

Recent Cases on Advertisement of "Free" Items by Telecoms Operators

Dr Warren Pengilly looks at comparative advertising, the advertising of "free" items and what we can learn from recent cases on advertising by telecommunications companies

There has always been some contention in relation to comparative advertising tactics and in relation to what is meant by items advertised as "free". The telecommunications battles of recent times have thrown up some court cases which are illustrative of the problems involved and give useful law on these two subjects. The cases are *Australian Competition & Consumer Commission v Telstra Corporation Limited* [(1997) ATPR ¶ 41-540: Federal Court of Australia - Jenkinson J]; *Telstra Corporation Limited v Optus Communications Pty Limited* [(1997) ATPR ¶ 41-541: Federal Court of Australia - Merkel J]; and *Nationwide News Pty Limited v Australian Competition & Consumer Commission* [(1997) ATPR ¶ 41-543 - Full Federal Court of Australia]. The three cases are conveniently reported in virtually adjoining reports in the 1997 volume of the *Australian Trade Practices Reporter*.

It is intended here to deal with the principles which emerge from each of the cases.

Australian Competition & Consumer Commission ("ACCC") v Telstra Corporation Limited ("Telstra")

This was a proceeding for declaratory and injunctive relief.

Optus Communications Pty Limited ("Optus") announced in June 1996 the inception of its arrangements that a local telephone call service in Australia would be 20¢. At that time the generally applicable charge for each local call on Telstra's telephone service was 25¢.

Telstra subsequently made public statements in relation to the local costs made under a plan offered by Telstra to its customers and known as the Local Call Saver 15 Flexi-Plan ("CS15"). This plan provided as follows:-

- If customers made more than 2 local calls a day a discount of 15% applied which resulted in all local calls costing 21¢.

- If customers spent more than \$15 per month (2 calls per day) all local calls above that attracted a 15% discount.

- Discounts were available on all local calls made under CS15.

- CS15 was available to all customers without limitation.

It was alleged that the representations were false in that:

- If customers made more than 2 local calls then the discount of 15% did not apply and this resulted in all local calls costing 21¢.

- If customers spent more than \$15 per month (2 calls per day) all local calls above that did not attract the 15% discount.

Discounts were not available on all local calls made under CS15; and

- CS15 was not available to all customers without limitation.

In the particulars filed in the case, the ACCC set out the average calls made per day and the average call cost in a month. These varied significantly. Suffice it here to say that if an average of 2 calls were made per day, then the average call cost in a month was 25¢. If an average of 20 calls were made per day, the average call cost was 22.88¢. The lowest cost involved was that applicable to 13 calls per day and this cost was 21.81¢.

It was submitted by Counsel for the ACCC that statements made by Telstra executives along the lines set out above on radio and television were misleading or deceptive. This was because the Telstra executives stated that the basic price for a call for customers who spent more than \$15 a month on Telstra's Flexi-Plan was 21¢ whereas the actual charges were not levied on this basis.

The court said that the executives involved had access to officers of Telstra who did have precise knowledge of the costing of the calls even if they themselves lacked such knowledge. Thus the failure of those executives to avoid engaging in misleading or deceptive conduct was "in the circumstances, deplorable".

Mr Justice Jenkinson stated that:

"Harm done by conduct of (the above) kind is not wholly undone by subsequent retraction and explanation and curial retribution. Among the multitude of customers misled by such conduct not a few are likely to remain unaware of the retraction and retribution."

Accordingly, his Honour restrained Telstra (for a limited time only in view of the circumstances outlined in the judgment) from making a false or misleading representation on radio or television programmes in respect of the amount of any charge for a telecommunications service.

Lessons from the Case

A lesson from *ACCC v Telstra Corporation Limited* is a fairly simple one. This is that representations as to costs savings must be accurate in all respects. It seems as if the Telstra executives making claims on radio and television were not fully informed of the situation. However, this did not excuse them or Telstra. The executives involved had ready access to the true information or to those Telstra officers who knew the actual position. Obviously a claim that calls under the CS15 Flexi-Plan cost no more than 21¢ could not be other than misleading or deceptive when the cost of calls ranged from 25¢ to 21.81¢.

