Mobile Phone Advertising and the *Trade Practices Act*

Christina Hardy highlights some of the issues for the telecommunications industry which arise from the Federal Court's recent decision on misleading and deceptive conduct in the advertising of a mobile telephone plan.

The latest decision on misleading conduct in the telecommunications industry by a single judge of the Federal Court of Australia has continued to send a hardline message to an industry at an extremely aggressive stage of competition.

Facts

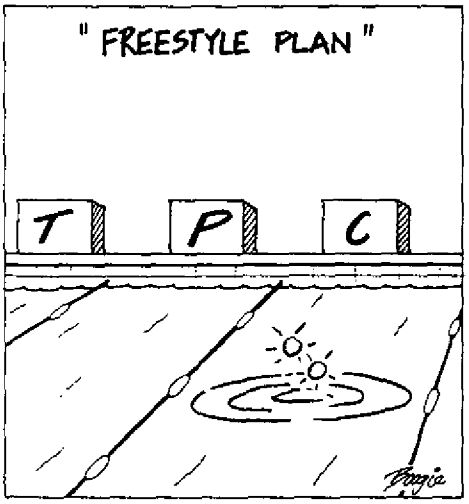
On 6 March Tamberlin J. handed down the decision in *Trade Practices Commission v. Optus Communications Pty Limited and Optus Mobile Pty Ltd ('Optus')*.

The Trade Practices Commission (TPC - which handed over its regulatory reins to the Australian Competition and Consumer Communission (ACCC) in November 1995) commenced an inquiry into a 30 second television advertisement for the Optus "Freestyle" digital mobile telephone plan following complaints made by Telstra Corporation Limited for misleading and deceptive conduct.

The Freestyle Plan product comprised a digital mobile phone handset and a connection to the Optus network with a connection fee and monthly access fee. In return for purchasing the handset at a low price, the customer committed to a 12 months' network contract. Early termination of the network contract by the customer involved paying out the access fee for the remainder of the term.

The advertisement, which ran on three television stations from 30 March 1995 to 7 June 1995, offered free local calls using the following phrases: "one hour of free local calls on weekends", "free local calls on weekends" and "free local calls". At the bottom of the screen the following superscript appeared for four seconds: "Only Optus Freestyle Plan has free weekend calls (up to $52 per month). Some exclusions apply".

During the first three weeks of the advertising campaign, the words "See local newspapers for details" appeared at the close of the advertisement. Newspaper advertisements were run two to three weeks after the launch of the product on 31 March 1995 in conjunction with the television advertisements. In the newspaper advertisements, the word "Free" and "Calls" appeared in large typeface. The words "Some exclusions apply" appeared at the bottom of the advertisement in script that J Tamberlin considered to be one twentieth the size of the words "Free" and "Calls". The newspaper advertisement did not list the exclusions.



Mobile to mobile calls were excluded from the $52 worth of free weekend "local" calls advertised, but this was not mentioned in the television or newspaper advertisements..

The TPC alleged a series of oral misrepresentations by Optus employees in connection with the Freestyle Plan. To assist with its inquiry, TPC officers visited and telephoned various Optus Centres to obtain more information about the product. Optus staff did not volunteer information about the exclusions of mobile calls when asked about the Freestyle Plan by TPC officers.

Trace Practices Act

The relevant provisions of the *Trade Practices Act* 1974 (Cth) (TPA) were section 52, subsection 53(c) (prohibiting any representation that goods or services have benefit they do not have), subsection 53(e) (prohibiting false or misleading representations with respect to the price of goods or services) and subsection 53(g) (prohibiting a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy).

Issues and Findings

The three issues in the case were:

- **Whether there had been misleading or deceptive conduct or representations which fell within sections 52, 53(c), 53(e) or 53(g) of the *Trade Practices Act***

Tamberlin J. found that Optus' conduct was misleading and deceptive and in breach of the relevant sections of the Act.

- **Whether an injunction should be granted to restrain Optus**

Tamberlin J. decided that "proper protection of the public interest" required that a declaration be made to give effect to his findings that the television advertising was deceptive and misleading and breached subsection 53(e). He also found that an injunction should be granted to restrain further repetition of the Optus conduct. He referred to the fact that this conduct had continued after the TPC had expressed its concern in the months after the issues had first been brought to the attention of Optus by Telecom.

