IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M98 of 2013

BETWEEN:

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Appellant

and

TPG INTERNET PTY LTD
ACN 068 383 737
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are certified as being in a form suitable for publication on the internet.

PART II: ISSUES PRESENTED BY THE APPEAL

2. The fundamental issues for determination in this case are:

   (a) What were the differences of significance between the findings of the Full Court and those of the trial judge? In particular, did the Full Court overturn the trial judge's finding that a consumer would not have a starting assumption about whether an advertised ADSL2+ service was bundled or not?

   (b) Did the Full Court identify appellable errors in the trial judge's findings on the inferences to be drawn from uncontested facts or in the application of the law to the facts as found?

   (c) Did the Full Court fail to give adequate consideration to deterrence in the imposition of penalty?

   (d) If the Appellant succeeds, what is the appropriate relief?

PART III: NOTICE UNDER THE *JUDICIARY ACT 1903*

3. The Respondent ("**TPG**") has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* and determined that such notice is not required.

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PART IV: CONTESTED FACTS

4. The material facts set out in the Appellant's narrative of facts or chronology that are contested, either as inaccurate or wrongly omitted, are as follows:

   (a) TPG did not begin its initial advertisements in all media on 25 September 2010 and finish them all on 7 October 2010. Rather, the start and end dates of the various advertisements were as follows[1]:

      i. Initial print – 25 September 2010 to 5 October 2010[2];

      ii. Initial radio – 28 September 2010 to 5 October 2010[2];

      iii. Initial television – 3 October 2010 to 7 October 2010;

      iv. Initial online (Fairfax and realestate.com.au) – 29 September 2010 to 6 October 2010;

      v. TPG's own website – 25 September 2010 to 5 October 2010[2].

   (b) further, the revised advertisements were not all published from 7 October 2010. They were gradually commenced during the weeks following 6 October 2010[3];

   (c) the description of the advertisements given by the Appellant at paragraph [8] of its submissions is incomplete and does not properly represent the nature or content of the advertisements. A more accurate and complete description of the advertisements and the qualifying statements in them is set out at paragraphs [21] - [24] below;

   (d) the set-up fee charged by TPG depended upon the term of the contract chosen by the consumer. The set-up fee for a six month contract was $129.95 and the set-up fee for an 18 month contract was $79.95[4];

   (e) the changes to the revised advertisements which were considered by TPG in December 2010 occurred after the Appellant sought an interlocutory injunction but before a decision had been handed down. It was considered unnecessary for TPG to make those changes when Ryan refused the Appellant's application for an injunction[5].

5. Attached to these submissions is a schedule setting out a table of the findings of the trial judge and the Full Court, and the penalties imposed, on the various issues.

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[1] TPG Advertising Schedule at Appeal Book number 8.4 (page number #) – cf Appellant's chronology at 25 September 2010 and the Appellant's submissions dated 20 September 2013 (**Appellant's submissions**) at [6], [10].

[2] That is, one day after the initial complaint from the ACCC – email and letter from ACCC to TPG dated 4 October 2010 at Appeal Book number 45 (page number #).

[3] TPG Advertising Schedule at Appeal Book number 8.4 (page number #) – cf Appellant's chronology at 7 October 2010 and Appellant's submissions at [10].

[4] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [7] – cf Appellant's submissions at [7.3].

[5] *ACCC v TPG Internet Pty Ltd* [2010] FCA 1478.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

6. TPG accepts the Appellant's statement of applicable constitutional provisions, statutes and regulations.

PART VI: RESPONDENT'S ARGUMENTS IN SUPPORT

(a) Overview - Liability

7. Contrary to the Appellant's submissions[6], the Full Court did not "*overturn a central finding of fact of the trial judge that ordinary and reasonable consumers would not have a starting assumption about whether a particular advertised internet service was 'bundled'*". Further, the Full Court did identify a number of errors of principle in the reasoning of the trial judge.

8. The different findings made by the trial judge and the Full Court were that:

   (a) The trial judge found that the reasonable consumer would not see or hear the bundling condition in the initial advertisements or the revised television advertisement or, if they did, they would not understand it[7]. He accepted that the reasonable consumer would see or hear the bundling condition in the revised advertisements (other than the revised television advertisement) but found that they would not understand it[8].

   (b) The Full Court, on the other hand, found that the reasonable consumer would see, hear, and understand, the bundling condition in all of the advertisements (other than the initial television advertisement)[9].

9. The Full Court's reasons for arriving at different conclusions to the trial judge were that:

   (a) by separately focusing upon a supposed dominant message and a supposed qualifying message, the trial judge erroneously considered parts of the advertisement in isolation from each other rather than considering the advertisement as a whole[10]; and

   (b) the trial judge failed to properly take into account the fact that the reasonable consumer would know (as is the fact) that ADSL2+ services are commonly sold as part of a bundle[11].

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[6] Appellant's submissions at [2.1(1)].
[7] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [67] – [70], [73], [75] - [76], [82], [87], [91].
[8] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [83] – [84], [90], [92], [94], [97].
[9] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [111] – [124].
[10] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [104].
[11] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [105] – [106].

10. On the issue of the reasonable consumer's knowledge, the trial judge found that, as the purchase of a broadband internet service is a substantial purchase, reasonable consumers would undertake research about what was being offered and would know that set-up fees usually apply[12]. He also found that ADSL2+ services are sold in several ways, including when bundled with telephone services[13]. However, the trial judge did not (at least expressly) consider whether or not ordinary consumers would be aware of this fact.

