



HIGH COURT OF AUSTRALIA

12 December 2013

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TPG INTERNET PTY LTD
[2013] HCA 54

Today a majority of the High Court allowed an appeal from a decision of the Full Court of the Federal Court of Australia, holding that TPG Internet Pty Ltd ("TPG") engaged in misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth) ("the TPA") and the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("the ACL").

Between 2010 and 2011, TPG deployed a multi-media advertising campaign. The advertisements displayed a prominent offer of unlimited ADSL2+ service for \$29.99 per month. Much less prominently, the advertisements displayed the requirement that consumers bundle that service with a home telephone service provided by TPG for an additional \$30 per month for a minimum of six months. Further, a setup fee of \$129.95 and a \$20 deposit for telephone charges also applied.

The Australian Competition and Consumer Commission ("the ACCC") claimed that the advertisements were misleading and deceptive contrary to s 52 of the TPA and s 18 of the ACL by reason of the disparity between the prominent headline offer and the less prominent terms qualifying that offer. The ACCC also claimed that some of the advertisements contravened s 53C(1)(c) of the TPA by failing to specify, in a prominent way and as a single figure, the single price for the package of services offered. The primary judge upheld the ACCC's claims and imposed a pecuniary penalty of \$2 million.

TPG appealed to the Full Court which set aside all but three of the primary judge's findings. The pecuniary penalty was reduced to a total of \$50,000.

In the High Court, the ACCC argued that it was not open to the Full Court, in the proper exercise of its appellate function, to hold that the advertisements were not misleading. Further, the ACCC contended that the penalty imposed by the primary judge should be restored, given the circumstances of TPG's offending and the need for the penalty to reflect the important considerations of general and specific deterrence. A majority of the High Court held that the Full Court erred, first, in holding that the primary judge was wrong to regard the "dominant message" of the advertisements as critically important; and secondly, in failing to appreciate that the tendency of TPG's advertisements to mislead was not neutralised by the Full Court's attribution to members of the target audience of knowledge that ADSL2+ services may be offered as a "bundle". A majority held that these errors, reflecting differences in point of principle with the approach taken by the primary judge, led the Full Court into error in the performance of its appellate function. The pecuniary penalty of \$2 million imposed by the primary judge was reinstated.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.