Dan Star's Federal Court Judgements

CONSUMER LAW

Ambush marketing for the 2016 Rio Olympics game – Whether infringement of the *Olympic Insignia Protection Act 1987* – Whether misleading and deceptive conduct under the Australian Consumer Law

In *Australian Olympic Committee Inc v Telstra Corporation Limited* [2016] FCA 857 (29 July 2016) the Court (Wigney J) dismissed an application by the Australian Olympic Committee (AOC) that advertising by the respondent (Telstra) in its 'Go to Rio' marketing campaign contravened the *Olympic Insignia Protection Act 1987* (Cth) (OIP Act) and the Australian Consumer Law (ACL).

The main facts were not in dispute (at [6]). The Summer Olympics Games are probably the largest and most widely recognisable sporting event in the international sporting calendar. The Olympic Games and all associated intellectual property is owned by the International Olympic Committee. Under the Olympic Charter, the AOC, as Australia's National Olympic Committee, has the right to use and protect property associated with the Olympic Games and Olympic Movement. For many years, the AOC has entered sponsorship and affiliation agreements with national and multinational companies, granting the companies the right to promote themselves by association with the Olympic Games and allowing them to use terms such as 'Olympic', 'Olympics' and 'Olympic Games'. For many years, Telstra was the AOC's exclusive telecommunications sponsor. All sponsorship arrangements between AOC and Telstra came to an end in 2012. The AOC, however, entered an agreement with Seven Network (Operations) Ltd (Seven), granting Seven exclusive Olympic Games broadcast rights in Australia on television, mobile phones and tablet devices. As part of the agreement, Seven was permitted to sell broadcast sponsorships and advertising in connection with the Olympic Games, but could not grant its broadcast sponsors the right to use Olympic properties, including the words 'Olympic', 'Olympics' and 'Olympic Games'. In June 2016, Seven entered an agreement with Telstra to sponsor the broadcast of the Rio Olympic Games, allowing Telstra to use certain designations such as "Seven's Olympic Games broadcast is supported by Seven's official technology partner, Telstra" (at [19]). The agreement also allowed Seven to provide 'premium content' to eligible Telstra customers. It was apparent from Telstra's marketing brief that it wanted to 'own' an association with the Olympic Games but could not imply any official association with the Olympics themselves (at [25]). The issue was whether any of Telstra's promotions crossed that fine line (at [26]).

The AOC initially sought interlocutory injunctions restraining Telstra from running certain promotions and campaigns. However, the parties sought and were granted an urgent final hearing. The trial was heard and judgment delivered prior to the commencement of the Rio Olympics Games. The trial concerned thirty-four separate types of advertisements (at [27]) such as televisions commercials, videos on third-party websites, Telstra catalogues, retail or point of sale material and Telstra emails and other digital materials.

Section 36(1) of the OIP Act provides that: "A person, other than the AOC, must not use a protected Olympic expression for commercial purposes." There was no dispute that the AOC did not issue a licence to Telstra to use any of the Olympic expressions during the time that any of the relevant advertisements, promotions or marketing materials were broadcast or otherwise made available for the purposes of the exception in s 36(2) of the OIP Act (at [75]). Section 30 of the OIP Act sets out relevant situations in which a person is said to use a protected Olympic expression for commercial purposes. There was essentially no dispute that Telstra applied Olympic expressions ('Olympic', 'Olympics', and 'Olympic Games') to its services within the meaning of s 28 of the OIP Act (at [79]).

The contested issue under s 30(2)(c) of the OIP Act was stated by Wigney J at [80]: "The real question is whether, in each case, the application of the expression or expressions 'to a reasonable person, would suggest that [Telstra] is or was a sponsor of, or is or was the provider of sponsorship-like support for', relevantly, the AOC, IOC, the Rio Olympic Games or the Australian Olympic team or any section or member of it. That question involves an objective test. The question is what the application of the Olympic expressions would suggest to a reasonable person ..."