11. The Full Court, on the other hand, did expressly consider whether consumers would be likely to know that ADSL2+ services are commonly bundled with telephone services and found that they would[14]. For the reasons explained below, it was clearly entitled to arrive at this conclusion. However, the Full Court did not find that consumers were required to assume that the services offered were bundled services or that consumers must read an advertisement like a lawyer reads a contract[15]. Rather, the Full Court's finding went no further than stating that where (as here) the bundling condition was clearly set out in the main body of the advertisement, the reasonable consumer would not be misled into thinking that there was no requirement to take the ADSL2+ service as part of a bundle.

12. The Appellant's submissions misstate the proper role of an intermediate court of appeal. The appeal to the Full Court was by way of rehearing[16]. There was no dispute about the advertisements that were published or the circumstances of publication and, as the Full Court found[17], it was in as good a position as the trial judge to make determinations of fact and to decide upon the proper inferences to be drawn from those facts[18]. The Full Court was required to, and did[19], give appropriate respect and weight to the conclusions of the trial judge, but the Full Court was nonetheless required to conduct a real review of the evidence and the trial judge's reasons and findings[20]. Once the Full Court reached its own conclusions, it was required to give effect to those conclusions – on the facts and the law and the application of the law to the facts - where they differed from the trial judge[21].

(b) The Reasonable Consumer

13. As the Full Court noted[22], the law relating to misleading or deceptive conduct is well settled. In the context of this case, the following propositions are relevant:

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[12] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30], [34].
[13] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [32].
[14] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [98].
[15] See Appellant's submissions at [34].
[16] *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507. For a recent examination see *Nexus Adhesives Pty Ltd v RLA Polymers Ltd* [2012] FCAFC 135 at [6] to [16].
[17] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [90].
[18] *Warren v Coombes* (1979) 142 CLR 531 at 551.
[19] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [91], [112].
[20] *Fox v Percy* (2003) 214 CLR 118 at [25].
[21] *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at [25]; *Cabal v United Mexican States* (2001) 108 FCR 311 at [223].
[22] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [78].

The Reasonable Person Test

(a) one must consider the effect of a fair reading or viewing of the impugned advertisement on "reasonable" or "ordinary" members of the target audience[23]. The class may include a wide range of people (including the inexperienced and the gullible) but the ordinary or reasonable member will be identified as having particular characteristics[24];

(b) the prohibition against misleading or deceptive conduct is not designed to protect people who fail to take reasonable care to protect their own interests[25];

10 (c) a degree of robustness is required[26];

(d) the court will not take into account extreme or fanciful reactions to the advertisement[27];

(e) it is necessary to establish that a "significant proportion" of readers or viewers would have been misled before it can be said that an advertisement is misleading[28]. This is because:

> *"To speak of a reasonable member of a class necessarily implies that one is speaking of a significant proportion of that class. It is impossible to postulate a situation in which the reasonable member of a class is not representative of such a proportion"*[29].

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[23] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199 (Gibbs CJ), 209 (Mason J); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, 48; *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 336 (Tamberlin J); *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85.

[24] *Google Inc v ACCC* (2013) 294 ALR 404 at [7]; *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at [18]; *Astrazeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* [2006] FCAFC 22 at [34], [37].

[25] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199, *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102] – [103]; *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at [18].

[26] *Singtel Optus Pty Ltd v Telstra Corp Ltd* [2004] FCA 859 at [66]; *Stuart Alexander and Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161 at 164-165; *ACCC v Global One Mobile Entertainment Ltd* [2011] FCA 393 at [51].

[27] *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [105]. It is instructive to note that example of an "extreme" or "fanciful" interpretation that the High Court used in that case (at [105]). The High Court said that it would be extreme or fanciful for a prospective purchaser of pet food or toilet cleaners to believe that only the Nike sporting company could use the Nike name in respect of such products. See also *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at [18].

[28] *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at [21]-[23] per Dowsett J, referring to Wilcox J in *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299 (***10th Cantanae***) at 302 and, to the same effect at [70] – [71] per Jacobsen and Bennett JJ referring to Pincus J in *10th Cantanae* which he said that it was not sufficient that "some readers" were affected and Gummow J who said that it was necessary to prove that a substantial proportion had been misled. See also *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [39].

[29] *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [23]; note that in *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521 at [25] – [26] (a passage cited with approval by Gordon J in *ACCC v Telstra Corp Ltd* (2007) 244 ALR 470 at [17]) that Finkelstein J rejected the idea that it was necessary to show that a significant proportion of the class would have been misled. Finkelstein J's comments to this effect were rejected by the Full Court in *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [71]. See also *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCAFC 181;

The Context

(f) it is wrong to take part of an advertisement or to consider in isolation some only of the words or phrases that are used. Instead an attempt must be made to assess the veracity of the message by considering it in its full context[30];

(g) Where the impugned matter is in an advertising campaign, the whole campaign must been seen in context[31];

Qualifications and Exclusions

(h) the question whether a potentially misleading dominant message in an advertisement is qualified or corrected by an appropriate disclaimer will depend upon the circumstances[32]. An asterix may be sufficient to alert consumers to the fact that an offer is only available upon certain additional terms and conditions[33]. Further, where the smaller print tells the reader the conditions under which they can get what is advertised in the body of the advertisement[34], that is a very different thing to a heading in an advertisement that portrays the "highly exceptional as the norm", with the true position hidden away somewhere that is unlikely to be read[35];

(i) even if a reasonable viewer may not read the detail of all qualifications in one viewing, the text may be sufficient to put them on notice that conditions apply[36];

Internet and telephony purchases

(j) where a significant purchasing decision is involved, a reasonable consumer will take more active steps to check matters than might be the case with a smaller, impulse purchase[37]. The prospective purchaser of a substantial item may reasonably be assumed to have some knowledge of the comparative

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(2008) 171 FCR 579 at [44]-[47]; [55]; [66]; *Optical 88 Limited v Optical 88 Pty Ltd (No 2)* (2010) 275 ALR 526; [2010] FCA 1380 at [337] – [342] (Yates J).