His Honour stated that:

"Under the exigencies which keep competition for the custom of a multitude of consumers imposes on the respondent it constantly resorts, as does its competitor Optus, to repetitive television advertisements marked less by information than by

emotional stimulation. I would expect that the text of such advertisements would be carefully scrutinised by the respondent's advisers to ensure that no misleading conduct occurred."

Telstra V Optus

In this case, Optus was the defendant in proceedings brought by Telstra. Again, the issue was the cost of telephone calls.

Optus conducted a national television programme relating to its Optus guarantee and to the price of international telephone calls. Both the guarantee and the international cost of calls were part of a broad campaign of commercials designed to take advantage of the fact that Optus' standard international rates were cheaper than those of Telstra. The Optus guarantee had been developed as a means by which customers would be assured of saving on their total telephone bills and promised customers savings on their total long distance call bill compared with Telstra. Customers became entitled to the benefits of the guarantee once they signed an authority to change their long distance carrier. Optus compared its bills against Telstra's bills and guaranteed a credit to customer's account of twice the difference shown if the customer's account was lower with Telstra. As it turned out, although Optus' standard charges were cheaper than Telstra's standard charges, Telstra's range and variety of discounts available, including Telstra's Flexi-Plan, made price comparisons very difficult to make.

Telstra complained that in the Optus commercial, Optus had falsely represented that its prices for long distance and international calls were cheaper than Telstra's prices. Optus disputed that its representations were misleading or deceptive and claimed that its commercials were true.

The Decision

The Optus evidence was that the Telstra's complicated cost savings plans led to it being very difficult for customers to compare like with like. Billing by each carrier was on a periodic basis and compared the total billing for all telephone calls and services provided during the relevant period after taking into account the discounts to which particular customers were entitled. Optus said that its marketing campaign was focussed on the aggregate bill amount as opposed to individual call rates and the comparisons were made on this basis. Hence the Optus guarantee was developed

as a means by which customers could be assured of "bottom line" savings that is, savings on the total bill.

Mr Justice Merkel characterised the case as one which raised the issue of whether a television advertisement which may or may not contain an inaccurate statement or representation when its visual, audio and written constituent parts are carefully considered, can nevertheless breach section 52 of the *Trade Practices Act* (covering misleading or deceptive conduct) because the impression its interacting constituent parts conveyed is misleading or deceptive or likely to mislead or deceive. Thus, for example, the international calls commercial raised two interrelated questions. The first was whether the example of "normal" rates which was given, whilst accurate in itself, was misleading in that the overall impression created by the commercial was that Optus offered cheaper rates generally for international calls. Clearly, said his Honour, the impression given by the advertisement was broader than the specific example given in the advertisement itself. The second issue was whether the failure to state that the comparison might not apply to customers using the Telstra Flexi-Plan made the commercial misleading.

The case was an application for an interlocutory injunction and thus the issues before the court were whether there was a serious question to be tried and whether the balance of convenience favoured the grant of an injunction.

His Honour held the following principles to be applicable as regards whether or not section 52 of the *Trade Practices Act* was breached:

- the advertising of Optus must be viewed in the context that it was on national television;
- the conduct of Optus must be viewed as a whole. It would be wrong to view words or acts alone which might be misleading or deceptive when, viewed in their overall context, they were not capable of misleading;
- it would not be right to select some words only and to ignore others which provided the context which gives meaning to particular words;
- under section 52, the importance of first impressions conveyed must be given considerable weight. However, balanced against this, a fairly robust approach must be called for when

determining whether television commercials are false, misleading or deceptive. This is because the public is accustomed to the puffing of products in advertising. Although the class of persons likely to see the commercial is wide, it is inappropriate to make distinctions that are too fine and precise;

- one must look at the veracity of its message by reading it in context. One also needs to take into account the fact that many readers would not make a close study of the advertisement but would read it fleetingly and absorb its general thrust;
- a statement may be deceptive even if the constituent words may be literally or technically construed so as not to constitute a misrepresentation. The buying public does not weigh each word in an advertisement or a representation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser;
- thus even though each sentence considered separately is true, the advertisement as a whole may be misleading because factors are omitted which should be mentioned or because the message is composed to highlight the appealing aspects.

