

Consumer Protection Enforcement Update: Spotlight on Telecommunications Industry

Recent regulatory changes have seen a range of new measures introduced to assist consumers in their dealings with telecommunications service providers. Bruce Lloyd, Matthew Battersby and Alexia Takis take a look at the growing willingness of the ACCC and the ACMA to take enforcement action to change advertising, disclosure and sales practices in the industry.

Introduction

Consumer protection in the telecommunications sector continues to be a focus area for Australian regulators. The Australian Competition and Consumer Commission (**ACCC**) and the Australian Communications and Media Authority (**ACMA**) have both signalled that enforcement action will be taken using formal warnings, infringement notices, court enforceable undertakings and pecuniary penalty proceedings, in addition to education and compliance efforts.

In February, ACCC Chairman Rod Sims released the ACCC's updated Enforcement and Compliance Policy and announced the ACCC's priorities for 2013¹, with "consumer protection in the telecommunications and energy sectors" at the top of its list.² Looking ahead, the more traditional focus on misleading and deceptive conduct, particularly in advertising, is likely to continue. New provisions in the Australian Consumer Law (**ACL**) dealing with unfair contracts, unsolicited consumer agreements and consumer guarantees commenced on 1 January 2011 and are also starting to receive particular attention.

In addition, the ACMA registered the Telecommunications Consumer Protections Code 2012 (**TCP Code**) just over a year ago. The TCP Code was developed in partnership with the industry and contains some prescriptive requirements on carriage service providers designed to improve advertising and sales practices, minimise bill shock, and address confusing mobile plans and poor complaints-handling practices.

One of the key objectives behind the focus on consumer protection by the ACCC and the ACMA is a desire to improve the level of transparency and disclosure in the industry to avoid consumer confusion and provide sufficient information for consumers to make an informed decision when purchasing products or services. The ACL and TCP Code are the principal regulatory and enforcement tools used to achieve this objective.

This article explores some of the recent consumer protection matters which have been pursued by the ACCC and the ACMA and considers the implications for telecommunications service providers.

¹ Rod Sims, "The ACCC's 2013 Priorities" (Speech delivered at the Committee for Economic Development of Australia, Sydney, 21 February 2013).

² ACCC, *Compliance and Enforcement Policy* (February 2013).

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SAVE THE DATE

Thursday 28 November

The Communications and Media Law Association invites members to the Annual General Meeting and End of Year Drinks

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Advertising and Disclosure

The rapid take-up of smartphones and internet plans has caused the ACCC and the ACMA to focus closely on advertising standards in the telecommunications sector. Both regulators have expressed concerns about the level of transparency and disclosure in advertisements and have taken action where they perceive a risk of consumer harm.

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Truth-in-Advertising Undertaking

Looking back to 2009, Telstra, Optus and Vodafone gave a court-enforceable undertaking to the ACCC to "set a new industry benchmark for 'truth in advertising'" in response to a "significant number of complaints" received by the ACCC about advertising and promotional practices in the industry (**Truth-in-Advertising Undertaking**).³ The Truth-in-Advertising Undertaking has now expired, but contained commitments from the three carriers that they would not engage in specific advertising practices which the ACCC considered were likely to mislead or deceive consumers.

TCP Code

Many of the specific advertising restrictions contained in the Truth-in-Advertising Undertaking can now be found in Chapter 4 of the TCP Code which commenced on 1 September 2012 and has been progressively phased in over the last 12 months.⁴ The TCP Code is a mandatory industry code registered under Part VI of the *Telecommunications Act 1997* (Cth) and applies to carriage service providers who supply telecommunications products to residential and some small business customers.

The TCP Code contains some prescriptive requirements designed to improve transparency and disclosure. These include rules for the use of headline representations, disclaimers, price representations and terms such as "unlimited", "free", "cap", "no exceptions", "no exclusions"

or "no catches".⁵ The TCP Code also contains mandatory disclosure requirements, which require carriage service providers to:

- prepare a two page "Critical Information Summary" for current pre-paid and post-paid plans which must be made available online and in store;⁶
- prominently disclose in any advertisement containing the price or dollar value of a post-paid plan the cost of a two-minute standard national call, a standard SMS and using 1MB of data within Australia;⁷ and
- issue notifications to consumers with post-paid plans or data plans when usage of their included value allowance (for voice, SMS and data) reaches 50, 85 and 100 per cent.⁸

The ACMA is focused on TCP Code compliance and has issued formal warnings or directions to comply to several service providers in the past year, including Touch Mobile and Vodafone.