[30] *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, 4. *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199, 210-211, *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 338 (Tamberlin J); *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [41].

[31] *ACCC v Telstra Corp Ltd* (2007) 244 ALR 470 at [19] (Gordon J).

[32] *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553 (Moore J); *Singtel Optus Pty Ltd v Telstra Corp Ltd* [2004] FCA 859 at [40]; *ACCC v Telstra Corp Ltd* (2007) 244 ALR 470 at [116] (Gordon J); *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 338-340 (Tamberlin J).

[33] *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553.

[34] *Singtel Optus Pty Ltd v Telstra Corp Ltd* [2004] FCA 859 at [54]-[56].

[35] *ACCC v Boost Tel Pty Ltd* [2010] FCA 701 at [80].

[36] *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [9].

[37] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199; *Duracell Australia Pty Ltd v Union Carbide Australia Ltd* (1988) 14 IPR 293, 299; *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* [2009] FCA 692 at [9].

prices in the relevant market or, at least, will have a chance to acquaint themselves with those comparative prices or pricing policies[38];

(k) a number of cases have determined that consumers of internet and telephony services are "*more astute than many members of the public*" and would have some familiarity with the sorts of access plans which are offered by telecommunications providers,[39] including the concept of bundling[40];

(l) the purchase of a broadband plan is a substantial purchase rather than an impulse buy[41] and, hence, the reasonable consumer is expected to have done some research before purchasing. Consumers should be taken to have some basic understanding about the means of internet supply.[42]

14. Further, there is no prohibition on component pricing (or, as the Appellant has chosen to describe it, "headline pricing")[43]. At the relevant time, section 53C of the *Trade Practices Act 1974*[44] regulated component pricing and provided that the single price for goods had to be "prominently" displayed. Where (as here) the services being advertised were to be paid for by periodic payments, there was no obligation for the single price to be displayed as prominently as the component price[45]. In this case, the Appellant in effect seeks to insert a new section into the legislation (which is not, and never was, there) requiring an advertiser to publish the total monthly (or periodic) price (as well as the single price) and to do so as least as prominently as any other component prices.

(c) Approach of the Trial Judge – Liability

15. The trial judge made various findings about the target audience. Consistently with a number of prior decisions[46], the trial judge found that the ordinary and reasonable consumer of broadband internet services at whom the advertisements were aimed:

(a) would do some research, because the purchase was substantial and so the ordinary and reasonable consumer would have a higher level of knowledge about the various offerings in the market as a result[47];

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[38] *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* [2009] FCA 692 at [9].

[39] *Singtel Optus Pty Ltd v Telstra Corp Ltd* [2004] FCA 859 at [47] (Jacobsen J).

[40] *ACCC v Telstra Corp Ltd* (2004) 208 ALR 459 at [51] (Gyles J); *ACCC v TPG Internet Pty Ltd* [2010] FCA 1478 at [16] (Ryan J).

[41] *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 at [26] (Perram J); *Singtel Optus Pty Ltd v Vodafone Pty Ltd* [2010] FCA 1448 at [19] (Nicholas J). The trial judge agreed with this approach in this case - *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].

[42] *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 at [28] (Perram J).

[43] The Explanatory Memorandum for the *Trade Practices Amendment (Clarity in Pricing) Bill 2008* – which became the Act by which this provision was introduced into the *Trade Practices Act 1974* – said at paragraph [1.4] that "It is not intended that corporations should be prohibited from using component pricing".

[44] Now s 48 of schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the *Australian Consumer Law (**ACL**)*).

[45] *Trade Practices Act 1974* (Cth) sub-ss 53C(4), (5); *ACL* ss 48(5),(6).

[46] *ACCC v Telstra Corp Ltd* (2004) 208 ALR 459 at [51] (Gyles J); *ACCC v TPG Internet Pty Ltd* [2010] FCA 1478 at [16] (Ryan J); *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 at [26] (Perram J); *Singtel Optus Pty Ltd v Vodafone Pty Ltd* [2010] FCA 1448 at [19] (Nicholas J).

[47] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].

(b) would have a certain degree of background knowledge about basic internet usage[48] and would know that ADSL2+ is a more desirable form of service than ADSL1 or dial up[49];

(c) would be more knowledgeable about broadband services than the ordinary user of internet services[50] because people who knew little or nothing about broadband internet services would not be included in the target audience[51].

16. The trial judge found (and it was not the subject of appeal) that the ordinary consumer would know that set-up fees are usually charged by broadband internet suppliers[52].

17. The trial judge also found – from TPG's advertisements and those of its competitors that were before him[53] - that bundling was one way in which broadband services were commonly offered by TPG and its competitors. The other ways included "stand alone" (where the telephone service is provided by another provider) and "naked" (where no telephone service at all is provided to the consumer)[54]. However, the trial judge did not consider whether the hypothetical reasonable consumer would know that internet services were frequently bundled with telephony services. Rather, after referring to TPG's submission to the effect that an ordinary consumer would not assume that the advertisements referred to unbundled services, the trial judge said (entirely consistently with TPG's submission) that the ordinary, reasonable consumer would not have a starting assumption about the service being advertised but would look to the advertisement for information about that service[55]. This finding involves the necessary implication that the reasonable consumer knows that internet services are frequently bundled with telephony services because, if that were not so, the trial judge would have found that the reasonable consumer would start with an assumption that the service being offered was not bundled.

