

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

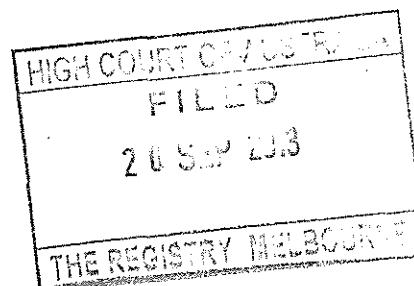
NO M 98 OF 2013

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**
Appellant

AND: **TPG INTERNET PTY LTD
(ACN 068 383 737)**
Respondent

SUBMISSIONS OF THE APPELLANT



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PART I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The appeal raises issues of both liability and penalty:

- 2.1. At the stage of liability, the two central issues are:

(1) Was the Full Court entitled to overturn a central finding of fact of the trial judge that ordinary and reasonable consumers would not have a starting assumption about whether a particular advertised internet service was 'bundled', without identifying any relevant error in the trial judge's approach to the evidence; and

(2) Was the Full Court entitled to find appellable error in the manner in which the trial judge approached the statutory question under the *Trade Practices Act 1974* (Cth) (**TPA**) (which prescribes conduct that is in breach of ss 52 and 53(e) and (g)) and its successor, the *Australian Consumer Law*¹ (**ACL**)?

- 2.2. On penalty, did the Full Court err in failing to give due consideration to deterrence, contrary to the earlier Full Court authorities² relied upon by the trial judge,³ which gave central importance to both specific and general deterrence when determining a pecuniary penalty for contravention of the consumer protection provisions of the TPA, now contained in the ACL?

3. Consequential issues of relief also need to be considered.

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. The Appellant (**ACCC**) certifies that it has considered whether s 78B notices should be given and has concluded such notice should not be given.

PART IV JUDGMENTS OF COURTS BELOW

5. The judgments of the trial judge are found at *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 (**ACCC v TPG**) and *ACCC v TPG Internet Pty Ltd (No 2)* [2012] FCA 629 (**ACCC v TPG No 2**). The judgments of the Full Court are found at *TPG*

¹ Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

² *NW Frozen Foods Pty Ltd v ACCC* [1996] FCA 1134; (1996) 71 FCR 285 (*NW Frozen Foods*) at 292E-295A per Burchett and Kiefel JJ (as her Honour then was) (Carr J agreeing), citing French J (as his Honour then was) in *TPC v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 (*CSR*) at 52,152; *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; (2012) 287 ALR 249 (*Singtel*) at [62] per Keane CJ (as his Honour then was), Finn and Gilmour JJ.

³ *ACCC v TPG No 2* [2012] FCA 629 at [63]-[66].

Internet Pty Ltd v ACCC [2012] FCAFC 190 (*TPG v ACCC*) and *TPG Internet Pty Ltd v ACCC (No 2)* [2013] FCAFC 37 (*TPG v ACCC No 2*).

PART V FACTS

6. The Respondent (TPG) supplies telephone and internet services to residential consumers. On 25 September 2010, it commenced a substantial advertising campaign via TV, radio, online and print promoting its broadband internet ADSL2+ service.⁴
7. TPG's relevant bundled service offering comprised the following:⁵
 - 7.1. a broadband internet ADSL2+ service, for **\$29.99** per month (with a minimum of 6 months commitment);
 - 7.2. a home telephone service, provided through landline technology, for an additional **\$30** per month (again with a minimum of 6 months commitment); and
 - 7.3. a set-up fee of **\$129.95** plus a deposit of **\$20** for telephone charges.
8. TPG's impugned advertisements promoted this service offering with a dominant or headline claim '*Unlimited ADSL2+ for \$29.99 a month*', with less prominence given (in varying degrees) to the other price components.⁶
9. The scale of the initial phase of the advertising was large. The TV advertisement was broadcast 59 times on national television: 27 times on Channel 10, 26 times on Foxtel and 6 times on Channel 9.⁷ TPG's initial print advertising was published 14 times, spread across a range of mass-circulation capital city newspapers.⁸ TPG's initial internet advertising was published to a mass audience via the Fairfax Digital website, the realestate.com.au website,⁹ and on TPG's own website.¹⁰
10. The advertising campaign was revised from about 7 October 2010, after the ACCC expressed concerns in writing to TPG regarding the advertisements.¹¹ The revised advertising was published in a broader range of media and continued for 13 months until 4 November 2011.¹²

⁴ *ACCC v TPG* [2011] FCA 1254 at [3]-[5].

⁵ *ACCC v TPG* [2011] FCA 1254 at [7]-[9].

⁶ *ACCC v TPG* [2011] FCA 1254 Annexures A to H.

⁷ TPG Advertising Schedule, Full Court Appeal Book Part C, Tab 117.

⁸ TPG Advertising Schedule, Full Court Appeal Book Part C, Tab 117. This included including the *Australian* (IT Section), the *Sydney Daily Telegraph*, the *Melbourne Herald Sun* (Sports section), the *Melbourne Age* (including two full page advertisements), the *Sydney Morning Herald* (another full page advertisement), the *Adelaide Advertiser* and the *Adelaide Sunday Mail*.

⁹ TPG Advertising Schedule, Full Court Appeal Book Part C, Tab 117.

¹⁰ TPG Advertising Schedule, Full Court Appeal Book Part C, Tab 117.

¹¹ *ACCC v TPG* [2011] FCA 1254 at [4].

¹² *ACCC v TPG No 2* [2012] FCA 629 at [3].

11. In December 2010, during the second stage of the campaign, TPG considered, but did not proceed with, making a further revision to its advertising campaign, by which the headline price of '\$59.99' would be displayed instead of '\$29.99'.¹³
12. Viewing the campaign as a whole, which had 'a geographical dissemination at least across Australia',¹⁴ TPG conceded that the campaign would have been seen by 'hundreds of thousands, if not millions, of people'.¹⁵ During the campaign, revenue of \$59.3m was generated by TPG from sales of the advertised service,¹⁶ yielding net profit estimated by TPG at \$8.15m.¹⁷ TPG's earnings in that financial year increased by 37% and there was a 40% increase in the group's net profit after tax.¹⁸
13. The trial judge and Full Court differed significantly on liability: the trial judge found almost all the initial and revised advertisements were misleading within the meaning of ss 52 and 53(e) and (g) of the TPA and (after 1 January 2011) ss 18 and 29(1)(i) and (m) of the ACL; the Full Court overturned all of those findings save for the initial television advertisement.¹⁹ The trial judge and Full Court also differed significantly on the approach to pecuniary penalties for these consumer protection provisions.