Interestingly, on 17 July and 13 September 1995 Optus had given undertakings to the Court that it would not broadcast the advertisement without a prominent disclaimer referring to the exclusion of calls to other mobile phones. The TPC relied on the fact that it first expressed its concern in writing to Optus on 10 May 1995.

- **Whether corrective advertising by Optus should be ordered**

His Honour did not order corrective advertising on the basis that the declaration of misleading and deceptive conduct and the granting of injunctive relief had sufficiently protected the public interest. In addition, Optus had taken steps to train staff to avoid a repetition of the false representations. Justice Tamberlin considered that the "incentive and monitoring effect" of an injunction would serve to minimise any repetition of the misleading conduct.

Target audience

The TPC submitted that the target audience of the advertisements comprised (in the words of Tamberlin J.) "young people who are relatively inexperienced in the use of mobile phones and are relatively unsophisticated as to the charging mechanisms and terminology used."

Optus, on the other hand, considered that the target audience "must be taken to have substantial familiarity with fixed line services and with telephone directories and services generally, and as a result they should be taken to be familiar with the charging procedures adopted by the communication corporations".

Tamberlin J. found that "the relevant section of the public includes those persons who wish to use the phone for social and recreational purposes, many of whom will be first time mobile phone users". Justice Tamberlin did not accept the contention that this group could be "taken to have sufficient familiarity with mobile phone billing provisions, statements in telephone directories, standard practices of persons using mobile phones, or the timing of mobile calls so as to lead them to infer that the term "local call" as used in the context of a mobile phone, would mean an untimed call".

Further, His Honour stated that "it is inappropriate to view the advertisement on the basis that it is directed to an audience of such sophistication so as to be cognisant of and aware of telephone billing proctices".

What is a "local call"?

Of particular interest to telecommunications lawyers is his Honour's approach to what constituted a "local call".

Optus contended that consumers would understand a local call to be an "untimed call". To support this, Optus relied on evidence of a Telstra employee set out in a letter to the TPC from Telecom which stated that "in my view, consumers would consider a local call to be an untimed call regardless of whether it was made on a fixed or mobile phone".

Optus also referred to the telephone directory which describes local calls as "untimed calls". Optus said that since all calls to other mobile phones are timed, they would not be considered a local call and therefore a consumer would not be misled by the advertisement.

The TPC submitted that "local calls" referred to all calls from a mobile phone within a geographic area, whether or not they were timed.

Tamberlin J. agreed with the TPC view that consumers would understand a local call to be a call to a limited geographic location. In support, the TPC referred to the ordinary Macquarie Dictionary and Shorter Oxford English Dictionary meaning of "local". The Shorter Oxford English Dictionary defines "local" as "...of or pertaining to a particular place in a system. 2. Belonging to ...a particular place, locality or neighbourhood, esp. a town, country...as opp. to the country as a whole".

The special collation of a "local call" in the Oxford English Dictionary is cited: "a telephone call within a prescribed area around a callers local exchange".

In determining whether the "local call" statement was misleading, his Honour appplied the test of the sense in which a reasonable person would understand a statement on a fair viewing (*Typing Centre of NSW Pty Ltd v. Northern Business College Ltd (1989) ATPR 40-943).*

In any event, Tamberlin J. found that even if a consumer understood a local call to be an untimed call, it was not possible to make an untimed call from a mobile phone, and therefore, the exclusion was meaningless.

Post-broadcast steps

Optus argued that there were several points in time between viewing the advertisement and signing a Freestyle Plan contract which would negate any misleading impression that a potential customer would have gained from viewing the advertisement.

For example, to participate in the Freestyle Plan, a customer would have to make further enquiries at an Optus Centre or the premises of an Optus agent, and speak to a representative of Optus. In addition, at these locations were numerous materials (including flyers, pocket guides, and information on the back of the handset box) which referred to the mobile to mobile exclusion. His Honour applied *Tec and Thomas (Australia) Pty Ltd* v. *Matsumiya Computer Co Pty Ltd* (1984) 1 FCR 28. He found that if a viewer did take a further step of making enquiries, they would probably be led to do so as a result of the "attractive but misleading" publicity in the television broadcast. Further, that many viewers would not make specific enquiries about whether mobile to mobile calls were within the exclusions. His Honour also found that, on evidence presented by the TPC, Optus sales staff could not be taken to make it clear to enquirers that mobile to mobile calls were excluded.

Implications

The case has implications for the entire telecommunications industry, not just the mobile telephone sector.

