HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, BELL, GAGELER AND KEANE JJ

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION APPELLANT

AND

TPG INTERNET PTY LTD RESPONDENT

Australian Competition and Consumer Commission v TPG Internet Pty Ltd
[2013] HCA 54
12 December 2013
M98/2013

ORDER

1. *Appeal allowed with costs.*

2. *Set aside order 1 of the Full Court of the Federal Court of Australia made on 20 December 2012 and the orders of the Full Court made on 4 April 2013 and, in their place, order that:*

   (a) *orders 4, 9 and 10 of the Federal Court made on 15 June 2012 be set aside;*

   (b) *the appeal to the Full Court be otherwise dismissed; and*

   (c) *the respondent pay the appellant's costs of the appeal to the Full Court.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth and C D Golvan SC with E J C Heerey for the appellant (instructed by Australian Government Solicitor)

N J O'Bryan SC with M J Hoyne for the respondent (instructed by Truman Hoyle Lawyers)

CATCHWORDS

Australian Competition and Consumer Commission v TPG Internet Pty Ltd

Consumer law – Misleading or deceptive conduct – Whether respondent's advertisements breached *Trade Practices Act* 1974 (Cth) ("TPA") and Australian Consumer Law – Whether "dominant message" approach correct – Whether ordinary and reasonable consumer would have starting assumption that advertised internet service was bundled with telephony service – Whether consumers must consider whole of advertisement (including small print or quickly spoken detail) to correct otherwise misleading headline representations.

Consumer law – Pecuniary penalties – Whether Full Court of Federal Court failed to adequately consider specific and general deterrence in reducing pecuniary penalty – Whether reduced pecuniary penalty manifestly inadequate – Whether primary judge correctly assessed number and classes of contraventions.

Words and phrases – "dominant message".

Trade Practices Act 1974 (Cth), ss 52, 53, 53C(1)(c), 76E(3).
Competition and Consumer Act 2010 (Cth), Sched 2, ss 18, 29, 224(3).

1 FRENCH CJ, CRENNAN, BELL AND KEANE JJ. From late September 2010 until early November 2011, TPG Internet Pty Ltd ("TPG") engaged in a multi-media advertising campaign, the centrepiece of which was the offer to consumers of an attractive price for the ADSL2+ service which it supplies. That service utilises a consumer's home telephone line to provide a broadband internet connection that has no data download limit[1].

2 The advertisements deployed in TPG's campaign prominently displayed the offer to supply broadband internet ADSL2+ service for $29.99 per month. Much less prominently, the advertisements qualified this offer, stating that it was made on the basis that the ADSL2+ service was available only when bundled with a home telephone service, provided by TPG through landline technology, for an additional $30.00 per month (with a minimum commitment of six months). In addition, TPG required the consumer to pay a setup fee of $129.95 plus a deposit of $20.00 for telephone charges.

3 The Australian Competition and Consumer Commission ("the ACCC") brought proceedings in the Federal Court of Australia against TPG. It alleged that the advertisements were misleading and deceptive by reason of the disparity between the prominent headline offering TPG's ADSL2+ service at an attractive price and the less prominent terms qualifying that offer. The ACCC also alleged that some of the advertisements contravened s 53C(1)(c) of the *Trade Practices Act* 1974 (Cth) ("the TPA") by failing to specify "in a prominent way and as a single figure, the single price" for the package of services offered by TPG.

4 The primary judge upheld the ACCC's claim, and made a number of orders against TPG, including the imposition of a pecuniary penalty of $2 million.

5 TPG was largely successful in an appeal to the Full Court of the Federal Court of Australia. All but three of the primary judge's findings that TPG had engaged in misleading conduct were set aside; and the pecuniary penalty was reduced to a total of $50,000 in respect of the findings of infringement which were upheld.

6 The ACCC appeals to this Court pursuant to special leave granted on 16 August 2013.

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1 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,683 [2].

7 The ACCC submitted, among other things, 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 in accordance with his Honour's findings as to the extent of TPG's contraventions and, given the circumstances of TPG's offending, that the penalty reflect the importance of personal and general deterrence considerations.

8 For the reasons which follow, it should be accepted that the Full Court erred in setting aside the findings of the primary judge as to the extent of TPG's contraventions of the TPA; and his Honour's assessment of the appropriate pecuniary penalty of $2 million should be restored.

Statutory framework

9 Section 52 of the TPA provided that "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

10 Section 53 of the TPA relevantly provided that:

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

11 The TPA was amended by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* 2010 (Cth) with the consequence that the TPA applied in relation to advertisements published before 1 January 2011 and the Australian Consumer Law[2] ("the ACL") applied with respect to advertisements

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2 Sched 2 to the *Competition and Consumer Act* 2010 (Cth).

published on or after that date. Sections 52 and 53(e) and (g) of the TPA are in the same terms as ss 18 and 29(1)(i) and (m) of the ACL except that the phrase "[a] person must not" is used in the ACL rather than the phrase "[a] corporation shall not" in the TPA. It was common ground that this difference was of no relevant consequence[3].