His Honour, in his decision, cited a number of Australian court and United States decisions and commentaries to support each of the above propositions.

His Honour commented on the question of comparative advertising and, in this regard, made the following points:

- When a person produces a television commercial that not only boosts his own product but, as in this case, compares it critically with the product of another so that the latter is shown up in an unfavourable light by comparison, such advertiser ought to take particular care to ensure that statements are correct.
- In comparative advertising errors may have a greater potential to mislead consumers than statements made in ordinary advertising which may be perceived as mere "puffs".
- In particular cases, a "half-truth" may be misleading or deceptive. A comparison between goods or services may be rendered misleading by the

omission of material that would be necessary to render the comparison fair. An unfair comparison may, quite simply, because it is unfair, be misleading. It may mislead a consumer into thinking there is a basis for a choice where, in truth, there is not or that a choice may be made on grounds which are not truly valid.

His Honour cited a number of Australian court decisions for each of the above principles.

Applying the above principle to the Optus' advertisements, his Honour believed that the Optus message was:

- Optus guaranteed that its long distance telephone prices and consequently its bills were cheaper than Telstra's; and
- Optus would credit the customer with double the difference it was wrong.

His Honour found that implicit in that message was a representation by Optus that its long distance telephone prices were cheaper than Telstra's prices. However, Optus' own case accepted that a general price comparison cannot be fairly or accurately made. The offer by Optus to credit double the difference between its price and Telstra's price did not, in his Honour's view, assist Optus. The false dominant message was conveyed in the first part of the advertisement which contained the guarantee of total bill saving. His Honour took the view that this false dominant message was not ameliorated by the later statement that if you "switch to us and take advantage of the Optus guarantee, you will save".

His Honour also said that the same conclusion could be reached by a different route. The material submitted by Optus acknowledged that it was cognisant of the subtle distinctions involved in the advertising of charges. Optus had left the position blurred.

Similarly, a statement by Optus that it was cheaper to "anywhere at any time" was misleading or deceptive because those subscribers to the Telstra Flexi-Plan might well have international calls cheaper than the equivalent Optus call depending upon the time and other circumstances of the call involved.

The balance of his Honour's judgment relates to question of balance of

convenience and the discretion of the court that both being factors involved in whether or not an interim injunction should be granted. However, his Honour was satisfied that Telstra had presented a case that there was a serious issue to be tried and that the balance of convenience favoured the grant of interlocutory relief. His Honour was further satisfied that there were no discretionary reasons for refusing relief. Accordingly, the interlocutory injunction requested by Telstra was granted.

Lessons from the Case

The case is a useful one in collecting relevant authorities on the question of comparative advertising, "half truths" and "impressions". His Honour's research is not limited only to Australian material. The case reinforces the principles that impressions are paramount in television advertising and that there is a special duty cast on advertisers to ensure that comparisons are accurate. If a comparison cannot be truly made or if a comparison is based on assumptions which may not be correct, then comparative advertising should not be engaged in. The case is likely to become a standard citation, because of its research, on the rights and wrongs of television advertising and comparative advertising.