PART VI ARGUMENT

Primary contentions of the ACCC

14. The Full Court was not entitled to find appellable error in the manner in which the trial judge approached the statutory question, most particularly s 53(e) and (g) of the TPA and s 29(i) and (m) of the ACL (these being the provisions attracting civil penalties).
15. In determining whether there was a false or misleading representation concerning price or the existence of any condition, it was available in law for the trial judge to have regard to each of the following: the nature and characteristics of the target audience; the manner in which the advertisements were constructed, including the usage of techniques such as prominence; the form of media being exploited; and the manner in which consumers would or might attend to the advertisements in question. Consistent with these principles, the trial judge made findings of fact including that:
- 15.1. the target audience included all persons in Australia who may be considering an internet purchase, including first-time users,²⁰ the ordinary

¹³ ACCC v TPG [2011] FCA 1254 at [69] and Annexure J.

¹⁴ ACCC v TPG [2011] FCA 1254 at [22].

¹⁵ ACCC v TPG No 2 [2012] FCA 629 at [82].

¹⁶ ACCC v TPG No 2 [2012] FCA 629 at [92], [117].

¹⁷ ACCC v TPG No 2 [2012] FCA 629 at [118].

¹⁸ ACCC v TPG No 2 [2012] FCA 629 at [88].

¹⁹ The Full Court upheld the trial judge's finding that the initial print and internet advertisements contravened s 53C of the TPA: TPG v ACCC [2012] FCAFC 190 at [125]-[133]. TPG did not appeal the trial judge's finding that the initial television advertisement contravened s 53C of the TPA.

²⁰ ACCC v TPG [2011] FCA 1254 at [22]-[23], [29].

and reasonable member of which would not have had any starting assumption about the type of service being advertised;²¹

15.2. each of the initial and revised advertisements contained a dominant or headline claim which on its own was misleading because it failed to state the total monthly price payable for the bundled service offered, and the secondary claims were not given sufficient prominence to 'cure' the misleading headline claim.²²

10 16. Based on these findings, the trial judge was entitled to find the initial and revised advertisements conveyed the misrepresentations pleaded under ss 53(e) and (g) of the TPA and 29(1)(i) and (m) of the ACL.²³

17. Neither of the two grounds identified by the Full Court for finding appellable error in the liability finding can be sustained in law:

17.1. there was no basis in the evidence or by judicial notice to overturn the trial judge's finding of fact as to the starting knowledge which consumers might bring to the advertisements; and

17.2. the trial judge's attention to dominant message as one of a range of analytical tools to be given its due weight in answering the overall statutory question of whether the advertisements were misleading is consistent with the earlier Full Court authority and does not depart from the statutory test.

20 18. As to the penalty, general and specific deterrence must play a primary or critical role in assessing the appropriate penalty. The Full Court failed to give deterrence this role. This may be seen most clearly from the absence of clear and explicit reference to deterrence as the prism through which to view the various facts in play; the failure to identify any *House v The King*²⁴ error in the centrality which the trial judge gave to deterrence; the derisory nature of the penalty assessed (\$50,000 for the smaller number of contraventions); and the Court's erroneous approach to other aspects of the penalty assessment process, such as the substitution of an effective maximum penalty of \$3.3m for the true available statutory maxima.

30 Context of proposed appeal: Headline advertising and bundled products

19. TPG's advertisements employed '*headline advertising*' to promote the supply of '*bundled*' internet and telephony services. Headline advertising involves a claim featured prominently about one aspect of the product being advertised to create an overall impression about price or offer, which is qualified by fine print or other transitory disclaimers that are given less prominence, both in terms of the size of any text and/or the duration of the disclaimer made relative to the headline claim (the '*secondary claims*'). Headline claims, viewed in isolation from the secondary

²¹ ACCC v TPG [2011] FCA 1254 at [31].

²² ACCC v TPG [2011] FCA 1254 at [78], [82], [84], [87], [90], [92], [97], [101]-[104], [105], [108], [109].

²³ Amended Fast Track Statement, paragraphs 5 and 13.

²⁴ [1936] HCA 40; (1936) CLR 499 (*House v The King*).

claims, may be misleading. Headline advertising is frequently used in the telecommunications industry, and has been the subject of a number of ACCC investigations and resulted in a series of Court proceedings.²⁵ It is a practice apt to encourage deception.

20. In the present case, despite the headline claim of ADSL2+ for 29.99 per month, consumers were required to pay \$59.99 per month for the bundle, after an initial payment of \$149.95 for the set-up fee and the telephone deposit.²⁶

10 21. TPG's advertising strategy was to promote significantly as the headline claim that the ADSL2+ service was available for \$29.99 per month, and to give less or no prominence to other aspects of the bundle. The advertisements were carefully constructed so that the secondary claims did not detract from the inducement constituted by the headline claim.

22. The obvious strategy was to get one main message into the customers' head, as a 'hook'. If called to account by a regulator before a court, TPG would say, as it did here '*but the consumer could find all the information somewhere in the ad if he or she looked or listened hard enough*'. The whole point of constructing the advertisements as they were was to incline the customer *not* to do so.

23. The contrasting approaches of the trial judge and Full Court on liability and penalty are considered in turn below.

20 The approach of the trial judge to liability

24. The trial judge's approach to liability gave attention to each of: the nature and characteristics of the target audience; the manner in which the advertisements were constructed, including the use of techniques such as prominence; the form of media being exploited; and the manner in which consumers would or might attend to the advertisements in question. In the course of this analysis, he made two critical findings:

30 24.1. The campaign targeted consumers who wanted an internet service with no download limit, which included first-time users.²⁷ Based on the evidence, whilst bundled internet and telephony services was one option available to consumers, the array of other internet options meant that the ordinary or reasonable consumers would not have any starting assumption about the type of service being advertised. Instead, they would simply rely on the advertisement for relevant information as to the service offered.²⁸ The evidence indicated a variety of different forms of ADSL2+ services: '*bundled*', '*naked*' and '*stand alone*'.²⁹

²⁵ For example only, in addition to *Singtel*, see *ACCC v Boost Tel Pty Limited* [2010] FCA 701 and *ACCC v Global One Mobile Entertainment Ltd* [2011] FCA 393.