Australian Consumer Law

In addition to the specific requirements in the TCP Code, the ACL contains general prohibitions on misleading or deceptive conduct in relation to goods or services (sections 18, 29, 33 and 34) and requires suppliers to specify the single price of consumer products in a prominent way and as a single figure (section 48). These provisions of the ACL apply to conduct "in trade or commerce" such as advertising, sales and post-sales practices.

The ACCC is responsible for enforcing the ACL and has commenced court proceedings against a number of telecommunications service providers over the years, including Telstra, Optus and TPG, in relation to advertisements which it believes contravene the ACL and its predecessor provisions in the *Trade Practices Act 1974* (Cth) (**TPA**).⁹

In recent times, the ACCC has taken a stronger stance on conduct which it considers may mislead consumers and has commenced pecuniary penalty proceedings or issued infringement notices to several telecommunications service providers. The case studies below show that the ACCC has focused on headline representations, component pricing and the adequacy of disclaimers.

3 Telstra Corporation Limited, Singtel Optus Pty Limited, Vodafone Hutchison Australia Pty Limited, *Undertaking to the Australian Competition & Consumer Commission given for the purposes of section 87B* (14 September 2009).

4 Although some rules have had a delayed implementation date, the majority of the key obligations under the TCP Code have now commenced.

5 *Telecommunications Consumer Protections (TCP) Code* (C628:2012), cl 4.2.

6 TCP Code, cl 4.1.2.

7 TCP Code, cl 4.2.6.

8 TCP Code, cl 6.5.2. Smaller service providers (less than 100,000 customers) have an additional 12 months before they are required to issue SMS/voice usage notifications. All service providers must provide data notifications from 1 September 2013.

9 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2007] ATPR 42-207; [2007] FCA 2058.

Case study: ACCC v Singtel Optus Pty Ltd (March 2012)

The ACCC commenced proceedings against Optus in September 2010 alleging misleading claims about download allowances in Optus' "Think Bigger" and "Supersonic" broadband internet plan advertisements. The advertisements marketed a cap on peak and off-peak downloads and contained a disclaimer stating that "speed limited once peak data exceeded". Once the peak quota was used up, the speed of the service was shaped irrespective of the usage of the off-peak or overall quotas.

The ACCC took issue with advertisements promoting the plans over a 5 month period. Justice Perram agreed at first instance and fined Optus \$5.26 million for 11 contraventions of section 55A of the TPA (now section 34 of the ACL).¹⁰ In March 2012, the Full Federal Court reduced this penalty to \$3.61 million.¹¹

Case study: ACCC issues infringement notice to iiNet Limited (June 2013)

In June 2013, iiNet paid a \$102,000 infringement notice in relation to advertisements for iiNet's Naked DSL Service which the ACCC considered did not *prominently* display the total minimum price payable for the service, as required by section 48 of the ACL. The \$1,518.75 total price over 24 months was displayed towards the bottom of the advertisement and in font smaller than the \$59.95 monthly payment.

Case study: ACCC v TPG Internet Pty Ltd (ongoing)

In September 2010, TPG commenced an \$8.9 million multi-media advertising campaign promoting an unlimited ADSL2+ broadband service for \$29.95 per month where a consumer bundled this with a home phone service for a total of \$59.95 per month. The bundling condition, setup charges and total cost over the life of the contract were displayed less prominently than the headline \$29.95 representation.

Despite modifying its initial advertisements in response to ACCC concerns, the ACCC commenced proceedings against TPG in December 2010 alleging that its advertising campaign was misleading. The trial judge agreed and fined TPG \$2 million for contraventions of sections 18 and 29 of the ACL and the TPA predecessors of sections 18, 29 and 48 of the ACL.¹² TPG appealed and was largely successful, with the Full Federal Court finding that only some initial advertisements (which ran for 12 days prior to the ACCC raising concerns with TPG) were misleading. In April 2013, the Full Federal Court reduced the pecuniary penalty to \$50,000, set aside the injunction, corrective advertising and compliance program ordered by the trial judge and ordered the ACCC to pay 75% of TPG's costs.¹³

The Full Court emphasised that the "overarching rule" or "critical question" which must be examined is whether the whole of the advertisement in its full context was misleading, and not just the dominant message conveyed by the advertisement. The Court held that the full context included consumer knowledge about "the 'bundling' method of sale commonly employed with this type of service, as well as knowledge that setup charges are often applied".¹⁴

In August 2013, the High Court granted the ACCC special leave to appeal the Full Federal Court's decision.

