

term of the contract;

(b) the contract provides for periodic payments for the services

to be made during the term of the contract;

(c) if the contract also provides for the supply of goods—the

goods are directly related to the supply of the services.

…

(7) In this section:

*single price* means the minimum quantifiable consideration for the supply concerned at the time of the representation concerned, including each of the following amounts (if any) that is quantifiable at that time:

(a) a charge of any description payable by the relevant person to the corporation making the representation (other than a charge that is payable at the option of the relevant person);

…

121 The section requires TPG to specify in a prominent way the minimum total charge for Unlimited ADSL2+ of $509.89. Section 53C(4) provides that the single price of a service must be specified in the advertisement so that it is at least as prominent as the most prominent of the parts of the price for supply of the service. However subs (5) makes it clear that subs (4) does not apply in circumstances where the consumer is paying for services over a period of time, such as by monthly payments, rather than in a lump sum. In the circumstances of this matter the monthly price of $29.99 is therefore allowed to be more prominent than the single price of $509.89.

122 Subsections (4) and (5) say no more than that the single price must be prominently specified but is not required to be as prominent as the periodic charge, where periodic charges apply (such as the monthly charges in this matter).

123 The question that falls to be determined is whether the single price of $509.89 that was set out in the initial advertisements is “prominent”. There is no definition of “prominent” in the Act or any explanation of what the word means in the context of the section. There have been no reported decisions that have considered what “prominent” means in s 53C.

124 Adopting what it says is a purposive approach to interpretation of the Act apparently drawn from subss (4) and (5), TPG contends that s 53C means that the single price is required to be sufficiently prominent such that the reasonable reader or viewer is likely to have read or seen it. I do not accept this. I consider that for the single price to be prominent the section requires more than it simply be able to be read or seen. Section 53C provides “specifies in a prominent way”. If all that these words mean is that the single price must be readable the section need only have provided “specifies as a single figure”. To read the section the way TPG argues is to treat the word “prominent” as redundant or otiose.

125 The Shorter Oxford English Dictionary 3rd edition defines the adjective “prominent” as:

1. Jutting or standing out: projecting, protuberant. 2. Conspicuous 1759. b. fig. Standing out so as to strike the attention; conspicuous; distinguished above others 1849.

The Macquarie Dictionary 4th edition defines it as:

1. Standing out so as to be easily seen; conspicuous; very noticeable: a prominent feature. 2. Standing out beyond the adjacent surface or line; projecting…

126 There is nothing in the context of the section or the Act which operates to give the word anything other than its natural meaning. Accordingly “prominent” in s 53C means that the single price is required to stand out so as to “strike the attention”, “be conspicuous”, “be easily seen” or “be very noticeable”, with the proviso that there is no requirement that the single price be as conspicuous as the specification of the $29.99 monthly charge.

127 If there be any doubt about this meaning, the legislative purpose of s 53C also points to it. The section came into operation on 25 May 2009 as a result of the *Trade Practices Amendment (Clarity in Pricing) Act* *2008* (Cth). The amendment introduced a requirement that where a representation of part of the price of goods and services is made, the single (in the sense of total) price of the goods or services must be specified in a prominent way.

128 The Explanatory Memorandum to the *Trade Practices Amendment (Clarity in Pricing) Bill* 2008 stated that the amendment was introduced to respond to the use of “component pricing” in representations by businesses to consumers. It stated:

Component pricing is the practice of advertising prices as the sum of multiple component parts, for example as dollar x and dollar y. Component pricing can create an impression that a product is being offered for sale at a lower price than it actually is.

129 In the Second Reading Speech in the House of Representatives on 25 September 2008 the Minister for Competition Policy and Consumer Affairs said at pages 10-11 that the total a consumer will pay must be prominently stated so that consumers can “see how much that service is really costing them”.

130 It follows that the purpose of this section is that sufficient prominence be given to the single price such that an impression is not created that the service is being offered for sale at a lower price than it is. Accordingly, where a prominent component price is specified, such as the $29.99 per month in this matter, the minimum charge is also required to stand out, be conspicuous, be easily seen or very noticeable. It is not though required to be as prominent as the monthly charge.