12 Under s 76E of the TPA and s 224 of the ACL, the maximum pecuniary penalty for each act or omission in contravention of s 53(e) and (g) of the TPA or s 29(1)(i) and (m) of the ACL was $1.1 million[4].

13 Section 53C(1) of the TPA relevantly provided:

> "A corporation must not, in trade or commerce, in connection with:
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> (a) the … possible supply of … services to a person …; or
>
> (b) the promotion by any means of the supply of … services to a person …;
>
> make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the … services unless the corporation also:
>
> (c) specifies, in a prominent way and as a single figure, the single price for the … services".

The advertisements

14 Between 25 September 2010 and 7 October 2010, in the first phase of the campaign, TPG deployed advertisements on three national television stations and seven capital city radio stations, in a number of national and capital city newspapers, and on the websites of TPG and two third parties ("the initial advertisements").

15 On 4 October 2010, the ACCC was prompted by the initial advertisements to write to TPG to convey its concerns regarding the advertisements. Although

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3 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,685 [18].

4 *Trade Practices Act* 1974 (Cth), s 76E(3); Australian Consumer Law, s 224(3).

TPG did not accept that the ACCC's concerns were warranted, it amended the advertisements with effect from about 7 October 2010.

16 The advertisements in the second phase of the campaign were deployed from 7 October 2010 until 4 November 2011 ("the revised advertisements"). The revised advertisements were published on or in four national television stations, the same seven radio stations as the initial advertisements, a wider range of national and capital city newspapers, the TPG website and third party websites, national cinema screens, national magazines, coupon booklets left in letter boxes, brochures, public transport, billboards and noticeboards[5].

17 Representative samples of the advertisements may be found annexed to the reasons of the primary judge and the Full Court. The primary judge and the Full Court viewed replays of the television advertisements and listened to replays of the radio advertisements. The parties did not invite this Court to do likewise.

The findings and conclusions of the primary judge

18 The primary judge proceeded to his conclusions on the basis that TPG's target audience consisted of "the broad class of Australian consumers around mainland capital cities who were users or potential users of broadband internet services."[6] His Honour found that the target audience did not include people who knew little or nothing about broadband internet services[7]. While users of ADSL2+ were more knowledgeable about such services than the general class of users or potential users of internet services, the primary judge found that "this does not impute a high level of knowledge about broadband internet to the ordinary or reasonable consumer."[8]

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5 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,683 [5].

6 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,685 [23].

7 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,686 [27].

8 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,686 [28].

The bundling condition

19 His Honour found that the target audience included first time users of ADSL2+ services[9]. The primary judge also found that, by virtue of the array of available internet options, the ordinary or reasonable consumer would not have any starting assumption as to whether TPG's offering was of a separate or bundled service, and would rely on the advertisement for information as to the service offered[10].

20 The primary judge found that each advertisement had the same dominant message, namely: "Unlimited ADSL2+ for $29.99 per month"[11]. His Honour found that 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"[12]; and the balance of the advertisement which contained that information was not given sufficient prominence to counter the effect of the headline claim[13].

21 The primary judge held that the dominant message was false "because – as TPG conced[ed] – 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."[14]

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9 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,686 [29].

10 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,686 [31].

11 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,689 [54].

12 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,689 [55].

13 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,692 [78], 44,693 [82], 44,693 [84], 44,693 [87], 44,694 [90], 44,694 [92], 44,695 [97], 44,695-44,696 [102]-[104], 44,696 [105], 44,696 [108], 44,696 [109].

14 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,689 [56].

22 His Honour observed that the bundling condition operated to[15]:

> "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."

23 In these circumstances, the primary judge concluded that the information about TPG's bundling condition needed to be "quite clear and prominent if it [was] to correct the misleading impression of the message."[16]

24 His Honour found that the initial and revised television advertisements did not meet this requirement, and made findings to similar effect in relation to the initial and revised radio advertisements, newspaper and other print advertisements and internet advertisements, as well as in relation to the revised public transport, billboard and noticeboard advertisements[17].

25 As to the revised brochure advertisements, the primary judge accepted that consumers would read the brochure more carefully than a newspaper so that any misleading impression created by the headline offer in relation to the price of the ADSL2+ service was likely to be corrected by the balance of the information[18].

The setup condition

26 The primary judge accepted that setup fees are always charged for broadband contracts for less than 24 months, and that the consumers targeted by

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15 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,690 [62].