18. After having found that the reasonable consumer would not start with any assumption about the form of service being offered, the trial judge then examined whether there was a so-called "dominant message" in the advertisements[56]. He found that the "dominant message" was "Unlimited ADSL2+ for $29.99 per month" and that the requirement to bundle the service or pay a set-up fee did not form part of that dominant message[57].

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[48] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].
[49] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [28].
[50] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [28].
[51] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [27].
[52] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [33] – [34].
[53] Appeal Book number 6.11 (page number #).
[54] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [32].
[55] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [31]-[32].
[56] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [43] – [54].
[57] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [54].

19. This finding is inconsistent with the trial judge's finding that the reasonable consumer would not start with any assumption about whether the service being offered was bundled or unbundled but would look to the advertisement itself for such information. The reasonable consumer (who the trial judge found did not have a starting assumption about bundling) who sees or hears an advertisement which does not make an offer of an unbundled product would not assume that it relates to an unbundled product. Even if the advertisements said nothing about whether the service was bundled or not (unlike the advertisements in this case) then the reasonable consumer might be left confused but they would not be misled or deceived[58].

20. Having found that there was in each advertisement a "dominant message", the trial judge separately considered whether any other part of the advertisement was sufficient to qualify or correct this dominant message[59].

21. The bundling condition – that is, the requirement to bundle the ADSL2+ broadband service with telephone line rental for $30 per month – was expressly stated in each of the advertisements. In the newspaper advertisements[60], for example, the following words (or very similar words appeared in the main body of each advertisement:

"WHEN BUNDLED WITH TPG LINE RENTAL $30 PER MONTH"

22. The requirement to bundle the broadband service with telephone line rental was repeated in the terms and conditions at the bottom of the print advertisements. The main body of the advertisement also included a statement that the minimum charge was $509.89. A number of the revised advertisements contained the words "BUNDLE DEAL" in the main body of the advertisement[61], while other revised advertisements appeared on pages with other advertisements for unlimited ADSL2+ on a standalone basis for $59.99 per month[62].

23. Similar qualifying statements appeared in the television advertisements.

24. The radio advertisements contained statements to the following effect:

> "*Unlimited ADSL2+ is available only when you bundle with TPG's home phone line rental for $30 a month.*"[63]

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[58] *Google Inc v ACCC* (2013) 294 ALR 404 at [8]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199 (Gibbs CJ), 209 (Mason J); *Campomar Sociedad Limitada v Nike International* (2000) 202 CLR 45 at 87; *Singtel Optus Pty Ltd v Telstra Corp Ltd* [2004] FCA 859 at [76].

[59] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [57] – [64]. The revised radio advertisement contained a similar condition but it was stated in the main body of the advertisement.

[60] See the newspaper and magazine advertisements at Appeal Book numbers 15, 16, 22-29, 36 (pages ##).

[61] For example Exhibit R8, *The Age*, 25 January 2011, at Appeal Book number 26 (page numbers ##), also at Annexure 7 to *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190.

[62] For example Exhibit R6, *MX Magazine* , 3 December 2010 at Appeal Book number 24 (page numbers ##), also at Annexure 8 to *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190.

[63] In the revised radio advertisements, the qualification was contained in the main body of the advertisement as follows – "*Yep unlimited ADSL2+ for only $29.99 per month when you bundle TPG's home phone line rental for $30 a month*".

25. The trial judge found that the ordinary consumer would not have heard or seen these qualifying statements in any of the initial advertisements or the revised television advertisement[64]. He also found that, even if the reasonable consumer did see or hear the bundling condition, they could have understood the condition to mean a number of things including "*a special offer of one cent more to attract new customers to a bundled service as this offer is only made to new customers.*"[65] This finding was inconsistent with the way in which the Appellant put its case at trial.[66] As such, the trial judge found, the consumer would be left with the dominant message only[67].

26. The trial judge found that the ordinary consumer would have read or heard the bundling condition in the revised advertisements (other than the television advertisement) but, again, would not have understood what it meant[68].

27. On the other hand, the trial judge also found that the reasonable consumer knows that set-up fees often apply and, hence, it was sufficient if a reference to set-up fees appeared in the footnotes[69]. The trial judge's inconsistent findings about the reasonable consumer's knowledge about the bundling condition and set-up fees are difficult to reconcile. On the trial judge's approach, the reasonable consumer has to read the footnotes to know that set-up fees are payable. This assumes that the reasonable consumer will read the small print footnotes relating to set-up fees but will not read the much larger text in the main body of the advertisement relating to the bundling requirement (or, indeed, the fine print relating to the bundling requirement, which follows immediately after the fine print relating to the set-up fees).

(d) Approach of the Full Court - Liability

28. The Full Court considered the advertisements in detail[70], the legal principles relating to misleading or deceptive conduct[71] and the legal principles that apply to a rehearing by an intermediate court of appeal[72]. The Full Court considered the attributes of the target audience (i.e. the hypothetical reasonable consumer) and adopted the findings of the trial judge on this issue[73]. The Full Court agreed that the consumer to whom the advertisements were directed must be taken to have some familiarity with the market for the provision of broadband services,[74] which was entirely consistent with the findings of the trial judge[75].

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[64] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [67], [73], [76], [82], [87], [91].
[65] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [70].
[66] Amended Fast Track Statement dated 4 May 2011 paragraphs 5(a) and 5(b) and 13. That is, the representations alleged by the Appellant were that the ADSL2+ service would be supplied without the obligation to purchase any other service and without the obligation to "pay any additional monthly cost". An express obligation to purchase a phone line at an additional cost (even if a nominal cost) is not consistent with that allegation.
[67] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [71].
[68] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [83], [90], [94].
[69] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [63], [110] – [111].
[70] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [25] – [73].
[71] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [74] – [89].
[72] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [90] – [91].
[73] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [92] – [94].
[74] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [98].
[75] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].