The case illustrates the difficulty in conveying complex product descriptions in television advertisements. It also indicates the importance of following through in any related media advertising, such as local newspapers in the Optus case, with the detail of any applicable exclusions (although it should be noted that there is no indication in the judgment that any follow-through would necessarily negate a finding of a s.52 contravention with respect to a TV advertisement.)

Further, a company cannot assume that post-advertising steps taken by consumers will dispel any misleading impression in an advertisement. The current view is that an advertisement will stand alone to be judged whether it is misleading or deceptive.

In addition to any general in-house trade practices compliance training program, there is need for training on specific products as and when they are released. This becomes more difficult to control when, as is so common in the mobile telephone market, selling is done through agents and dealers.

The ACCC has been successful in obtaining undertakings to conduct compliance training from several mobile telephone service providers. The fact that the ACCC proceeded to prosecution in this case demonstrates that it takes any infringements very seriously indeed.

The literal approach to the meaning of "local" call also sends out a warning to an industry that has developed and relies on technical jargon to "sell" its product and services. When tested in the courts, these assumed terms of art cannot be relied upon as conveying the correct meaning to consumers.

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Competition, Content and Cultural Identity - Why Free-To-Air TV will thrive in the Future.

Kerry Stokes, Chairman of the Seven Network, discusses the future of broadcast television in the face of competition from pay television and converging technologies.

A question I am often asked is: "Why invest in a Television Network?" "Broadcast Television is an anachronism. Television will be relegated to the pages of history." "It will be surpassed by new communication technologies. Audiences will leave television behind." My answer is simple. You are wrong.

It is clear that broadcast television will thrive in the new world of communication technologies. We can however be certain of one thing. Broadcast television will change.

You may ask how broadcast television will retain a presence in what will undoubtedly become a crowded market. You may also hear a lot of dire predictions about the future of broadcast television. What is being lost in the headlines is the underlying strength of broadcast television. The capability to deliver large unsplintered audiences. What is also being overlooked is the strengthening of broadcast television in international markets.

Much has been written about the future developments in information technology. While the changing shape of telecommunications has been the subject of thousands of column centimetres, uncertainty remains about its form and content. Despite the conjecture, "crystal balling" and in some cases "navel-gazing", we can be certain about a number of key facts.

First, broadcast television will continue to dominate communications, commanding the largest audiences and the biggest slice of advertising revenue. It is worthwhile to consider some of the latest figures from the United States, where cable has been part of television for 4 decades:

- Despite the continuing dramatic increase in the number of viewing options - in some markets as many as one hundred channels - broadcast television commands more than 70 per cent of total viewing. Cable and pay television attract less than 30 per cent of total viewing, with the leading cable networks attracting household ratings of less than two per cent.
- The four networks in the United States - NBC, CBS, ABC and FOX - command more than 80 per cent of total advertising revenue. Less than 20 per cent of the advertising revenue pie is split between the plethora of cable networks.

Largely overlooked in the ongoing debate about the wonders of new communications technology is the issue of content. Those who own the copyright will be the gatekeepers in this new multi-media environment. All information and entertainment is driven by quality of content - whether it is movies, music, information, sport, text or data. This key fact is driving Seven's future planning and business strategies which ensure the ongoing development of expertise in programme production.

The third key fact is the marketing of broadcast television. Seven is one of Australia's best known and highly regarded brands. Some recent surveys show Seven up there with the likes of Coca Cola and Holden in terms of brand recognition. The imperative now is to build from this platform of strength and ensure branding across all programmes and markets to reinforce Seven's position as the number of viewing options increase. There has been some interesting consumer research in the United States. In a crowded market - in a battlefield of 100 channels - the three most recognised and highly regarded brands in television are NBC, CBS and ABC. All three networks have worked vigorously to protect their franchise and build their brands. Expect the same of Seven in this country.

The fourth key fact is the evolution of the relationship between the network and the advertiser. The days of simply buying time are behind us. Increasingly networks will form partnerships with advertisers to ensure campaigns are relevant, targeted, flexible to respond to competitive activity and provide "value-added" elements.

Mega-mergers and other alliances over recent times have been drawn between the owners of delivery systems and entertainment software. The relationships between television, entertainment, publishing and computers provide us with the fifth key fact. Telephone companies will increasingly provide a method of distribution of information, particularly into the home. Computer companies will develop control mechanisms and will design systems which will allow the marriage between entertainment companies, publishing companies and telephone companies.