16 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,690 [62].

17 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,691 [73], 44,693 [82], 44,693 [84], 44,693 [87], 44,694 [90], 44,694 [92], 44,695 [97].

18 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,695 [99].

the campaign would be aware of this fact. Nevertheless, his Honour held that because the dominant message gave the impression that there would be no further charges, it was necessary for the advertisements to qualify clearly that message with an indication of the requirement of a further fee[19].

27 In relation to the initial television, radio, newspaper and internet advertisements, the primary judge found that none of them was sufficiently clear as to the requirement of the setup fee[20]. Consequently, his Honour held, in relation to these advertisements, that a consumer would likely conclude that no further fee was required by TPG[21]. With respect to the revised campaign, the primary judge found that all advertisements, except the revised radio advertisement, provided information regarding the setup fee that was sufficiently clear to correct what would otherwise have been a misleading message[22]. As to the revised radio advertisement, his Honour held that many consumers hearing it were likely to have seen or heard one or other of TPG's advertisements and to be aware of the existence of the setup fee as a result[23].

Section 53C(1)(c)

28 The primary judge also concluded that the single price of $509.89 was not displayed in a prominent way, within the meaning of s 53C(1)(c) of the TPA, in the initial television, newspaper and internet advertisements[24]. The ACCC had made no complaint in this regard in relation to any of the revised advertisements.

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19 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,695 [100].

20 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,695 [102], 44,696 [105], 44,696 [106], 44,696 [109].

21 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,696 [104], 44,696 [105], 44,696 [108], 44,696 [109].

22 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,696-44,697 [110]-[111].

23 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,696 [110].

24 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,700 [138].

Penalty

29 In a separate judgment, the primary judge made orders for injunctions, pecuniary penalties, corrective advertising, the implementation by TPG of a compliance program and costs[25]. The only one of these orders presently in controversy relates to the quantum of the pecuniary penalties imposed on TPG. His Honour ordered that TPG pay a total penalty of $2 million made up as follows[26]:

"Conduct		Penalty
First phase advertisements		
Television		$175,000
Radio		$150,000
Internet		$125,000
Print		$150,000
	Subtotal	$600,000
Second phase advertisements		
Television and cinema		$350,000
Radio		$250,000
Internet		$200,000
Print		$325,000
Outdoor		$275,000
	Subtotal	$1,400,000

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25 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* (2012) ATPR ¶42-402.

26 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* (2012) ATPR ¶42-402 at 45,604-45,605 [141].

Total: $2,000,000"

The conclusions of the Full Court

30 The Full Court (Jacobson, Bennett and Gilmour JJ) was not persuaded that the primary judge was wrong in his conclusion that the initial television advertisement was misleading[27]. Further, the Full Court held that the primary judge's conclusions in relation to s 53C(1)(c) revealed no appealable error[28].

31 On the other hand, the Full Court held that the revised television advertisement, initial and revised radio advertisements, initial and revised newspaper advertisements, initial and revised online advertisements and public transport advertisements were not misleading[29].

32 Their Honours proceeded to that determination on the footing that they were in as good a position as the primary judge to determine the proper factual findings to be made in relation to each of the advertisements, and were required to give effect to their conclusion in that regard[30].

33 The Full Court did not reject the primary judge's conclusions in relation to the misleading character of the advertisements simply on the basis of a different impression of the facts of the case or the inferences properly to be drawn from those facts[31]. Close examination of the Full Court's reasons shows that their Honours' conclusion reflected differences in point of principle with the approach taken by the primary judge. It is necessary to identify those points of divergence and to note their influence on the conclusions of the Full Court before proceeding to a discussion of the reasons for upholding the approach of the primary judge.

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27 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 290 [112].

28 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 291-292 [125]-[133].

29 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 290 [113], 290 [115], 290 [117]-[118], 291 [119], 291 [122], 291 [124].

30 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]; [2003] HCA 22; *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 435-436 [24]-[27].

31 *Warren v Coombes* (1979) 142 CLR 531 at 553; [1979] HCA 9.

Differences in approach

34 The Full Court acknowledged that it was not in dispute that "a percentage of the target audience is likely to have a lower level of interest in broadband internet bundled with a home telephone line", and that it was agreed that "the percentage of consumers with a fixed home telephone line has been falling since 2005, particularly amongst 18-24 year olds living away from home."[32]

35 The Full Court differed from the primary judge in relation to his Honour's view that the "dominant message" of the advertisements was of critical importance in determining whether they were to be characterised as misleading. In that regard, the Full Court treated as decisive[33] the statement of principle of Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*[34] that:

> "where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words."