Nationwide News V ACCC

Nationwide News conducted a promotion in newspapers which concerned an offer to readers of a "free" mobile telephone. As a condition of receiving the phone, the purchaser of it was required to enter into a contract which involved a total expenditure of \$2,295.00. The ACCC prosecuted Nationwide News. At trial, Nationwide was found to have breached section 53(e) and section 53(g) of the *Trade Practices Act* (covering misleading representations in relation to price and misleading representations in relation to conditions, warranties and guarantees respectively). At trial, Nationwide News was held to have breached these two sections. The present case was an appeal from the trial decision. The leading judgment was written by Lindgren J, Spender J and Lehane J agreeing with his Honour's judgment.

The Decision

The main issue in the case was the interpretation of the word "free". Nationwide News submitted that the words "conditions apply" which appeared in the advertisement qualified the

"freeness" aspect of the offer. In fact, those supplied with mobile phones had to enter into an arrangement with Smartcom Telecommunications pursuant to which the phone owner had to pay a connection fee, a delivery charge, a security deposit and an amount of \$130.00 a month in advance for a minimum of 15 months. The monthly payment was in respect of access to the Vodafone mobile digital network and included the first \$120.00 of calls per month.

His Honour held the following propositions applicable to the word "free":

- The word "free" is rich and diverse in meaning. There is no dictionary definition of the word "free" which can be applied in all cases. Depending on circumstances, the word "free" may mean not subject to a payment or given or provided without charge or payment or gratuitous.
- Advertisers have been charged not infrequently with failing to provide goods or services which are "truly free" as advertised.
- There are many conditional "free" goods offers which result in deception of purchasers. In some cases, the merchant may increase the advertised price of an article over the ordinary and customary selling price in an amount sufficient to offset, in whole or in part, the cost of the "free" goods. In other cases, the merchant may substitute inferior merchandise for that ordinarily and customarily sold at the designated price involved in the transaction thereby recovering in whole or in part the cost of the "free" goods.
- Offers of "free" goods conditional on the purchase of other merchandise may appear at first impression to be unconditional offers of "free" goods. This is brought about by the prominent featuring of the "free" goods offer in a way to obscure or minimise the condition attached. This will result in deception and it is not sufficient that the purchaser be made fully aware of any conditions before the transaction is finally consummated. The purchaser should be fully apprised of all the terms and conditions of the offer at its very inception.
- It is misleading or deceptive to reiterate the concept of "free" items

when these items may be acquired only with some significant loss or outgoing by an offeree who accepts them. In this respect, his Honour noted the decision of Gummow J in *Fraser v NRMA Holdings Limited* (1994) ATPR ¶ 41-346 in which his Honour dealt with the question of what was meant by "free shares".

His Honour said that whilst each case turns on its own facts, it is clear that there is judicial recognition of the propensity of the word "free" in advertising to mislead or deceive. An advertiser relies on common understandings at its peril. Any respect in which goods or services offered as "free" may not be free should be prominently and clearly spelt out so that the magnetism of the word "free" is appropriately qualified.

In his Honour's view, this had not occurred in the present case. In reaching this conclusion, he relied upon the above principles. His Honour further stated that the addition of the words "conditions

apply" did not detract from that position. Rather, they indicated that upon satisfying certain conditions, the purchaser would be entitled to become the owner of a mobile telephone service still without his having to outlay money or undertake to do so.

Lessons from the Case

Mr Justice Lindgren's judgment is an interesting one. It draws not only upon Australian Federal Court decisions but draws extensively on United States authorities which clearly were of assistance to him in clarifying an area in Australian law which, to date, has received only limited judicial interpretation. It is clear from his Honour's judgment that the word "free" must be used sparingly and that strict parameters are applicable to it. Advertisers would be wise to heed his Honour's admonitions when planning the advertisement of "free" goods.

Conclusion

In the telecommunications industry, there has been strong competition of recent times and thus a tendency perhaps to obscure the true worth of deals offered to the public. The cases clearly illustrate that the judiciary will not be party to any sliding in standards and advertisers who have an elliptical view of the truth will face considerable litigation risks as a result of their views. In particular caution is required by advertisers in comparative advertising and in advertising "free" items.

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