29. In that context the Full Court noted[76] that ordinary consumers would know that services such as ADSL2+ are usually offered for sale as either bundled or unbundled. As noted above, the trial judge appears (at least implicitly) to have reached a similar conclusion, namely that consumers do not have a starting assumption about bundling and therefore expect to read or hear something about bundling in the advertisement.

30. The Appellant submits[77] that the complexities of this case are such that the Court cannot find, without explicit evidence, what the ordinary consumer may, or may not, know. However, a Court is required to form a view about the attributes of the hypothetical reasonable consumer and where it determines (as the trial judge did here) that the consumer will do some research on the topic, the best evidence of what the consumer is likely to know are the sorts of advertisements which the reasonable consumer is likely to have seen. In this case, the Full Court had the following material before it:

(a) the TPG advertisements and those of its major competitors[78];

(b) the express (and unchallenged) findings of the trial judge that ADSL2+ services were available in both bundled and unbundled forms and consumers would not make an assumption either way[79];

(c) the trial judge's finding that consumers would know that set-up fees apply[80];

(d) the trial judge's finding that the ordinary consumer would do some research and have a degree of background knowledge about broadband internet supply[81];

(e) various findings by other judges in similar cases that consumers have some familiarity with offers made in the market for the provision of broadband internet services[82].

31. Hence, even if the trial judge had not found that the reasonable consumer would be aware that ADSL2+ services are commonly sold as part of a bundle, the Full Court was entitled to do so. The Full Court was in as good a position as the trial judge to make such findings of fact and it was equally entitled to draw appropriate inferences from the evidence before it[83].

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[76] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [98].
[77] Appellant's submissions at [28].
[78] Appeal Book number 6.11 (page number #).
[79] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [31] – [32].
[80] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [34].
[81] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].
[82] *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 at [26] - [28], referred to by the Full Court at *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190 at [96] – [97]; *ACCC v Telstra Corp Ltd* (2004) 208 ALR 459 at [51] (Gyles J); *ACCC v TPG Internet Pty Ltd* [2010] FCA 1478 at [16] (Ryan J); *Singtel Optus Pty Ltd v Vodafone* [2010] FCA 1448 at [19] (Nicholas J). Indeed, the trial judge agreed with this approach in this case - *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [30].
[83] *Warren v Coombes* (1979) 142 CLR 531 at 551.

32. The evidence that the Full Court had before it was exactly the same evidence that was before the trial judge when he found that consumers would know that set-up fees apply and that ADSL2+ services are available as bundled, standalone or naked[84]. Contrary to the submissions of the Appellant[85], the Full Court's findings on this issue were not solely based on the findings of Ryan J. Rather, the Full Court simply noted that it agreed with Ryan J's findings on this issue.

33. The Full Court disagreed with the trial judge's approach on two matters of legal principle. First, the Full Court found that, by focusing upon the dominant message separately and in isolation from the rest of the advertisement, the trial judge had failed to look at the whole of the advertisements in their full context and had thereby erroneously taken parts of the advertisements and read them in isolation from other parts of the advertisements[86]. Secondly, the Full Court found that, by focusing upon the dominant message, the trial judge had failed to properly apply his own findings about the attributes of the reasonable consumer[87]. The trial judge found that it was sufficient to advise the hypothetical consumer of the set-up fees in small print in the footnotes because the hypothetical consumer knows that set-up fees usually apply[88]. If the same consumer also knows that ADSL2+ is commonly sold as part of a bundle then, where the obligation to bundle is stated in the main body of the advertisement, the "dominant message" found by the trial judge could not have been the message that was conveyed by the advertisements when considered as a whole.

34. The Full Court next considered each of the advertisements in turn. The Full Court's awareness of the limitations upon an appeal court overturning factual findings of the trial judge is clear from its approach to the initial television advertisement. Despite doubting that anyone would in fact have been misled by that advertisement, the Court did not overturn the trial judge's findings[89].

35. In respect of each of the other advertisements, the Full Court did overturn the trial judge's findings because it found that the bundling condition would have been seen and understood by the reasonable consumer[90].

36. The Full Court was only considering, and was only called upon to consider, the advertisements which were before it. The Full Court did not say that if, the bundling condition was not set out in the advertisement, or if the advertisements were such that a reasonable consumer would not see or hear the condition, the same result would have obtained.

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[84] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [32].
[85] Appellant's submissions paragraph [30] – [31].
[86] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [101] – [104].
[87] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [105].
[88] *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [34], [63].
[89] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [112].
[90] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [113] – [124].

37. There is nothing in the Full Court's decision that is inconsistent with its approach in *Global One Mobile Entertainment Pty Ltd v ACCC*[91] (***Global One***). *Global One* is an example of the class of cases where the "*primary statement was flagrantly misleading when read in light of the inconspicuous fine print.*"[92] Indeed, given that many of the flagrantly misleading statements were directed at children, the *Global One* case was a particularly egregious example of this type of case.

38. Ultimately, the only way in which one can arrive at the conclusion contended by the Appellant, and found by the trial judge, is to find that reasonable consumers, who are looking after their own interests, and have done some research on the way in which ADSL2+ services are marketed and sold, would nonetheless either not read the conditions set out in the main body of the advertisements (even though they would read conditions relating to set-up costs in the small footnotes) or would fail to understand what bundling meant. This is simply not tenable and the Full Court was correct to reject that line of reasoning and the trial judge's conclusions based upon it.