²⁶ *ACCC v TPG* [2011] FCA 1254 at [7]-[9]. For an 18 month contract, the set-up fee and telephone deposit amount payable was \$99.95.

²⁷ *ACCC v TPG* [2011] FCA 1254 at [29].

²⁸ *ACCC v TPG* [2011] FCA 1254 at [31].

²⁹ "... ADSL2+ is available from TPG or its competitors in a variety of different forms. It is available "bundled" with a home telephone line as it is in this case, "naked" which requires a landline to be physically present but not

24.2. Each of the initial and revised advertisements contained a dominant or headline claim ('*Unlimited ADSL2+ for \$29.99 a month*'), which on its own was misleading because it was not the total monthly price payable for the bundle being advertised, and the secondary claims were not at any time given sufficient prominence or positioning in either the initial or revised advertisements to 'cure' the misleading effect of the headline claim, for example, by referring to the true monthly minimum cost of \$59.99.³⁰

The approach of the Full Court to liability

25. By contrast to the trial judge, the Full Court took a different approach:

10 25.1. As a starting point, the Full Court held that a reasonable consumer must be taken to know that ADSL2+ requires a telephone line, which will either be 'bundled' or 'stand alone',³¹ and must know that set-up fees are often charged.³² According to the Full Court, this provided the 'prism' through which each advertisement must be considered.³³ Thus, it is supposed that the advertiser can lawfully make a headline claim regarding the ADSL2+ price without any need to tell consumers, let alone prominently state, that there are additional charges for the cost of the bundle – consumers are expected to know that there are likely to be such additional charges and to find out what they are before committing.³⁴ The basis of this assumption is nowhere properly explained, and is contradicted by the findings at trial. (For avoidance of doubt, in challenging the finding referred to in paragraph 2.2 of the Notice of Appeal concerning knowledge of bundling, the ACCC notes the finding in *TPG v ACCC* [2012] FCAFC 190 at [105] that there was knowledge of bundling 'commonly employed with this type of service', and as such, to the extent necessary, leave is sought to amend paragraph 2.2 to insert the word 'commonly' before 'bundled'.)

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25.2. As a separate (although related) point, each advertisement, except arguably the first TV advertisement, was found not to be misleading on the ground that 'a degree of robustness' was required.³⁵ In the Full Court's view, consumers could be expected to carefully analyse the whole of an advertisement in its full context and with the knowledge attributed by the Full Court to the hypothetical reader or viewer.³⁶ In fact, it is not clear what the Full Court is basing this analysis on, given that there is a range of possible packaging options available in the knowledge of the ordinary and reasonable consumer. The position of such a consumer (found to include first-time users and those with a lower level of interest in a broadband deal that was bundled with line rental) lacking a high level of knowledge about

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connected, and "stand alone" which means that it is provided using a telephone line rented from another provider." *ACCC v TPG* [2011] FCA 1254 at [32].

³⁰ *ACCC v TPG* [2011] FCA 1254 at [78], [82], [84], [87], [90], [92], [97], [101]-[104], [105], [108], [109].

³¹ *TPG v ACCC* [2012] FCAFC 190 at [98].

³² *TPG v ACCC* [2012] FCAFC 190 at [105].

³³ *TPG v ACCC* [2012] FCAFC 190 at [106].

³⁴ *TPG v ACCC* [2012] FCAFC 190 at [111]-[112], [114], [116], [118], [119], [122], [124].

³⁵ *TPG v ACCC* [2012] FCAFC 190 at [110].

³⁶ *TPG v ACCC* [2012] FCAFC 190 at [113], [115], [117], [118], [120], [122], [124].

internet usage is not properly considered by the Full Court. This body of consumers cannot be ignored in the assessment of whether the advertisements are misleading.

Errors in the Full Court's approach to liability – no evidence of consumers' 'starting assumption' that ADSL2+ would be bundled with a telephone line

- 10 26. The Full Court's first step involved an error in the appellate function. The trial judge had identified and considered the evidence for the finding that a significant proportion of the consumers to whom the advertisements were directed would not bring to the advertisements any starting assumption as to whether ADSL2+ might be bundled.³⁷
27. The Full Court overturned this central finding without identifying any error in how the trial judge dealt with the evidence, or identifying any other evidence on which to overturn the finding, other than to say that at an interlocutory hearing another judge came to the opposite view.³⁸ In this way, the Full Court acted without evidence, and contrary to the evidence at trial.
- 20 28. In some cases, it may be open to a Court to characterise conduct by reference to consumer perceptions without explicit evidence, for example where ordinary human experience would suggest that certain conduct is or is not misleading. However, in a case such as the present, dealing with a particular form of technology offered in at least three particular forms ('bundled', 'naked' and 'stand alone') to a broad range of persons with likely different degrees of knowledge in the area, judicial notice is unlikely to assist. It does not provide a sufficient basis for the type of finding made by the Full Court, being that reasonable Australian consumers must be taken to 'know that services such as ADSL2+ are offered for sale as either "bundled" or "stand alone"',³⁹ and then they are somehow meant to tease out whether it is 'bundled' or 'stand alone' (or indeed 'naked') in assessing the true pricing commitment of the offering. Some consumers might have had this degree of sophistication; but how could the Full Court conclude that ordinary and reasonable consumers did?
- 30 29. Insofar as the Full Court relied upon the interlocutory observations of Ryan J, his Honour was not referring to a body of evidence to draw a conclusion as to consumers' starting assumptions. Rather, Ryan J concluded from the advertisements themselves (and only from looking at revised newspaper, radio and television advertisements) that consumers would be familiar that ADSL2+ is offered 'bundled' or 'stand alone'.⁴⁰
30. There are two immediate problems with Ryan J's approach: first, on the facts later established by evidence at trial, there are in fact 3, not 2, relevant offerings:

³⁷ ACCC v TPG [2011] FCA 1254 at [24]-[34].

³⁸ TPG v ACCC [2012] FCAFC 190 at [98].