36 Their Honours observed that[35]:

> "consumers to whom the advertisements were directed must … be taken to have some familiarity with the market for the provision of broadband services. In particular, they would know that services such as ADSL2+ are offered for sale as either 'bundled' or 'stand alone'."

37 The Full Court brought this statement of principle and their Honours' factual observation together, saying[36]:

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32 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [99].

33 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 286 [79].

34 (1982) 149 CLR 191 at 199; [1982] HCA 44.

35 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 288 [98].

36 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [105].

> "to approach the question as one based solely upon the 'dominant message' does not take into account the need to have regard to the attributes of the hypothetical reader or viewer. As we have said, these attributes include knowledge of the 'bundling' method of sale commonly employed with this type of service, as well as knowledge that set-up charges are often applied."

38 The Full Court's approach was also informed by the statement of Gibbs CJ in *Puxu*[37] that "[t]he heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests." Paraphrasing this statement, the Full Court said "[t]he legislation does not operate for the benefit of those who fail to take care of their own interests"[38]. What was said in *Puxu* and adopted by the Full Court reflects a similar observation in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*[39] that s 52 of the TPA (and now s 18 of the ACL):

> "does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence."

39 Whether speaking of representations to the public at large or in negotiations between parties of equal bargaining power and competence, the quoted observations in *Puxu* and *Miller* go to the characterisation of conduct as misleading or deceptive. Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. That is to say there must be a sufficient causal link between the conduct and error on the part of persons exposed to it[40]. It is in that sense that it can be said that the prohibitions in s 52 and s 18 were not enacted for the benefit of people who failed to take reasonable care of their own interests.

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37 (1982) 149 CLR 191 at 199.

38 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 290 [110].

39 (2010) 241 CLR 357 at 371 [22] per French CJ and Kiefel J; [2010] HCA 31.

40 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 241 per Gummow J.

40 The effect of these differences of approach upon the conclusion of the Full Court can be seen in the following passage in the reasons of the Full Court[41]:

> "The primary judge answered the critical question by finding that the dominant message in each of the relevant advertisements was that the reader or viewer could acquire ADSL2+ for $29.99 per month without incurring an obligation to acquire any additional service or to pay any further charges.
>
> On that approach, the ordinary or reasonable reader would be misled unless the misleading dominant message was corrected by a sufficiently clear and prominent statement which prevented the inaccurate dominant message from being misleading, or likely to mislead or deceive.
>
> In our respectful view, that was not the correct approach to adopt when considering the advertisements. It is true … that many persons will only absorb the general thrust. But this is not a mandate for ignoring the rule that the whole of the advertisement must be considered in its full context."

41 It is to be noted that, in this passage, their Honours accepted that "many persons will only absorb the general thrust" of the advertisements. That view of the tendency and effect of the advertisements was in accord with the conclusion of the primary judge. The Full Court reached the conclusion that TPG's advertisements were not misleading via a view of principle which differed from that of the primary judge, and which should not have been of decisive application, given their Honours' view as to the tendency and effect of the advertisements.

42 The divergence in point of principle between the primary judge and the Full Court can also be seen in the following passage[42]:

> "It seems to us that the primary judge's emphasis on the 'dominant message' led him into error. The authorities which have considered advertisements containing a misleading 'primary' or 'dominant' statement do not depart from the overarching rule that it is necessary to look at the

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41 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [101]-[103].

42 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [104]-[105].

whole of the advertisement. Also, in those cases, the primary statement was flagrantly misleading when read in light of the inconspicuous fine print.

Moreover, to approach the question as one based solely upon the 'dominant message' does not take into account the need to have regard to the attributes of the hypothetical reader or viewer. As we have said, these attributes include knowledge of the 'bundling' method of sale commonly employed with this type of service, as well as knowledge that set-up charges are often applied."

43 As it happens, their Honours had not previously, in the course of their reasons, said that the attributes of the hypothetical reader or viewer included "knowledge that set-up charges are often applied." More importantly, however, their Honours went on to explain that they reached a different conclusion from the primary judge as to the character of the advertisements by reference to their view that the primary judge had erred in point of principle. The Full Court said[43]:

"This is the prism through which the critical question of the overall impact of the commercials on the ordinary and reasonable consumer must be considered. It produces a different answer to that reached by the primary judge in almost all of the advertisements because the consumer must be taken to have read or viewed the advertisements with knowledge of the commercial practices of bundling and set-up charges."

44 The Full Court, viewing the case through its different "prism", concluded in relation to the particular advertisements that each of the revised television advertisement, the initial and revised radio advertisements, the initial and revised print advertisements, the initial and revised online advertisements and the public transport advertisements was not misleading. In this regard, their Honours concluded that the advertisements were not misleading because the bundling condition could not be missed except by "perfunctory" viewing or listening; and, alternatively, because an ordinary and reasonable viewer or listener would know

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43 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [106].

that "services may be offered as a 'bundle'" and, in the case of the revised television advertisement, that setup charges are often required[44].