Ultimately, the Court held that the AOC had not proved that Telstra contravened s 36 of the OIP Act because none of the advertisements that employed the Olympic expressions would suggest to a reasonable person that Telstra is or was a sponsor of, or is or was the provider of, sponsorship-like support to any relevant Olympic body (at [124]).

The AOC also argued that Telstra's advertising, considered individually or collectively, conveyed a false or misleading representation, or involved misleading or deceptive conduct and, accordingly, Telstra contravened either or both of s 18 or ss 29(g) and (h) of the ACL. Wigney J observed at [135]: "The critical question, in general terms, is whether Telstra's advertisements, marketing and promotions, conveyed, or were likely to convey, to reasonable persons in the class to whom they were directed or likely to be received, that Telstra had some form of sponsorship, licensing or affiliation arrangement with a relevant Olympic body. If that message or representation was conveyed, it was misleading and deceptive and Telstra's conduct in causing the advertisement to be published or disseminated was misleading and deceptive."

The Court held, for essentially the same reasons as those given in dismissing the OIP Act claim, that the AOC's claim under the ACL failed (at [137] and [150]). It was insufficient for the AOC to prove that Telstra's advertisements were Olympic themed; there was no express reference to any Olympic body, or use of any Olympic symbols or emblems. Promoting a relationship with Seven, including with respect to the Olympics on 7 app, was not misleading or deceptive, or likely to mislead or deceive (at [140]). It was found at [142] that the message was of Telstra's association with Seven, not with any Olympic body, and therefore not misleading or deceptive. While Telstra clearly sought to exploit an association with the Rio Olympic Games, it did so by promoting its sponsorship arrangement with Seven in relation to Seven's Olympic broadcast, not to the Olympics itself. This was despite the fact that "Telstra intended to, and may well have succeeded in, capitalising or exploiting, in a marketing sense, the forthcoming Rio Olympics Games" (at [149]).

CONSUMER LAW

Penalty hearing – Admitted misleading or deceptive conduct by underquoting the price range of a property by real estate agent – Observations on instinctive synthesis in the assessment of penalty

In *Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd* [2016] FCA 1184 (6 October 2016) the Court (Middleton J) considered the appropriate penalty and other orders that should be made in relation to admitted contraventions of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (ACL (Vic)). The respondent, a real estate agent, admitted contraventions of both s 18 and s 30(1)(c) of the ACL (Vic). The admissions covered eleven separate contraventions (at [23]) regarding the sale of eleven residential properties in Richmond and Kew in Victoria during 2014 and 2015. The contraventing conduct was underquoting the price range in the marketing and advertising of the property in advertisements online on a website and in a hardcopy publication.

The Court held a penalty of $30 000 for each contravention to be an appropriate penalty, amounting to a total penalty of $330 000 (at [83]). The respondent will also pay costs of approximately $80 000 to $90 000.

The Court considered the effect of the High Court's decision in Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 90 ALJR 113. Justice Middleton said at [41]-[42]:

> "Consumer Affairs submitted that the sharp distinctions drawn by the High Court in principle and practice, between the criminal sentencing discretion and determination or resolution of civil penalty proceedings, suggests that while the resolution of civil penalty proceedings still requires the exercise of a broad discretion, the task is not met by the processes involved in 'instinctive synthesis'.
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> I do not accept this submission. The process of determining the appropriate amount of civil penalty still involves an 'instinctive synthesis'. However, the relevant considerations to be taken into account between the imposing of fines in a criminal context and the imposing of a civil penalty are different."

REPRESENTATIVE PROCEEDINGS

Approval of settlement in class action proceeding – Whether proposed settlement fair and reasonable – Consideration of authority to give releases

In N*ewstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 (7 October 2016) the Court (Beach J) made orders approving the settlement and scheme in a shareholder representative proceeding in accordance with s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA Act). Of interest, Beach J made observations on the releases to be provided by group members as against the respondent (at [55]-[62]). The Court's power to make orders covering the breadth of the releases under s 33ZB and s 33Z(1)(g) of the FCA Act are not limited to the pleaded claims (at [56]).

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