³⁹ TPG v ACCC [2012] FCAFC 190 at [98]. See also [99], [105], [106]. See also the trial judge's identification of the target audience at ACCC v TPG [2011] FCA 1254 at [23], which was not challenged on appeal to the Full Court: TPG v ACCC [2011] FCAFC 190 at [93].

⁴⁰ ACCC v TPG [2010] FCA 1478 at [16].

'naked', 'bundled' and 'stand alone'.⁴¹ Secondly, his Honour's reasoning is circular: his Honour found, from merely looking at the advertisements that people came to the advertisements with a pre-existing state of knowledge. But this assumes that the advertisements are not misleading. Such circularity in reasoning was not apt to support the central basis of the Full Court's approach in rejecting the ACCC's case on appeal.

- 10 31. It is not open to overturn a critical finding of fact at trial about the knowledge of the reasonable consumer merely by reference to a finding in an interlocutory hearing concerning only a sub-set of the advertisements. The Full Court identified no evidence as the basis on which to overturn that critical finding.
32. The implication of this error extends beyond these proceedings. In effect, the Full Court has made a finding, without evidence, that will entitle any supplier of ADSL2+ to promote inadequate headline pricing on the basis of suggested and unproven consumer knowledge. Advertisements in the form of Annexure 5 to the Full Court judgment have been given a 'green light' to participants in the telecommunications industry.⁴²

Errors in the Full Court's approach to liability – onus on consumers and 'dominant message'

- 20 33. The object of the provisions that were contained in Pt V of the TPA and now succeeded by the ACL is to protect consumers by eliminating unfair trade practices.⁴³ The provisions in question here place the onus squarely on traders to refrain from making misleading representations, and consumers ought to be entitled to assume that traders will comply with these prescribed statutory standards of conduct.
- 30 34. Despite this, the Full Court's approach in the present case requires consumers to actively protect their own interests by carefully analysing every part of an advertisement, even one published on radio or television, to see if the message conveyed in one part has a meaning significantly qualified by another part.⁴⁴ In effect, consumers are required to start from an assumption that claims, especially prominent ones in large print and in colour which stands out, should not be expected to reveal the full truth. In essence, the Full Court has, without evidence, *both* assumed a high level of product knowledge *and* placed the onus on consumers to carefully check the secondary claims or 'fine print' to ascertain whether a headline claim has been qualified or corrected, as a lawyer construing a contract would be obliged to do.

⁴¹ ACCC v TPG [2011] FCA 1254 at [32].

⁴² TPG v ACCC [2012] FCAFC 190 at Annexure 5.

⁴³ TPA, s 2 and CCA, s 2; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 204 per Mason J, also cited in *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 at [97].

⁴⁴ This error in approach is illustrated by the Full Court's view that it was 'perhaps clearer' for consumers when the critical bundling requirement was referred to in the 'rapid fire' section of the radio advertisements: *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190 at [117].

35. Moreover, the Full Court stated that it was '*not the correct approach*' to consider whether the ordinary or reasonable reader would be misled unless the dominant misleading message was corrected by a sufficiently clear and prominent statement which prevented the inaccurate dominant message from being misleading or likely to mislead or deceive.⁴⁵ On this basis, the Full Court concluded that '*the primary judge's emphasis on the "dominant message" led him into error.*'⁴⁶

10 36. The Full Court's approach, and its perception of error by the trial judge's focus on the '*dominant message*', cannot be reconciled with the approach of another Full Court⁴⁷ in *Global One Mobile Entertainment Pty Ltd v ACCC*⁴⁸ (*Global One*) (which was handed down after the trial judge's decisions but before the Full Court's hearing or decision).

20 37. The Full Court in *Global One* upheld the decision below of Bennett J,⁴⁹ upon which the trial judge in the present case had relied.⁵⁰ The advertisements in question were for mobile telephone ringtones, quizzes and video games. The ACCC contended that each of the advertisements represented that a consumer would purchase a one-off service, whereas in truth, the consumer was required to access a subscription service with an initial sign-up fee and recurring subscription fees billed to the consumer's mobile telephone account, and would incur SMS and data costs.⁵¹

38. The Full Court in *Global One* analysed each of the advertisements, focusing repeatedly and explicitly on the '*dominant impression*' of each advertisement,⁵² and determining whether that '*dominant impression*' was dispelled by the small text.⁵³

30 39. In this regard, the Full Court in *Global One* also supported Bennett J's focus on the '*dominant impression*' of the whole of the advertisements.⁵⁴ This reasoning of the Full Court in *Global One* is entirely consistent with the trial judge's reasoning in the present case, and is a correct application of the '*consumer protection*' law at issue. '*Dominant message*' is of course not a substitute for the statutory text, but it is an available analytical tool in understanding what representation is likely to be conveyed.

40. The Full Court in the present case did not cite any authority for its conclusion that the trial judge's approach was erroneous. On the contrary, Federal Court authority consistently supports the availability of '*dominant message*' as an

⁴⁵ *TPG v ACCC* [2012] FCAFC 190 at [101]-[103].

⁴⁶ *TPG v ACCC* [2012] FCAFC 190 at [104].

⁴⁷ Greenwood, Logan and Yates JJ.

⁴⁸ [2012] FCAFC 134.

⁴⁹ *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393.

⁵⁰ *ACCC v TPG* [2011] FCA 1254 at [58].

⁵¹ *Global One* [2012] FCAFC 134 at [19]-[22].

⁵² *Global One* [2012] FCAFC 134 at [84]-[89], [90], [95] and [105].

⁵³ *Global One* [2012] FCAFC 134 at [106].

⁵⁴ *Global One* [2012] FCAFC 134 at [41], referring to the decision of Bennett J in *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393 at [34].

analytical tool. The authority of the Full Court's decision in *Global One* demonstrates that the trial judge's approach was correct, as do the authorities cited by the trial judge on that point,⁵⁵ namely the Full Court decisions of *Medical Benefits Fund of Australia Ltd v Cassidy*,⁵⁶ *National Exchange Pty Ltd v ACCC*,⁵⁷ and the first instance decisions of Jacobson J in *Singtel Optus Pty Ltd v Telstra*⁵⁸ and Bennett J in *ACCC v Global One*.⁵⁹

- 10 41. Nor was there any substance in the Full Court's suggestion that the trial judge ignored the rule that the whole of the advertisement must be considered in its full context,⁶⁰ and that his Honour approached the question as one 'based solely upon the "dominant message"'.⁶¹ On the contrary, the trial judge, in considerable detail over some 50 paragraphs explicitly considered the other qualifying information contained in each of the initial and revised advertisements, and determined as a specific finding in each instance, that such information was in insufficient to dispel the incorrect dominant message.⁶²
42. Accordingly, it is submitted that the trial judge was correct in finding where TPG's headline pricing referred to '\$29.99', such advertising was misleading and not adequately corrected by reference to secondary claims or fine print. The true price of '\$59.99' was never appropriately or sufficiently conveyed.