The approach of the primary judge was correct

45 First, the Full Court erred in holding that the primary judge was wrong to regard the "dominant message" of the advertisements as of crucial importance: neither of the statements of Gibbs CJ in *Puxu* which the Full Court applied was decisive in the circumstances of this case. Secondly, the Full Court erred in failing to appreciate that the tendency of TPG's advertisements to mislead was not neutralised by the Full Court's attribution of knowledge to members of the target audience that ADSL2+ services may be offered as a "bundle".

Puxu

46 *Puxu* was a case in which the claim of misleading conduct rested "solely on the fact that the appellant sold goods which were virtually identical in appearance to those sold by the respondent."[45] The case was determined on the basis that potential purchasers of furniture costing substantial sums of money were able to inspect the furniture which was on display in the retailer's showroom[46]. The majority of the Court took the view that purchasers would, acting reasonably, pay attention to the label, brand or mark of the suite they were minded to buy and, as a result, would not be misled by similarities in the getup of rival products[47]. It was in this context that the observations of Gibbs CJ cited above should be understood.

47 This case is in stark contrast to *Puxu* in three respects. First, TPG's target audience did not consist of potential purchasers focused on the subject matter of their purchase in the calm of the showroom to which they had come with a substantial purchase in mind. Here, the advertisements were an unbidden

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44 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 290-291 [113]-[124].

45 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 196.

46 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 196, 201-202, 210, 225-226.

47 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199, 210-211, 225-226.

intrusion on the consciousness of the target audience. The intrusion will not always be welcome. The very function of the advertisements was to arrest the attention of the target audience. But while the attention of the audience might have been arrested, it cannot have been expected to pay close attention to the advertisement; certainly not the attention focused on viewing and listening to the advertisements by the judges obliged to scrutinise them for the purposes of these proceedings. In such circumstances, the Full Court rightly recognised that "many persons will only absorb the general thrust."[48] That being so, the attention given to the advertisement by an ordinary and reasonable person may well be "perfunctory", without being equated with a failure on the part of the members of the target audience to take reasonable care of their own interests.

48 Secondly, the Full Court did not recognise that the tendency of the advertisements to mislead was to be determined, not by asking whether they were apt to induce consumers to enter into contracts with TPG, but by asking whether they were apt to bring them into negotiation with TPG rather than with one of its competitors on the basis of an erroneous belief engendered by the general thrust of TPG's message.

49 It might be said, as TPG did, that consumers, acting reasonably in their own interest, could be expected to obtain a clear understanding of their rights and obligations before signing up with TPG; but to say that is to confuse the question whether the consumer has suffered loss with the anterior question as to whether the advertisement, viewed as a whole, has a tendency to lead a consumer into error. Thus, in *Campbell v Backoffice Investments Pty Ltd*[49] French CJ noted that the question of characterisation as to whether conduct is misleading is "logically anterior to the question whether a person has suffered loss or damage thereby". French CJ observed that characterisation of conduct "generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error"[50]. As observed earlier in these reasons, questions of carelessness by consumers in viewing advertisements may be relevant to that question of characterisation.

50 It has long been recognised that a contravention of s 52 of the TPA may occur, not only when a contract has been concluded under the influence of a

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48 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [103].

49 (2009) 238 CLR 304 at 318 [24]; [2009] HCA 25.

50 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [25].

misleading advertisement, but also at the point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded[51]. That those consumers who signed up for TPG's package of services could be expected to understand fully the nature of their obligations to TPG by the time they actually became its customers is no answer to the question whether the advertisements were misleading.

51 Thirdly, this is not a case where the tendency of TPG's advertisements to lead consumers into error arose because the target audience might be disposed, independently of TPG's conduct, to attend closely to some words of the advertisement and ignore the balance. The tendency of TPG's advertisements to lead consumers into error arose because the advertisements themselves selected some words for emphasis and relegated the balance to relative obscurity. To acknowledge, as the Full Court did[52], that "many persons will only absorb the general thrust" is to recognise the effectiveness of the selective presentation of information by TPG. The Full Court erred in failing to appreciate the implication of that finding.

52 It was common ground that when a court is concerned to ascertain the mental impression created by a number of representations conveyed by one communication, it is wrong to attempt to analyse the separate effect of each representation[53]. But in this case, the advertisements were presented to accentuate the attractive aspect of TPG's invitation relative to the conditions which were less attractive to potential customers. That consumers might absorb only the general thrust or dominant message was not a consequence of selective attention or an unexpected want of sceptical vigilance on their part; rather, it was an unremarkable consequence of TPG's advertising strategy. In these

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51 *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 at 338-339; *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at 14 [51]; *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* (2003) 133 FCR 149 at 171-172 [47]. See also *Bridge Stockbrokers Ltd v Bridges* (1984) 4 FCR 460 at 475.