(e) Penalty

39. The Appellant submits that the Full Court erred in its treatment of deterrence in three ways – by failing to identify the primacy of deterrence, by applying relevant principles inconsistently with the concept of deterrence and by imposing a penalty that is said to be manifestly inadequate. Each of these arguments is wrong.

Identification of Deterrence

40. It is clear that the Full Court was well aware that issues of specific and general deterrence play a central role in the imposition of penalties under the legislation and had the issue of deterrence at the forefront of its consideration. The principles that the Full Court relied upon are largely (if not exclusively) directed towards ensuring that an appropriate level of deterrence is achieved[93]. The fact that the Full Court did not use the word "deterrence" more frequently does not mean that the matter was not taken into account. The authorities referred to by the Full Court make it clear that deterrence was taken into account as a primary consideration.

41. The Appellant cites no authority for its submission[94] that oppression imposes the upper boundary on a penalty and deterrence sets the lower boundary and it is submitted to be wrong in principle. In a matter such as this, the issue of deterrence sets both the upper and lower boundaries. That is, a penalty needs to be sufficiently high to adequately deter, but it should be no higher than is necessary to achieve that objective[95]. Of course, reasonable minds can differ on the size or nature of the penalty that should be imposed to achieve an adequate element of deterrence and

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[91] [2012] FCAFC 134. This decision was cited to the Full Court in argument – T95-T96. Indeed, in *Global One*, the Full Court upheld a decision of Bennett J who was one of the judges on the Full Court in this proceeding.
[92] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [104].
[93] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [140].
[94] Appellant's submissions at [61].
[95] *TPC v CSR Ltd* (1991) ATPR 41-076 at 52,152 (French J as he then was) where his Honour suggested that deterrence was probably the only object of the penalties under the *Trade Practices Act 1974* (Cth).

so there will always be a range. If a penalty is oppressive then it is higher than is required to achieve an adequate level of deterrence[96].

42. The Appellant's submission[97] that the Full Court "*overturned the trial judge's attention to deterrence without identifying a House v The King[98] error*" is wrong in principle. The Full Court was obliged to re-exercise the discretion on penalty given that it had overturned most of the trial judge's findings in respect of liability. Hence, *House v The King* was beside the point. In any event, the Full Court did identify a number of errors of principle made by the trial judge in his treatment of penalty[99].

Application of Relevant Penalty Principles

10 43. The Appellant submits that the Full Court's treatment of "the relevant principles" "*undermined rather than secured the fundamental objective of deterrence*"[100]. The relevant principles are said to have related to the following matters:

(a) the number of categories of contravention[101];

(b) the theoretical maximum penalty of $3.3 million[102];

(c) the reduction of the final penalty on the basis of totality[103];

(d) the Full Court's supposed erroneous emphasis on TPG having an "essentially innocent state of mind"[104];

(e) the irrelevance of the s 87B undertaking given by TPG in 2009[105];

(f) the Full Court's finding that the trial judge ought not to have inferred that a
20 material number of customers were acquired by TPG as a result of the misleading or deceptive conduct[106].

44. The Appellant's appeal (as TPG understands it) does not involve any complaint about the Full Court's treatment of these matters individually. Rather, the Appellant's complaint appears to be that the manner in which the Full Court dealt with these issues failed to secure the objective of deterrence[107].

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[96] *ACCC v Leahy Petroleum Pty Ltd (No 2)* (2005) 215 ALR 281 at [9] (Merkel J) - relied upon by the Full Court in this case at *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [143].
[97] Appellant's submissions [57.1], [61].
[98] (1936) 55 CLR 499 at 504-505.
[99] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [147] – [163].
[100] Appellant's submissions at [62].
[101] Appellant's submissions at [63] – [65].
[102] Appellant's submissions at [66].
[103] Appellant's submissions at [67].
[104] Appellant's submissions at [68].
[105] Appellant's submissions at [69].
[106] Appellant's submissions at [70].
[107] See para [62] of the Appellant's submissions and the notice of appeal dated 29 August 2013 (Appeal Book number 108, page ##) where no reference is made to these matters.

45. However, this approach subverts the proper process of reasoning. The imposition of a penalty is a balancing exercise, taking account of a number of considerations. A Court is not permitted – let alone required - to ignore a factor that is relevant to penalty, or to take into account an irrelevant factor, simply because such a course of action might result in the Court setting a lesser penalty, thereby reducing the deterrent effect of the penalty.

46. In any event, having decided that the trial judge had erred on liability and on the proper approach to penalty, it fell to the Full Court to exercise its discretion on penalty afresh. The weight to be given to each penalty factor was a matter for the Full Court[108], within the boundaries set by *House v The King*[109].

47. In any event, the Appellant's submissions on the points listed at [43] above are wrong.

48. On the issue of the number of contraventions, the reference to a supposed *House v The King* error is again misplaced. Further, the Full Court's reasoning on this issue[110] is perfectly sound, while the trial judge's approach lacked logic. The trial judge's approach meant that, by correcting its advertisements in an endeavour to address the Appellant's stated concerns (albeit not sufficiently to avoid them contravening the Act), TPG rendered itself liable to a substantially increased maximum penalty than would have been imposed had it left the advertisements in their original form. The trial judge's approach acts as a disincentive to parties who are seeking to comply with requests of the authorities as it renders them liable to a higher maximum penalty.