# CONSIDERATION REGARDING SECTION 53C CLAIM

131 A determination as to whether the single price is sufficiently prominent can only be made by analysing the context in which the single price is specified in each of the three advertisements.

132 In the initial television advertisement the voiceover does not mention the minimum charge of $509.89. It is only specified in static small white capital font, while the viewer’s attention is taken elsewhere by the voiceover and by the much larger, coloured, changing and moving words and graphics of the dominant message “Unlimited ADSL2+ for only $29.99 per month”. It is unlikely that a viewer will notice the specification in this context.

133 In the initial radio advertisement, the minimum charge is only specified in the rapid-fire, less important part of the advertisement. It is so rapid that only the words “min. charge” are used. It follows the making and reiterating of the dominant message of “Unlimited ADSL2+ for only $29.99 per month”. The speed, manner and voice of the specification all militate against the specification being noticed by the listener.

134 In the initial newspaper advertisements, the single price is specified by the words “Min Charge = $509.89” in small white capital font, below the large coloured words and graphics of “Unlimited ADSL2+ $29.99”. The main message dominates the advertisement.

135 In the initial internet advertisement the specification of the minimum charge first appears on the third screen of the cycle. That screen is dominated by a very large red “$29.99 per month” while the minimum charge is specified in much smaller white font. On the fourth screen of the advertisement, which has the longest cycle, the minimum charge is set out in white capital font that is smaller again. The screen is again dominated by the large white, yellow words and graphics of “Unlimited ADSL2+ $29.99”.

136 In my view, in each of these advertisements it is unlikely the casual but not overly attentive consumer will notice the minimum charge in the context in which it appears. This is particularly true of the television and radio advertisements. Accordingly, even on TPG’s interpretation of the section the single price is not prominently specified.

137 I have found that the test is not as TPG proposes it, but rather whether the single price is prominent in the ordinary meaning of that word. In none of these advertisements does the specification of the minimum charge stand out so as to be conspicuous, or strike the attention, and it is not easily seen or very noticeable. Far from being prominent, each specification is better described as unobtrusive.

138 I find that each of the initial television, newspaper and internet advertisements fails to prominently specify the minimum charge as required by s 53C of the Act.

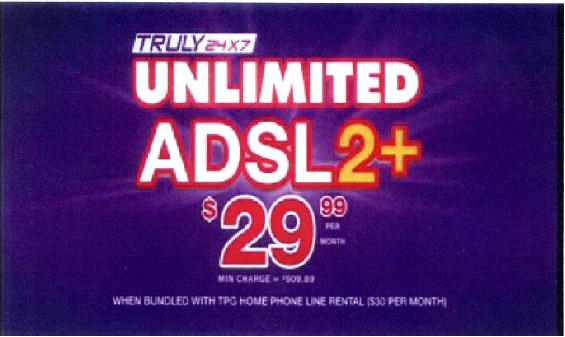
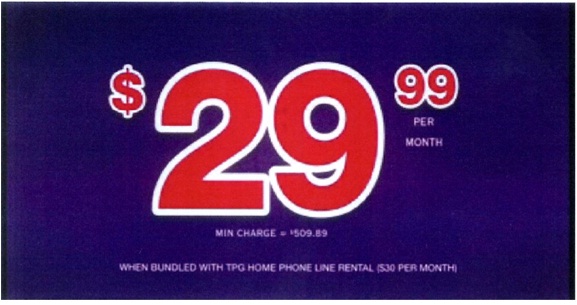
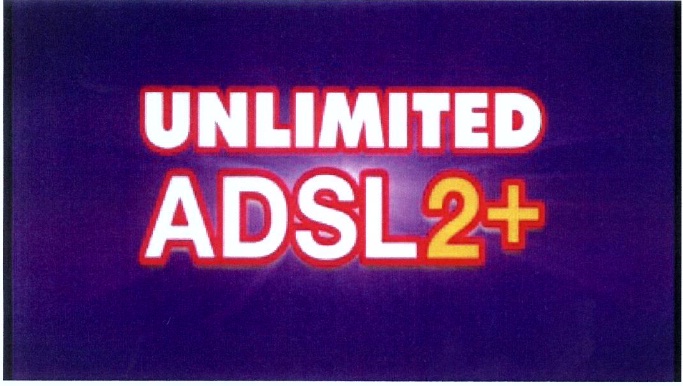
139 I will fix a date for a hearing as to relief.