52 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 289 [103].

53 *Arnison v Smith* (1889) 41 Ch D 348 at 369; *Gould v Vaggelas* (1985) 157 CLR 215 at 252; [1985] HCA 68; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199, 210-211.

circumstances, the primary judge was correct to attribute significance to the "dominant message" presented by TPG's advertisements.

The knowledge base of the target audience

53 It may be accepted that if the hypothetical reasonable consumer is taken to know that ADSL2+ services may be sold as part of a bundle with telephony services, then, if he or she brings that knowledge to bear in a conscious scrutiny of the terms of TPG's offer, he or she might be less likely to form the impression that the offer was of an ADSL2+ service available without a requirement to take and pay for an additional service from TPG. But the circumstance that many consumers might know that ADSL2+ services are commonly offered as a "bundle" was not apt to defuse the tendency of the advertisements to mislead, especially where the target audience is left only with the general thrust or dominant message after the evanescence of the advertisement.

54 As the primary judge said, the vice of TPG's advertisements was that they required "consumers to find their way through to the truth past advertising stratagems which have the effect of misleading or being likely to mislead them."[54] Given TPG's strategy, the primary judge was entitled to draw the inference that consumers might be enticed to enter into negotiation with TPG without appreciating that TPG's services were, in fact, being offered only as a "bundle". It is pertinent to note again that "many persons will only absorb the general thrust" and that the question is not whether consumers suffered loss by signing up to a contract to accept and pay for TPG's service[55].

55 It has long been recognised that, where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect[56]. Such an inference may be drawn more readily where the business of the representor is to make such

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54 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,697 [116].

55 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 351-352 [142]-[143].

56 *Gould v Vaggelas* (1985) 157 CLR 215 at 219, 237-238, 250-252, 262; *Australian Guarantee Corporation Ltd v Sydney Guarantee Corporation Ltd* (1951) 51 SR (NSW) 166 at 170-171; *Telmak Teleproducts (Australia) Pty Ltd v Coles Myer Ltd* (1988) 84 ALR 437 at 445; *Twentieth Century Fox Film Corporation v South Australian Brewing Co Ltd* (1996) 66 FCR 451 at 466.

representations and where the representor's business benefits from creating such an impression.

56 To say this is not to say that TPG acted with an intention to mislead or deceive: such an intention is not an element of the contravention charged against TPG, and there was no suggestion of such an intention in the ACCC's case. There can be no dispute, however, that TPG did intend to create an impression favourable to its offer in the mind of potential consumers; and that it did intend to emphasise the most attractive component of its offer in order to do so.

57 It cannot be denied that the terms of the message and the manner in which it was conveyed were such that the impression TPG intended to create was distinctly not that which would have been produced by an advertisement which gave equal prominence to all the elements of the package it was offering to the public. In this regard, it is significant that, as the primary judge noted, TPG considered deploying just such an advertisement and chose not to adopt it, evidently opting to continue with its headline strategy[57].

58 It was not open to the Full Court, in the proper exercise of its appellate function, to hold that TPG's advertisements were not misleading.

Penalty

59 As the findings of the primary judge in relation to TPG's contraventions of the TPA and the ACL are to be reinstated, the primary judge's assessment of penalty should also be restored. The Full Court expressed the view that, even if the primary judge's findings in relation to TPG's contraventions were sustained, the penalty imposed by his Honour was "outside the appropriate range of penalties"[58]. We disagree. In this regard, three broad observations may be made to indicate that the penalty fixed by the primary judge was within the appropriate range.

Number of contraventions

60 The primary judge assessed the pecuniary penalty on the basis that there were nine classes of contraventions based upon the four different types of the

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57 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2011) ATPR ¶42-383 at 44,691 [69].

58 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 292 [136].

initial advertisements and the five different types of the revised advertisements. The Full Court held that this approach was in error on the basis that there were "three different messages … (i) the 'no bundling condition', (ii) the no set-up fee in the initial advertisements, and (iii) the failure to prominently display the single price in the initial advertisements."[59]

61 The Full Court considered that, given that the content of the advertisements across the range of media was broadly the same, there were only three categories of contravention[60]. This led the Full Court to begin at a starting point where the total maximum penalty was not $9.9 million but $3.3 million[61]. The Full Court erred in this regard in failing to recognise that the primary judge was entitled to have regard to the circumstance that TPG pursued its "three different messages" by the deployment of different media.