Pecuniary penalties under s 76E of the TPA and s 224 of the ACL

- 20 43. There is no High Court authority to date on the assessment of pecuniary penalties for contraventions of the consumer protection provisions of the TPA or ACL.
44. The Federal Court's power to order pecuniary penalties against TPG for its contraventions of ss 53 and 53C of the TPA was provided by s 76E(1)(a)(ii) with effect from 15 April 2010. Section 224(1)(a)(ii) of the ACL has provided the same power from 1 January 2011 for TPG's contraventions of s 29 of the ACL. In each case, the maximum pecuniary penalty for each act or omission was \$1.1m: s 76E(3) of the TPA and s 224(3) of the ACL.
- 30 45. Pecuniary penalties have been available in respect of breaches of the anti-competitive conduct provisions (Part IV) since the TPA was enacted in 1974. It has long been established that the principal object of penalties imposed in respect of such breaches is deterrence, both specific and general. By way of a brief (non-exhaustive) summary, the ACCC makes the following submissions.

⁵⁵ *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [58].

⁵⁶ [2003] FCAFC 289; (2003) 135 FCR 1 at [37] per Stone J, Moore J agreeing at [1] and Mansfield J agreeing at [17].

⁵⁷ [2004] FCAFC 90; (2004) 61 IPR 420 at [50]-[51] per Jacobson and Bennett JJ.

⁵⁸ [2004] FCA 859 at [41].

⁵⁹ *ACCC v Global One Mobile Entertainment Pty Ltd* [2010] FCA 393 at [50].

⁶⁰ *TPG v ACCC* [2012] FCAFC 190 at [103]-[104].

⁶¹ *TPG v ACCC* [2012] FCAFC 190 at [105].

⁶² *ACCC v TPG* [2011] FCA 1254 at [60]-[111].

46. In *CSR*,⁶³ French J considered previous authorities which had considered s 76 in an analysis of the object of the penalties available under that provision. His Honour noted that while punishment in criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation, neither retribution nor rehabilitation had any part to play in the context of economic regulation, nor was there any compensatory process. His Honour held:⁶⁴

10 The principal, and I think probably the only, object of the penalties imposed by s. 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

47. These comments were cited by Burchett and Kiefel JJ (Carr J agreeing) in *NW Frozen Foods*.⁶⁵ Their Honours cited similar statements by Toohey J⁶⁶ and Lee J⁶⁷ and held:⁶⁸

 The Court should not leave room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also of others who might be tempted to think that contravention would pay.

20 48. The primacy of the deterrent purpose in setting penalties under s 76 has been applied and reinforced in numerous subsequent Full Court decisions, including:

48.1. by Wilcox, French and Gyles JJ in *Universal Music v ACCC (Universal Music)*;⁶⁹

48.2. by Heerey, Finkelstein and Allsop JJ in *ACCC v High Adventure Pty Ltd*,⁷⁰ - indeed the Court noted that general deterrence may sometimes require a penalty so high that the offender will become insolvent; and

48.3. by Moore, Dowsett and Greenwood JJ in *ACCC v Dataline.Net.Au Pty Ltd*.⁷¹

49. On 15 April 2010,⁷² s 76E was inserted into the TPA, extending pecuniary penalties to contraventions of consumer protection provisions including ss 53 and 53C.

30 50. Subsequently, in *Singtel*,⁷³ Keane CJ, Finn and Gilmour JJ applied the principle of deterrence to a penalty for misleading headline advertising. The trial judge had

⁶³ *CSR* (1991) ATPR 41-076 at 52,152.

⁶⁴ *CSR* at 52,152.

⁶⁵ [1996] FCA 1134; (1996) 71 FCR 285 at 292E-295A.

⁶⁶ *TPC v Mobil Oil Australia Ltd* [1984] FCA 363; (1985) 4 FCR 296 at 297-298.

⁶⁷ *TPC v Prestige Motors Pty Ltd* [1994] FCA 495; (1994) ATPR 42,693 at 42,699.

⁶⁸ *NW Frozen Foods* at 294G-295A.

⁶⁹ *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193; (2003) 131 FCR 529 (*Universal Music*) at [310]-[312].

⁷⁰ *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247; (2006) ATPR 42-091 at [11].

⁷¹ *ACCC v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513 at [60].

⁷² Schedule 2, Part 1 of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*.

explicitly relied upon the passages from *CSR* and *NW Frozen Foods* set out above in emphasising the primacy of the deterrent objective. This was not challenged on appeal. In fact, it was reinforced in their Honours observations that '*the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business*' and that '*a penalty which did not substantially affect the profitability of Optus' campaign could not reasonably be countenanced*'.⁷⁴

51. Most recently, Greenwood, Logan and Yates JJ applied these principles to s 76E in *Global One*.⁷⁵

10 Deterrence when setting penalties for multiple contraventions

52. When setting civil penalties of appropriate deterrent value for multiple contraventions a number of principles fall to be considered:

52.1. The statutory language requires the penalty to be fixed in respect of each act or omission constituting a contravention, as the court determines to be appropriate.

52.2. It remains important to pay careful attention to the maximum penalty available for each act or omission constituting a contravention under s 76E(3) of the TPA and s 224(3) of the ACL.⁷⁶

20 52.3. Where multiple acts or omissions of contravention truly represent only one '*course of conduct*', the '*course of conduct*' principle provides a discretionary '*tool of analysis*' which can be used to avoid any double-punishment for multiple offences arising from the same conduct.⁷⁷

52.4. However, if utilised, this discretionary tool does not convert the maximum penalty applicable for one act or omission of contravention into the maximum penalty for the identified '*course of conduct*' – a higher penalty can be imposed for each '*course of conduct*' if necessary in the circumstances of the case.⁷⁸

30 52.5. When appropriate penalties have been identified for each contravention or course of conduct (as the case may be) the Court should conduct a '*final check*' to ensure that the total penalty is not unjust or disproportionate to the

⁷³ [2012] FCAFC 20; (2012) 287 ALR 249.