Broadband Speed Claims

The ACCC announced in August 2013 that it is considering implementing a broadband performance monitoring and reporting program to examine actual broadband speeds available to consumers and compare them with headline speed claims by internet service providers.¹⁵

The ACCC has in the past expressed concerns about the marketing of broadband speeds and has published several information papers outlining its expectations of internet service providers.¹⁶ The ACCC considers that the proposed monitoring program would:

- provide transparency and allow consumers to compare broadband services based on real-world performance rather than theoretical maximum speed claims;
- hold internet service providers accountable for performance claims, including headline speed claims; and
- encourage competition and efficient investment in infrastructure.

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Fixed-line, fixed wireless and satellite broadband services would be examined initially with the option to add mobile broadband services at a later date. The ACCC is currently seeking feedback from the industry, consumer groups and other stakeholders on an appropriate program design, including the testing methodology, scope, quality of service metrics and reporting framework.

While the results of the broadband performance monitoring program may aid transparency, it indicates there will be special scrutiny of broadband performance claims and could result in further enforcement action by the ACCC where the results do not substantiate representations made in advertisements. The ACCC is warning that:

if there was evidence of a network operator over-promising and under-delivering the ACCC could consider enforcement action for misleading and deceptive conduct and/or for failure to comply with any applicable regulatory determinations.¹⁷

Unfair Contracts

A new prohibition on unfair contract terms commenced with the introduction of the ACL and enforcement of these new provisions is a current priority for the ACCC. The ACL states that a term in a standard form consumer contract will be void if it is unfair; that is it would cause a significant imbalance in the parties' rights and obligations, is not reasonably necessary in order to protect the legitimate interests of the party, and it would cause detriment (financial or otherwise) to a party if it were to be relied upon.¹⁸

Standard form consumer contracts are used extensively to supply retail telecommunications services. The ACCC recently conducted

10 *ACCC v Singtel Optus Pty Ltd (No. 4)* [2011] FCA 761.

11 *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20.

12 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR 42-383; [2011] FCA 1254; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* [2012] ATPR 42-402; [2012] FCA 629.

13 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 201 FCR 277; [2012] FCAFC 190; *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2013] ATPR 42-432; [2013] FCAFC 37.

14 *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 201 FCR 277; [2012] FCAFC 190 at [105].

15 ACCC Consultation Paper, "Broadband performance monitoring and reporting in the Australian context" (14 August 2013).

16 See for example ACCC Information Paper, "HFC and Optical Fibre Broadband "Speed" Claims and the Competition and Consumer Act 2010" (July 2011).

17 ACCC Consultation Paper, "Broadband performance monitoring and reporting in the Australian context" (14 August 2013) at page 3.

18 *Australian Consumer Law*, ss 23, 24. Section 25 of the ACL provides some examples of the kinds of terms that could be considered to be unfair.

a review of standard form contracts and published its findings in March 2013. This review identified contract terms which the ACCC considered were of particular concern (e.g. unilateral change rights, unfair restrictions on termination).¹⁹ The telecommunications sector was a target and terms in TPG and Dodo's standard form contracts are discussed in the ACCC's report.

Case study: ACCC v ByteCard Pty Ltd

The first case brought exclusively under the unfair contract terms provisions was against internet service provider ByteCard Pty Limited (trading as NetSpeed Internet Communications). The ACCC commenced proceedings in April 2013 alleging that a number of ByteCard's standard terms were unfair and should be declared void. The terms in question:

- allowed ByteCard to unilaterally change prices without giving the consumer a right to terminate the contract;
- required the consumer to indemnify ByteCard in circumstances where the consumer had not breached the contract and ByteCard may have caused the loss; and
- gave ByteCard the right to unilaterally terminate the contract at any time without cause or reason and without giving compensation to the consumer.

On 24 July 2013, the Federal Court made declarations that the terms were unfair and therefore void under the ACL and ByteCard was ordered to pay \$10,000 towards the ACCC's costs.