The s 87B undertaking

62 In 2009 TPG gave the ACCC an undertaking under s 87B of the TPA. In that undertaking TPG acknowledged that it might have contravened the TPA by its conduct and undertook not to engage in misleading and deceptive conduct generally. The primary judge took this undertaking into account in assessing the pecuniary penalty to be imposed on TPG in respect of the contraventions which he had found.

63 The Full Court held that his Honour erred in this regard on the basis that "[t]he existence of the undertaking, where the facts underlying the undertaking were never proved and no breach was ever alleged, was not a relevant circumstance."[62]

64 The Full Court erred in failing to appreciate the relevance of the undertaking in relation to the claims of personal deterrence upon the sentencing

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59 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 294-295 [148]-[152].

60 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 295 [150]-[151].

61 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 295 [155].

62 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 296 [159].

discretion. The fact that the undertaking had not been sufficient to secure TPG's adherence to the requirements of the TPA indicated that a more severe penalty was necessary to accomplish the task of securing that adherence. In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*[63], it was rightly said by the Full Court of the Federal Court that the court, in fixing a penalty, must "make[] it clear to [the contravener], and to the market, that the cost of courting a risk of contravention … cannot be regarded as [an] acceptable cost of doing business."

Deterrence

65 General and specific deterrence must play a primary role in assessing the appropriate penalty in cases of calculated contravention of legislation where commercial profit is the driver of the contravening conduct. TPG's campaign was conducted over approximately 13 months at a cost to TPG of $8.9 million[64]. It generated revenue of approximately $59 million, and an estimated profit of $8 million[65]. TPG's customer base grew from 9,000 to 107,000 during this period, although it cannot be said that this was at the expense of TPG's competitors.

66 The pecuniary penalty fixed by the primary judge did not exceed that which might reasonably be thought appropriate to serve as a real deterrent both to TPG and to its competitors. As was said in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*, the penalty for contravention of the TPA[66]:

> "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business. … [T]hose engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention."

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63 (2012) 287 ALR 249 at 266 [68].

64 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* (2012) ATPR ¶42-402 at 45,596 [79]-[80].

65 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* (2012) ATPR ¶42-402 at 45,601 [117]-[119].

66 (2012) 287 ALR 249 at 265 [62]-[63].

67 It was submitted on TPG's behalf that the matter should now be referred back to the Full Court because it had not dealt with aspects of TPG's appeal to it. That submission is without foundation. There is nothing in the reasons of the Full Court to suggest that it had not finally disposed of the matter before it, and TPG has not sought to maintain the orders of the Full Court on any basis other than that determined by the Full Court.

Orders

68 The appeal should be allowed.

69 Ordinarily, it would follow that the orders made by the Full Court of 4 April 2013 should be set aside and in their place the appeal to the Full Court should be dismissed, with the consequence that the orders of the primary judge would be reinstated. But the ACCC accepted that, with the passage of time and TPG's refraining from engaging in further contraventions, it is not necessary to reinstate the injunctions, corrective advertising and compliance programs ordered by the primary judge.

70 Accordingly, pars 1, 2, 3, 4, 5 and 6 of the orders made by the Full Court on 4 April 2013 should be set aside along with par 1 of its orders of 20 December 2012, TPG's appeal to the Full Court dismissed, and the orders of the primary judge of 15 June 2012 reinstated, save that those orders be varied by deleting paragraphs 4, 9 and 10.

71 TPG should pay the ACCC's costs of and incidental to the appeal to the Full Court and of the application for special leave and of the appeal to this Court.

72 GAGELER J. I regret that I am unable to concur in the reasons for judgment of the majority. My inability to concur is not because I disagree with the statements of legal principle set out in those reasons. It is because I cannot read the reasons for judgment of the Full Court of the Federal Court as having ignored them.

73 The question whether TPG's advertisements were likely to lead the ordinary and reasonable consumer or potential consumer of broadband internet services into error is ultimately a question of fact. The Full Court correctly recognised that it was in as good a position as the primary judge to reach its own conclusion on that question. The Full Court correctly recognised that it was therefore obliged in the appeal to do just that.

74 The question the Full Court was obliged to determine for itself fell to be addressed against the following background. DSL broadband internet services, which have been supplied widely in Australia since 2003, are delivered over copper wires of the kind used to deliver home telephone services. By the time TPG launched its advertising campaign in 2010, DSL broadband internet services had for some years been marketed widely, had often been marketed bundled with home telephone line rental, and commonly had a setup fee. Until recently, it had not been possible to acquire DSL broadband internet services without actually having a home telephone service.