49. Further, the trial judge's approach to the number of contraventions was less effective than the approach of the Full Court in taking into account the precise language, range, form and duration of the advertisements[111]. If the message in the advertisement changes then, on the Full Court's approach, the maximum penalty will increase but a change in message may make no difference on the trial judge's approach. In any event, the relevant stage to take these matters into account is at the stage of actually fixing the penalty, not in determining the theoretical maximum penalty.

50. The Appellant's submission that the Full Court determined that the maximum penalty for any course of conduct was, and only ever could be, $1.1 million involves a misunderstanding of the Full Court's judgment. The Full Court noted that the maximum penalty for each advertisement was $1.1 million[112]. The Full Court was required to determine the number of categories of conduct and it did this without failing to recognise that the categorisation of classes of conduct did not change the statutory maximum penalty. This can be seen in the Full Court's reference to the fact that the "*appropriate maximum penalty may be viewed as $3.3 million in the context*

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[108] *Bugmy v The Queen* [2013] HCA 37 at [24].
[109] (1936) 55 CLR 499 at 504-505.
[110] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [147] – [155].
[111] Cf Appellant's submissions at [65].
[112] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [147].

of the conclusion which we have come to as their [*scil* "there"] *being three categories of contraventions*"[113].

51. The Appellant's submission[114] that the appropriate penalty was reduced from $125,000 to $50,000 for reasons of totality is simply wrong. The issue of totality was only one reason for this reduction. The other reasons which the Full Court focused upon much more than totality were that, after the trial judge's decision, TPG was forced to terminate its lawful advertising campaign, incur substantial costs in that termination and it was also required to write to all customers that had signed up during the relevant period and inform them that it had been found to have engaged in misleading or deceptive conduct. By referring to the issue of totality, the Full Court was noting (as was appropriate) that, once these issues were taken into account, a penalty of $125,000 in all the circumstances was excessively harsh[115]. Further, the issues of the number of classes of contravention and totality are different issues and both must be taken into account by a sentencing court[116].

52. Contrary to the Appellant's submissions[117] the Full Court did not "*approach the assessment of penalty with an erroneous emphasis on TPG having essentially an innocent state of mind*". Indeed, the Full Court never used that phrase. In the context of noting that TPG's contravening conduct, while serious, was at the lower end of the range of serious conduct, the Full Court stated – in one sentence that was referring to a hypothetical set of circumstances - that it was not a case of a company acting deliberately or covertly in contravention of legislative requirements[118]. Clearly, had it been such a case, then it would have been more serious and a higher penalty would have been called for. There was no error in the Full Court's reference to this.

53. The Full Court was correct to overturn the trial judge's treatment of the s 87B undertaking given by TPG in 2009. The trial judge found that the undertaking was relevant because, he said, "*TPG's past similar conduct forms part of the relevant circumstances and weighs against it.*"[119] As the Full Court correctly found[120], the undertaking did not demonstrate that any such past behaviour had occurred and nor was it alleged at trial that the undertaking had been breached. The trial judge's treatment of this issue was plainly wrong.

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[113] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [155] – emphasis added.
[114] Appellant's submissions at [67].
[115] *TPG Internet Pty Ltd v ACCC (No 2)* [2013] FCAFC 37 at [14] – [15].
[116] *ACCC v Singtel Optus Pty Ltd (No 4)* (2011) 282 ALR 246; [2011] FCA 761 at [80]; *Hanssen Pty Ltd v Jones* [2009] FCA 192 at [100].
[117] Appellant's submissions at [68].
[118] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [163].
[119] *ACCC v TPG Internet Pty Ltd (No 2)* [2012] FCA 629 at [109].
[120] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [156] – [159].

54. Contrary to the Appellant's submissions, it was the Appellant and the trial judge, not the Full Court, who engaged in "*speculation as to what consumers were likely to have thought and done*" [121]. The onus of proving that loss and damage had been suffered by anyone was on the Appellant[122]. The Full Court was entitled (if not required) to reject the trial judge's drawing of inferences that damage would have been suffered by competitors in circumstances where there was no evidence of any such loss and not even a complaint by a competitor[123]. The Full Court explained why it rejected those inferences and why the mere fact that consumers had purchased the advertised services did not necessarily mean that this was the result of misleading or deceptive conduct[124]. Furthermore, the unchallenged evidence before the Court was that the rate of uptake of the service was not different before and after the initial advertising campaign, and the fact that it was the appealing characteristics of the service that was the primary driver of the uptake[125].

The Size of the Penalty

55. The Full Court determined that, subject to reduction for the reasons described above, the appropriate penalty was $50,000 for the bundling condition and $25,000 for the set-up condition (both relating to the initial television advertisement only) and $50,000 for the breach of s 53C (which related to the initial television, print and internet advertisements but not the initial radio advertisement). In coming to this conclusion the Full Court took into the various factors set out in paragraph [11] of the its second judgment[126], including the fact that no loss had been suffered by any person and, once the Appellant raised its concerns, TPG took immediate steps to change the advertisements in an endeavor to ensure that they complied with the Act.

56. Over the entire advertising campaign of more than 13 months, the initial television advertisement was shown for 4 days (or about 1% of the entire campaign), the advertisements were in newspapers for 9 days only (about 2%) and online advertisements (other than TPG's own website) for 8 days (about 2%). The entire initial campaign of 12 days comprised less than 3% of the entire campaign. Even if one assumed that profits were derived at a consistent rate over the entirety of the campaign[127] the profit generated while the initial television advertisements were being shown would have been approximately $80,000, while the profit during the entire initial campaign (noting that the only infringing conduct in the initial print and

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[121] Appellant's submissions at [72],
[122] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [160]; *ACCC v Singtel Optus Pty Ltd (No 4)* (2011) 282 ALR 246; [2011] FCA 761 at [27] – [28].
[123] *Warren v Coombes* (1979) 142 CLR 531 at 551.
[124] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [162].
[125] Affidavit of Antony John Moffatt of 13 December 2011 at [34] and tab 16 of AJM-3 to that affidavit at Appeal Book numbers 14 and 14.16, (pages ##),and Affidavit of Craig Linton Levy, of 12 December 2011 at [2] – [6], Appeal Book number 13, (pages ##).
[126] *TPG Internet Pty Ltd v ACCC (No 2)* [2013] FCAFC 37 at [11].
[127] Clearly the profits would have been higher as the campaign went on as the number of subscribers increased over the life of the campaign.

online advertisement was under s 53C of the Act) would have been approximately $240,000[128].

