

# “Context is all”: Court Confirms Test and Principles for False, Misleading or Deceptive Conduct

By Kirsten Webb, Mary Still, Kent Teague and Damiano Fritz, Clayton Utz

A recent decision of the Federal Court confirms the “ordinary and reasonable” consumer test under the Australian Consumer Law and rejects the test of whether a “not insignificant number” of reasonable consumers would be misled.

The Federal Court has confirmed the correct legal test to be applied in determining whether conduct is misleading or deceptive, or likely to mislead or deceive, in contravention of the Australian Consumer Law (ACL) in the recent decision in *Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372. Clayton Utz acted for the successful respondent, Optus.

In dismissing Telstra’s application, Justice Jagot considered the effect of the relevant conduct on ordinary and reasonable members of the class of persons to whom the conduct was directed, and held that there was no contravention of the ACL by Optus. Although her Honour indicated the result would have been the same in this proceeding, Justice Jagot confirmed that the number of reasonable persons who might be misled is irrelevant to the test under the ACL.

All organisations doing business in Australia should see the judgment as a welcome confirmation that, provided the effect of their conduct and public statements on ordinary and reasonable consumers is not misleading or deceptive, they will not contravene the ACL.

## A “strained and fanciful interpretation”

The proceeding concerned a series of advertisements promoting the Optus mobile network<sup>1</sup> that included the

words “Covering more of Australia than ever before” (and similar variants for a number of States).

Telstra contended that the advertisements conveyed representations to the effect that the Optus network or networks cover more of Australia or the relevant State than any other network has ever covered before. Optus argued that all that was conveyed by the advertisements was that Optus’ mobile network has more geographic coverage than it has ever had before - that is, that Optus’ mobile network is covering more of Australia than it has ever covered before.

Justice Jagot agreed with Optus. Her Honour held that the advertisements did not convey any comparison between Optus’ network and the network of any other telecommunications provider, including Telstra. Her Honour considered the representations alleged by Telstra were a “strained and fanciful interpretation” of the advertisements when considered in context.

## Correctness of the “reasonable or ordinary member” test

Apart from the substance of the representations conveyed by the advertisements, the main debate between the parties concerned the correct legal test to be applied.

It is well established that, for the purposes of the false, misleading or deceptive conduct provisions of the ACL, it is necessary to identify the impugned conduct and then to consider whether that conduct, considered as a whole and in context, is misleading or deceptive or likely to mislead or deceive.

It is also well established that:

- to be misleading or deceptive, conduct must lead or be likely to lead into error;
- there must be a sufficient nexus between the conduct and an error or misconception on the part of another person;
- causing confusion or questioning is insufficient;
- where the conduct is directed at the public or a section of the public, it is necessary to identify the class of consumers likely to be affected by the conduct and assess whether a hypothetical representative, the ordinary or reasonable member of that class, would be misled or deceived; and
- reactions that are extreme or fanciful are excluded from the assessment.

Telstra submitted that the Court must consider whether a “not insignificant number of ordinary or reasonable consumers would be likely to be misled or deceived”, relying on one line of lower court authorities which appeared to modify the settled principles set down by the High Court. In particular, Telstra quoted from a well-known passage in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1:

*“Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct [...] is misleading or deceptive conduct must be tested against each meaning which is reasonably open.*

<sup>1</sup> <https://www.youtube.com/watch?v=nxXRc4Yy8Ro>

*This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error."*

Rejecting Telstra's submissions, Justice Jagot confirmed that the "ordinary and reasonable" test established by the High Court is clear, and should be applied. Her Honour followed the recent decision of the Full Federal Court in *ACCC v TPG Internet Pty Ltd* [2020] FCAFC 130, where the Court confirmed that the test of whether a "not insignificant number of reasonable persons" would be misled is, "at best, superfluous to the principles stated by the High Court...and, at worst, an erroneous gloss on the statutory provision".

Importantly, her Honour clarified the meaning of the passage from Tobacco Institute that Telstra had sought to rely upon:

*"...the relevant passage must be read as a whole. Once that is done it is apparent that [the Tobacco Institute decision] is not suggesting that the meaning conveyed by the impugned conduct is to be determined outside of the context of ordinary and reasonable members of the class of persons to whom the conduct is directed."*

#### **"Context is all"**

The decision is also a salient reminder that the relevant conduct must be considered as a whole and in context. It is wrong to analyse particular words or acts in isolation, when they may well convey a

different meaning when viewed in context.

Justice Jagot emphasised that "context is all". In this case, that meant recognising that the advertisements were emblazoned with Optus' well-known branding throughout, before the final statement "Covering more of Australia than ever before" and the word OPTUS at the end of the advertisement. Her Honour found that the evidence established Optus' yellow "Yes" logo is strongly identifiable as Optus' brand, and featured prominently in the advertisements, being superimposed over each of the images in question. In context, her Honour determined that "the only reasonable meaning to be given to the advertisements" was that advanced by Optus.

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