75 Against that background, the essential difference between the Full Court and the primary judge concerned the level of sophistication each attributed to the ordinary and reasonable consumer or potential consumer of broadband internet services during the period of TPG's advertising campaign in 2010 and 2011.

76 The Full Court considered that an ordinary consumer of broadband internet services who was sufficiently aware of DSL broadband internet services potentially to be misled by those advertisements would also be aware that DSL broadband internet services were often bundled with home telephone line rental and commonly had a setup fee. The consumer would not form an impression, merely from a headline reference to "Unlimited ADSL2+ $29.99 per month", that what was being advertised was a stand-alone DSL service for a stand-alone price of $29.99 per month. The consumer would look to the whole of the advertisement in the first place. Looking to the whole of the advertisement, the consumer would form an impression as to whether the headlined DSL service was or was not being bundled with home telephone line rental and did or did not have a setup fee.

77 The question, as the Full Court saw it, was therefore not whether the fine print of an advertisement was sufficient to dispel a "dominant message" conveyed by its headline. The question was whether the ordinary and reasonable consumer or potential consumer of broadband internet services, looking with an open mind to the whole of the advertisement, would be likely in fact to have

formed an impression that what was being advertised was a stand-alone DSL broadband internet service for a stand-alone price of $29.99 per month.

78 In my opinion, the Full Court made no error of principle in framing the ultimate question of fact that way and it was open to the Full Court to answer that question in the way it did: yes for the initial television advertisements; but no for the other advertisements. The Full Court did not, as the ACCC sought to advance, err in the exercise of its appellate function.

79 What TPG was offering in each advertisement was a bundle of services for six months comprising: unlimited DSL broadband internet services for $29.99 per month; home telephone line rental for $30.00 per month and a once-off setup fee of $129.95. The Full Court concluded that the ordinary and reasonable consumer, aware that the headlined DSL service might or might not be bundled with home telephone line rental and might or might not have a setup fee, and looking to the whole of the advertisement, would not be likely to have been led by the headline reference to unlimited DSL broadband internet services into thinking that what was being advertised was less than the bundle comprising all three components.

80 In so concluding, the Full Court brought to its analysis of the home telephone line rental component essentially the same form of analysis as the primary judge brought to the setup component. The advertisements the Full Court found to be non-contravening all expressly referred to the home telephone line rental component in the words "when bundled with TPG Line Rental $30 pm" which followed (with less prominence) the words "Unlimited ADSL2+ $29.99 per month". The only reference to the setup component, where reference was made at all in those advertisements, was buried in the words "includes deposit and setup fees" which followed (with much less prominence) the words "min charge $509.89".

81 Telling also in favour of the Full Court's conclusion that the hypothetical ordinary and reasonable consumer would not be likely to have been misled (although obviously not determinative of that conclusion) was the dearth of evidence of any actual consumer being misled by any advertisement, even to the point of doing no more than contacting TPG to make an inquiry, despite TPG's advertisements having run nationally for a period of some 13 months.

82 Nothing for present purposes can, in my opinion, be made of TPG's choice to adopt a headline strategy in the advertisements, and to maintain that strategy in the face of ACCC opposition. Some other background facts are here important. TPG's pricing of two components of the bundle was unremarkable: TPG's competitors routinely charged $29.95 per month as the basic monthly access fee for a standard telephone service and between $80 and $200 for setup. The range of charges for basic telephone services had by 2010 been static for several years. The supply of DSL services, on the other hand, was hotly contested, with

suppliers differentiating their services based on speed, usage quotas, period and price. The TPG offering was significant as being one of the first to have unlimited downloads.

83 Within that market context, TPG understandably focussed in its advertisements on the component of its bundle which differentiated its services from those of its competitors and which TPG considered would be most attractive to consumers: unlimited downloads for $29.99 per month. It does not follow that TPG thereby intended to, was likely to, or did, lead consumers into error as to the existence of the other components.

84 Given my view on contravention, my conclusions on penalty can be stated quite briefly. In circumstances where the Full Court overturned findings of fact by the primary judge which impacted on the extent of TPG's contravening conduct, the Full Court was obliged to go on to determine the appropriate penalty for itself. That is what the Full Court did in its separate and subsequent judgment on penalty, delivered nearly ten months after the primary judge had ordered, amongst other things, injunctions and corrective advertising. The Full Court did not ignore the importance of deterrence. The Full Court treated the remaining contraventions as serious. The Full Court nevertheless took into account the impact on TPG of the decision of the primary judge, including being required to write to customers telling them it had engaged in misleading and deceptive conduct and being forced immediately to terminate its advertising campaign, which the Full Court itself found not to breach the Act. I can see no error of principle in the Full Court's reasoning and cannot regard the size of the penalty it imposed as manifestly inadequate.

85 I would dismiss the appeal.