|  |
| --- |
| I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy. |

Associate:

Dated: 4 November 2011

**ANNEXURE A**



- 2 -

**Script:**

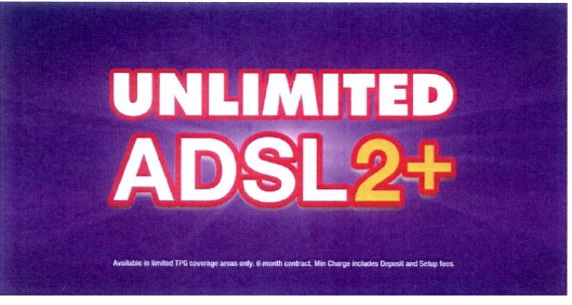
TPG gives you Unlimited ADSL2+ for $29.99 a month.

Yep unlimited ADSL2+ for $29.99 a month.

TPG is a multi award winner.

tpg.com.au

**ANNEXURE B**



- 2 -

**Script**

TPG gives you Unlimited ADSL2+ for $29.99 a month.

Yep unlimited ADSL2+ for $29.99 a month.

TPG is a multi award winner.

tpg.com.au

**ANNEXURE C**

**INITIAL ADVERTISEMENT**

**(25 Sept 10 - 7 Oct 10)**

**TRANSCRIPT OF RADIO ADVERTISEMENTS FOR TPG**

TPG gives you unlimited ADSL2+ for only $29.99 a month.

Yep unlimited ADSL2+ for only $29.99 a month.

With TPG’s new unlimited ADSL2+ you never have to worry about download limits again.

tgp.com.au

*(rapid fire section below)*

Unlimited ADSL2+ available only when you bundle with TPG’s home phone line rental for $30 a month.

Total min charges $509.89 available in selected coverage areas.

Visit tpg.com.au for details.

**ANNEXURE D**

**AMENDED ADVERTISEMENT**

**(7 Oct 10 till current)**

**TRANSCRIPT OF RADIO ADVERTISEMENTS FOR TPG**

TPG gives you unlimited ADSL2+ for only $29.99 a month.

Yep unlimited ADSL2+ for only $29.99 a month.

When you bundle TPG’s home phone line rental for $30 a month.

With TPG’s new unlimited ADSL2+ you never have to worry about download limits again.

tpg.com.au

*(rapid fire section below)*

Total min charges $509.89 available in selected coverage areas.

Visit tpg.com.au for details.

**ANNEXURE E**



**ANNEXURE F**



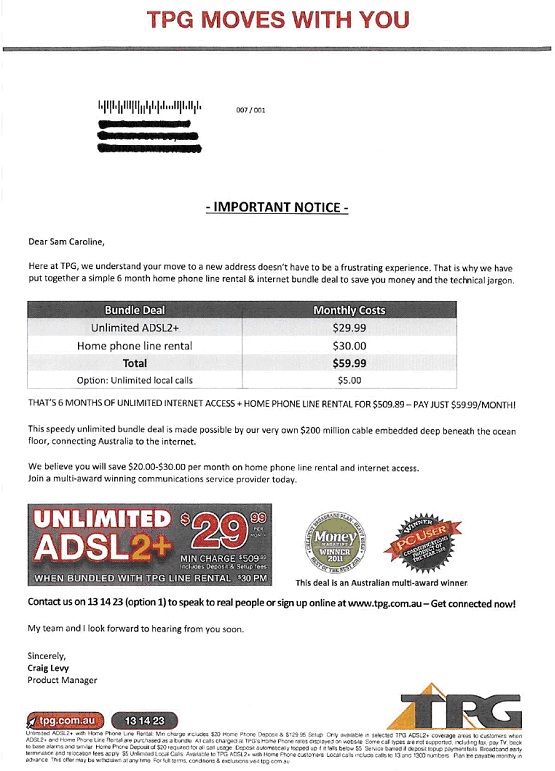
**ANNEXURE G**



**ANNEXURE H**



**ANNEXURE I**



**ANNEXURE J**