⁷⁴ *Singtel* at [62], [64].

⁷⁵ [2012] FCAFC 134 at [119], [124]-[125].

⁷⁶ *Markarian v the Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31]; *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190 at [146(b)].

⁷⁷ *Singtel* at [53], citing (among other authorities) *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 (*Cahill*) at [41]-[42]. These principles derive initially from the criminal case law see *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610 at [40]-[42]; *Johnson v R* [2004] HCA 15; (2004) 205 ALR 346 at [4]-[5] and [27] and *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-3. See also *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383 (*Mornington Inn*) at [5]-[7] and [41]-[46].

⁷⁸ *Singtel* at [53], citing (among other authorities) *Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [42]. See also *Mornington Inn* [2008] FCAFC 70; (2008) 168 FCR 383 at [18].

circumstances.⁷⁹ This principle is quite separate from the course of conduct principle.⁸⁰ In cases where the total of the proposed penalties is considered to be appropriate (eg as a result of treating a number of overlapping contraventions as a course of conduct) it may not be appropriate to impose any further reduction at the *'final check'* required by the totality principle.⁸¹

53. The application of these principles will vary, depending upon the circumstances. Importantly, they do not alter the primary goal of securing specific and general deterrence and should not be applied so as to undermine that fundamental objective.

10 The approach of the trial judge to penalty

54. The trial judge's approach to penalty was to give central importance to specific and general deterrence, consistent with the established Full Court authorities. He reasoned that both specific and general deterrence required the penalty to be sizable.⁸² In determining the precise size of the penalty, he considered that the many legally distinct contraventions could be grouped into 9 classes of contravention, reflective of the 2 stages to the campaign and the range of media exploited within each stage. He ultimately determined a total penalty of \$2m, being a total of \$600,000 for the categories in the initial phase and a total of \$1.4 m for the categories in the second phase.⁸³

20 The approach of the Full Court to penalty

55. TPG's notice of appeal to the Full Court did not assert any error in the trial judge's approach that specific and general deterrence required a sizable penalty. Nor did it ask the Full Court to depart from the principles established in the above authorities.
56. The Full Court, in its first judgment, accepted 3 other arguments which TPG put⁸⁴ and concluded that the penalty of \$2 m was 'outside the appropriate range both in terms of its components and the total penalty sum'.⁸⁵
57. Critically, in its key evaluation on penalty in the first judgment,⁸⁶ the Full Court:

⁷⁹ *Mornington Inn* [2008] FCAFC 70; (2008) 168 FCR 383 at [42]-[43], applying *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59 at 62-63.

⁸⁰ *Mornington Inn* (2008) 168 FCR 383 at [41]-[46], explaining the difference between the course of conduct principle and the totality principle by reference to the High Court decisions in *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59; *Johnson v R* [2004] HCA 15; (2004) 205 ALR 346 and *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610. See recently: *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205 at [74], [80] and [89].

⁸¹ *Mornington Inn* [2008] FCAFC 70; (2008) 168 FCR 383 at [90]-[92]; *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205 at [82].

⁸² *ACCC v TPG No 2* [2012] FCA 629 at [63]-[70].

⁸³ *ACCC v TPG No 2* [2012] FCA 629 at [71]-[78] and [141].

⁸⁴ *TPG v ACCC* [2012] FCAFC 190 at [147]-[162].

⁸⁵ *TPG v ACCC* [2012] FCAFC 190 at [163].

⁸⁶ *TPG v ACCC* [2012] FCAFC 190 at [163].

57.1. could not intervene unless it found an error of principle in the trial judge's exercise of discretion in accordance with the principles stated in *House v The King*;⁸⁷

57.2. did not clearly and explicitly identify that central attention that had to be paid to specific or general deterrence;

57.3. gave no reason to depart from the earlier Full Court authorities (*NW Frozen Foods* and *Singtel*) on that subject cited by the trial judge;⁸⁸

57.4. identified no appellable error in the trial judge's conclusion that both specific and general deterrence warranted a sizable penalty; and

10 57.5. approached the assessment of penalties for multiple acts or omissions of contravention on a basis that was fundamentally inconsistent with the primary objective of securing deterrence.

58. Carrying through this approach to the actual setting of the penalty in the second judgment (on the significantly more limited findings of contravention) the Full Court assessed a total penalty of a derisory amount of \$50,000.⁸⁹

Errors in the Full Court's approach to deterrence in assessing penalty

59. The Full Court erred in its treatment of deterrence in three (inter-related) ways.

(i) *The primacy of deterrence was not identified*

20 60. The Full Court failed to identify deterrence as the primary purpose of imposing penalties. The Full Court⁹⁰ cited the relevant 'factors' identified by French J in *CSR*,⁹¹ but did not set out the critical paragraphs earlier in that judgment which made clear that the overall relevance of these factors was in assessing a penalty 'of appropriate deterrent value'.

30 61. Indeed, the Full Court's only mention of deterrence was a passing reference to general deterrence in the context of avoiding penalties becoming oppressive.⁹² This reference to oppression correctly identified the upper boundary on a penalty, but what is missing from the Full Court's consideration is a proper recognition that deterrence establishes the prism through which all the factors are to be assessed; indeed it might be described as establishing the appropriate lower boundary on a penalty. In so doing it departed, without explanation, from a long established line of authority, and overturned the trial judge's attention to deterrence without identifying a *House v The King*⁹³ error.

⁸⁷ *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505; *TPG Internet Pty Ltd v ACCC* [2012] FCAFC 190 at [23].

⁸⁸ *ACCC v TPG No 2* [2012] FCA 629 at [63]-[66].

⁸⁹ *ACCC v TPG No 2* [2012] FCA 629.

⁹⁰ *TPG v ACCC* [2012] FCAFC 190 at [140].

⁹¹ *CSR* at 52,152.

⁹² *TPG v ACCC* [2012] FCAFC 190 at [143].

⁹³ [1936] HCA 40; (1936) 55 CLR 499.