57. Hence, the Full Court determined to impose a penalty which was effectively the entire profit made during the period that the initial television advertisement was shown and it imposed a penalty (again, subject to reduction for the reasons discussed) equal to about half of the profit earned during the period of the whole of the initial campaign. It is submitted that no reasonable business person would take on such a risk as simply a cost of doing business and the penalty is clearly appropriate.

Appropriate Orders

10 58. In the event that the Appellant succeeds in this appeal it is submitted that the appropriate course would be to refer the matter back to the Full Court. This is so for a number of reasons. First, the Full Court has not yet dealt with all aspects of TPG's appeal[129]. For example, if the Court was to accept either or both of the Appellant's arguments on liability, the Full Court would still need to determine whether the ordinary consumer would be likely to see or hear, and understand, the bundling condition (unless this Court is prepared to decide this issue itself). Further, the Full Court did not ultimately deal with all of TPG's complaints about the trial judge's findings on penalty, including the fact that, in assessing penalty, the trial judge took into account undertakings given to the Appellant by other telecommunications
20 providers[130]. As this Court has recently said[131], it is not a sentencing court, and the Full Court should reconsider the issue of the penalty based upon this Court's determination, assuming it is adverse to the Respondent.

59. The orders sought by the Appellant are, in any event, problematic. The Appellant seeks to have all of the orders of the Full Court set aside (other than orders relating to corrective advertising) and the reinstatement of the trial judge's orders, including the orders relating to injunctions. This is despite the fact that there is no appeal to this Court against the Full Court's findings about the inappropriateness of the injunctions and their form[132]. Similarly, it would result in the reinstatement of the compliance program which the Full Court determined was inappropriate and is also
30 not the subject of appeal to this Court[133]. Also, the orders sought by the Appellant would also see the declarations by the trial judge reinstated while the declarations of the Full Court would also remain in force[134]. Those two sets of declarations are largely overlapping.

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[128] The total profit from the ADSL2+ services sold over the life of the campaign was calculated as being approximately $8.15 million. The duration of the entire campaign (25 September 2010 to 7 November 2011) was 408 days. This calculates as just under $20,000 per day.
[129] *Bugmy v The Queen* [2013] HCA 37 at [24].
[130] Amended Notice of Appeal in the Full Federal Court, paragraphs 3, 4, 5, 6, 7, 13. Appeal Book number 102 (page number #).
[131] *Bugmy v The Queen* [2013] HCA 37 at [49].
[132] *TPG Internet Pty Ltd v ACCC* (2012) 210 FCR 277; [2012] FCAFC 190 at [164] – [166]; *TPG Internet Pty Ltd v ACCC (No 2)* [2013] FCAFC 37 at [16] – [21].
[133] *TPG Internet Pty Ltd v ACCC (No 2)* [2013] FCAFC 37 at [22] – [23].
[134] Appellant's submissions paragraph [82].

PART VII: NOTICE OF CONTENTION/CROSS APPEAL

60. Not applicable.

PART VIII: ESTIMATE OF TIME

61. The Respondent estimates that the presentation of its oral argument will take approximately 2 hours.

Dated 11 October 2013

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SCHEDULE - TABLE OF ISSUES ARISING

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TPG INTERNET PTY LTD

The infringements as found by the Full Court are as follows (matters currently outstanding as infringing are in italics and underlined) and the items which are shaded are those items which are in issue before this Court:

	Bundling Condition		**Set-up Fees**		**S 53C**		**Penalty Imposed by trial judge**
	Trial Judge	**Full Court**	**Trial Judge**	**Full Court**	**Trial Judge**	**Full Court**	
Initial Radio	Infringing	Not Infringing	Infringing	Not Infringing	Not alleged	--	$150,000
Initial Television	Infringing	*Infringing*	Infringing	*Infringing*	Infringing	*Not appealed*	$175,000
Initial Print	Infringing	Not Infringing	Infringing	Not Infringing	Infringing	*Infringing*	$150,000
Initial Internet	Infringing	Not Infringing	Infringing	Not Infringing	Infringing	*Infringing*	$125,000
Revised Radio	Infringing	Not Infringing	Not Infringing	Not appealed to FC	Not alleged	--	$250,000
Revised TV and Cinema	Infringing	Not Infringing	Not Infringing	Not appealed to FC	Not alleged	--	$350,000
Revised Print	Infringing	Not Infringing	Not Infringing	Not appealed to FC	Not alleged	--	$325,000
Revised Internet	Infringing	Not Infringing	Not Infringing	Not appealed to FC	Not alleged	--	$200,000
(Revised) Outdoor	Infringing	Not Infringing	Not Infringing	Not appealed to FC	Not alleged	--	$275,000
Brochure	Not Infringing	Not appealed to FC	Not Infringing	Not appealed to FC	Not alleged	--	Nil – no contravention found
Penalty Imposed by Full Court		$50,000		$25,000		$50,000	

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