Unsolicited Consumer Agreements

The ACCC has been active in the enforcement of the unsolicited consumer agreement provisions of the ACL. These provisions govern door-to-door sales and telemarketing and include specific requirements about documenting the agreement²⁰ and ensuring that sales staff:

- obey permitted calling hours;²¹
- disclose their purpose and identity prior to negotiating and provide consumers with information about their termination rights prior to an agreement being made;²² and
- leave premises immediately upon request.²³

Retail electricity and gas providers have been the focus of ACCC enforcement action to date,²⁴ however, any inappropriate telemarketing or door-to-door sales practices of telecommunications service providers will be targeted in the future given the ACCC's current priorities.

Case study: Utel Networks Pty Ltd

In June 2013, for example, Utel Networks Pty Ltd paid infringement notices totalling \$19,800 and gave the ACCC an enforceable undertaking in relation to its telemarketing practices. The ACCC alleged that Utel personnel made false representations that Utel was affiliated with Telstra (when it was not) and that the quality of service would not change if consumers switched from their current service provider to Utel. The ACCC also alleged that Utel did not provide consumers with compliant agreement documentation containing notice on the front page clearly informing consumers of their termination rights.²⁵

Consumer Guarantees

Part 3-2 of the ACL contains non-excludable statutory consumer guarantees which provide consumers with a basic, guaranteed level of protection for goods and services they acquire. Consumers supplied with goods or services that fail to meet the consumer guarantees are entitled to certain remedies under Part 5-4 of the ACL depending on whether the failure is major or minor. These remedies include a repair, replacement or refund.

The interaction between the statutory consumer guarantees regime and voluntary express warranty offered by device manufacturers has caused compliance issues for a number of telecommunications suppliers, particularly in relation to mobile phones. Optus and Vodafone have both given enforceable undertakings following concerns raised by the ACCC about how they were dealing with consumer complaints about faulty devices.²⁶ Businesses risk breaching the general prohibition on misleading and deceptive conduct under the ACL if they make false representations about the application of the consumer guarantees or the statutory remedies to which a consumer is entitled.

Case study: ACCC v Hewlett-Packard Australia Pty Ltd

The ACCC alleged that HP made misleading representations to consumers about their statutory guarantee rights over a 21-month period, including that:

- remedies were limited to those provided by HP at its discretion;
- HP products needed to be repaired multiple times before consumers were entitled to a replacement;
- the warranty period for HP products was limited to a specified express warranty period;
- consumers were required to pay HP to repair products not of acceptable quality; and
- consumers could only return HP products purchased from HP's online store at the sole discretion of HP.

The Federal Court found HP liable for 6 contraventions of section 29(1)(m) of the ACL and, by consent, imposed a \$3 million pecuniary penalty, \$200,000 towards the ACCC's costs, an injunction and corrective advertising orders among others.²⁷

Conclusion

The regulatory regime governing dealings between telecommunications service providers and consumers is comprehensive. The ACCC and the ACMA have both devoted significant resources to consumer protection and have shown a willingness to use their extensive armoury of enforcement tools, including pecuniary penalty proceedings in the Federal Court and infringement notices where they perceive a risk of consumer harm. The focus by these regulators on business practices in the telecommunications sector reinforces the need for a strong compliance and advertisement clearance program addressing matters under the ACL and the TCP Code to avoid penalties of up to \$1.1 million per ACL contravention and \$250,000 per TCP Code contravention.

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19 ACCC Report, *Unfair Contract Terms - Industry Review Outcomes* (March 2013).

20 *Australian Consumer Law*, ss 78 - 81.

21 *Australian Consumer Law*, s 73.

22 *Australian Consumer Law*, ss 74, 76.

23 *Australian Consumer Law*, s75.

24 See *Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd* [2012] ATPR 42-426; [2012] FCA 1357 (Neighbourhood Energy was ordered to pay \$850,000 and its marketing company Australian Green Credits Pty Ltd was ordered to pay \$150,000). In March 2012, the ACCC commenced proceedings against AGL Sales Pty Ltd, AGL South Australia Pty Ltd and AGL's marketing company CPM Australia Pty Ltd. In May 2013, Middleton J made orders for pecuniary penalties: AGL was fined \$1,555,000 and CPM was fined \$200,000. In March 2013, the ACCC commenced proceedings against Energy Australia Pty Ltd and its marketing company and in September 2013 it commenced proceedings against Australian Power & Gas Company and Origin Energy.

25 *Australian Consumer Law*, s79(b).

26 Optus Mobile Pty Limited, *Undertaking to the Australian Competition & Consumer Commission given for the purposes of section 87B* (6 January 2011); Vodafone Hutchison Australia Pty Limited, *Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B* (12 January 2010).

27 *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653.