(ii) **Relevant principles applied inconsistently with the requirement to deter**

62. The Full Court proceeded to apply the relevant principles in a way which undermined rather than secured the fundamental objective of deterrence, as follows.
63. First, the Full Court found error, without addressing *House v The King*⁹⁴ considerations, in the trial judge's analysis that there were 9 classes of contravention, accepting TPG's argument that there were only 3 categories. The Full Court did so on the bases that the content of the advertisements was '*broadly the same*', the vice which they contained was '*essentially the same*' and there was '*really only one campaign*' – indeed the Full Court considered it arguable that there were only 2 categories.⁹⁵ Ultimately 3 fairly similar amounts were found to be an appropriate starting penalty for the 3 categories - \$50,000, \$25,000 and \$50,000.⁹⁶
64. In so doing, the Full Court focussed exclusively on the similarity of the message of advertising and must have implicitly rejected the trial judge's consideration of a range of other factors such as the duration, reach and effect of the different kinds of advertisements, the different proportionality of dominant/qualifying messages in each phase of the advertisements, and the different provisions of the TPA breached.⁹⁷ Each of these other considerations was properly available to the trial judge in formulating how he would use the '*course of conduct*' tool.
65. The Full Court's approach to categorisation of contraventions signals to TPG and others that provided a marketing campaign contains '*broadly the same*' content it matters little to an assessment of their wrongdoing what precise language, range, form, medium and duration they choose.
66. Secondly, having determined that there were 3 categories of contravention, the Full Court assessed the penalty against a theoretical maximum of \$3.3m.⁹⁸ This was despite its earlier (correct) recognition that it was '*trite*' that the maximum penalty applicable to each advertisement was \$1.1m.⁹⁹ In holding that it was in effect bound to assess penalty against a maximum possible of \$3.3m the Full Court acted contrary to the language of s 76E and contrary to established principle.¹⁰⁰ Such an approach signals (contrary to the requirement to secure deterrence) that, no matter how widespread, serious or profitable a single contravening course of conduct might be, it could only ever attract a maximum penalty of \$1.1m.

⁹⁴ [1936] HCA 40; (1936) 55 CLR 499.

⁹⁵ *TPG v ACCC* [2012] FCAFC 190 at [150]-[152] and [163].

⁹⁶ *TPG v ACCC No 2* [2013] FCAFC 37 at [15].

⁹⁷ *ACCC v TPG No 2* [2012] FCA 629 at [75]-[77].

⁹⁸ *TPG v ACCC* [2012] FCAFC 190 at [155].

⁹⁹ *TPG v ACCC* [2012] FCAFC 190 at [147].

¹⁰⁰ *Singtel* at [53], citing (amongst other authorities) *Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [42]. See also *Momington Inn* [2008] FCAFC 90; (2008) 168 FCR 383 at [18].

67. Thirdly, the Full Court reduced the final penalty to \$50,000 for reasons (it said) of totality.¹⁰¹ Given the finding that all the contraventions should be grouped into only 3 categories of wrongdoing, and given the very low initial penalties identified for each of those categories, there could be no basis for a further separate reduction for totality purposes if the aim was to achieve deterrence, both specific and general. None was identified by the Full Court.
68. Fourthly, the Full Court approached the assessment of penalty with an erroneous emphasis on TPG having essentially an innocent state of mind. It held this was 'not a case of a corporation acting deliberately or covertly in contravention of legislative requirements'.¹⁰² However, such a finding is not a significant mitigating factor in a case such as the present. There is no doubt that TPG intended to conduct the particular advertising that it did.¹⁰³ It would fly in the face of its very objective to think it could have done so covertly. Accordingly, to equate this conduct with innocence is, again, to undermine the need for deterrence.
69. To like effect is the Full Court's finding that the earlier s 87B undertaking given by TPG regarding its 'Unlimited Cap Saver' mobile telephone plan in 2009 was irrelevant.¹⁰⁴ Having been put on notice of the ACCC's (relevantly similar) concerns at an earlier point in time, and having given an undertaking designed to address those concerns, TPG nonetheless chose to conduct its marketing in that particular form. In so doing it breached the TPA. Its decision to advertise in this way, despite the s 87B undertaking, must inform an assessment of its preparedness to risk non-compliance to maximise profits. To impose penalties without having regard to these matters undermines rather than secures the goal of deterrence. As Wilcox, French and Gyles JJ stated in *Universal Music*:¹⁰⁵ 'If a company "takes the odds", it must expect serious consequences if it miscalculates'. The trial judge did not err in having regard to the undertaking.
70. Finally, the Full Court held that the trial judge was not entitled to infer that 'a material number of customers were signed by TPG as a result of the misleading characteristics of the advertisements'.¹⁰⁶ An inference can be drawn if it is 'reasonable and definite' and does not involve a conjecture between two conflicting inferences of equal probability.¹⁰⁷ Here there was uncontested evidence which provided ample ground for such an inference.
71. It was not in dispute that with respect to the overall campaign TPG had greatly increased its subscription to ADSL services, its earnings and its net profit; TPG's broadband and home bundle was thus a 'major growth driver'; some \$59m was

¹⁰¹ *TPG v ACCC No 2* [2013] FCAFC 37 at [15].

¹⁰² *TPG v ACCC* [2012] FCAFC 190 at [163]; *TPG v ACCC No 2* [2013] FCAFC 37 at [11(f)].

¹⁰³ Cf *Google Inc v ACCC* [2013] HCA 1; (2013) 294 ALR 404

¹⁰⁴ *ACCC v TPG No 2* [2012] FCA 629 at [24], [108]-[109]; *TPG v ACCC* [2012] FCAFC 190 at [156]-[159].

¹⁰⁵ [2003] FCAFC 193; (2003) 131 FCR 529 at [310].

¹⁰⁶ *TPG v ACCC* [2012] FCAFC 190 at [160]-[162].

¹⁰⁷ *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (followed in *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470 at 480-1; *Trustees of the Property of Cummins v Cummins* [2006] HCA 6; (2006) 227 CLR 278 at [34]; *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352 at [94]); *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 305 and *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362.

generated from ADSL sales; and the cost of the campaign itself was \$8.9m.¹⁰⁸ These facts must be set alongside the decision of TPG senior management to press the campaign in the particular form it took, notwithstanding that TPG had been put squarely on notice of the ACCC's concerns with respect to advertising of that kind (both by TPG and within the telecommunications sector). It can readily be inferred why TPG embarked upon such a significant and costly campaign in a form that carried a real and obvious risk of contravening the TPA. It is because the particular infringing characteristics of those advertisements were considered by TPG to be of significant benefit in generating sales and profits.¹⁰⁹

- 10 72. The trial judge proceeded on the basis of this unremarkable reasoning process.¹¹⁰ This approach sat comfortably with the authorities on the drawing of inferences. The Full Court identified no legal error with this reasoning process.¹¹¹ On the contrary, it wholly ignored the commercial '*calculation*' made by TPG and instead embarked upon speculation as to what consumers were likely to have thought and done.¹¹² As such it proceeded to approach penalty in a way which gave TPG the benefit of its commercial risk assessment without the penalty cost of its miscalculation. Again, the effect of such an approach was to undermine, rather than secure, deterrence.

(iii) It is manifest from the size of the penalty itself that it is inadequate

- 20 73. The ultimate penalty of \$50,000 was, self-evidently, inadequate to secure deterrence, and stands in stark contrast to the Federal Court authorities reviewed above. A penalty of \$50,000 would very likely be regarded by TPG and others as '*an acceptable cost of doing business*', and relatively trivial in the context of a large national advertising campaign.

74. As liability currently stands after the Full Court decision, TPG is liable for, in substance, 3 kinds of contraventions: misrepresentations by initial TV advertisements failing to adequately reveal each of the bundling condition and the set-up fee; and for the initial TV, online and print advertisements failing to prominently state a single price required by s 53C.¹¹³ Even during the initial phase, the contravening advertising was published on a large scale, including 59
30 times on national television and 12 times in major newspapers.¹¹⁴ Further, the Full Court has not altered other important conclusions about the wrongdoing which had been made by the trial judge including that:

74.1. TPG took a calculated risk in preparing the advertisements in the way that it did;

¹⁰⁸ *ACCC v TPG No 2* [2012] FCA 629 at [88], [89], [92] and [79] respectively.

¹⁰⁹ Rather than, for example, using the form of advertisement TPG considered in December 2010 and referred to in paragraph 11 above.

¹¹⁰ *ACCC v TPG No 2* [2012] FCA 629 at [83] and [88]-[92].

¹¹¹ Whether or not a particular inference is available is a question of law: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 355 per Mason CJ.

¹¹² *TPG v ACCC* [2012] FCAFC 190 at [162].

¹¹³ *TPG v ACCC* [2012] FCAFC 190 at [148]-[151], [169].

¹¹⁴ See the evidence detailed at paragraphs [9]-[10] above.

74.2. TPG was Australia's third largest provider of ADSL services;

74.3. TPG had made a substantial profit from the campaign; and

74.4. the advertisements had been approved by senior management.¹¹⁵

75. Even on the (wrong) approach that each of these 3 (grouped) contraventions was subject to a separate maximum penalty of \$1.1m, \$50,000 is a mere 1.5% of a \$3.3m maximum, sending the message that the contraventions were trivial and may largely be excused.

76. On the contraventions found by the Full Court, a proper consideration of specific and general deterrence ought to have supported a penalty of at least **\$450,000**.

10 **(iv) Penalty if the trial judge's findings on liability are reinstated**

77. On the full findings on liability by the trial judge, there was a sustained and significant course of misleading conduct involving extensive national advertising over a 13 month period. From October 2010, TPG expanded its campaign over a broader range of media.¹¹⁶ The scale of the revised campaign was enormous, far reaching and sustained.¹¹⁷

20 78. In this context, the trial judge's total penalties of \$2m for all contraventions, and his explanation for the components, sit comfortably with the authorities, and pay proper regard to the importance of deterrence. In contrast, an overall penalty of \$500,000 for this contravening conduct (as suggested in obiter by the Full Court¹¹⁸) is less than 1% of the revenue earned during the campaign, and invites TPG and others to treat such penalties as an acceptable cost of doing business. It signals, in short, that contraventions will pay.

Conclusion

79. The Court should set aside the judgment of the Full Court, and should either confirm the trial judge's orders for pecuniary penalties (as per 54 above) or alternatively remit the matter to him for further consideration in the light of the reasons of the Court.

PART VII LEGISLATIVE PROVISIONS

80. *Trade Practices Act 1974* (Cth), ss 52, 53(e), 53(g), 53C, 76(1), 76E and 87B.

30 81. *Australian Consumer Law*, ss 18, 29(1)(i), 29(1)(m) and 224.

¹¹⁵ *ACCC v TPG No 2* [2012] FCA 629 at [93]-[111], [113]-[115], [121]-[122] and [129].

¹¹⁶ *ACCC v TPG* [2011] FCA 1254 at [5].

¹¹⁷ See the evidence detailed at paragraphs [9]-[10] above.

¹¹⁸ *TPG v ACCC* [2012] FCAFC 190 at [163].

PART VIII ORDERS SOUGHT

82. The ACCC seeks orders in the following terms:

82.1. Appeal allowed.

82.2. Paragraphs 1, 4, 5 and 6 of the Orders made by the Full Court on 4 April 2013 be set aside.

82.3. The orders made by the trial judge on 15 June 2012 be varied to the extent referred to in paragraph [168] of the judgment of the Full Court given on 20 December 2012.

10 82.4. Alternatively to 82.3, the Court makes the order sought in paragraph 82.3 above, save that orders 7 and 8 made by the trial judge on 15 June 2012 be set aside and the making of an order for pecuniary penalties be remitted to the trial judge for further consideration.

82.5. TPG pay the ACCC's costs of and incidental to the appeal to the Full Court and of the application for special leave to appeal and for the appeal.

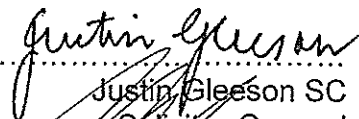
82.6. Such further or other orders as the Court deems appropriate.

PART IX ESTIMATED HOURS

83. The ACCC estimates it will require two hours to present its oral argument.

Date: 20 September 2013

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Justin Gleeson SC
Solicitor-General

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Colin Golvan SC

.....
Edward Heerey

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Counsel for the Appellant

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**
Appellant

AND: **TPG INTERNET PTY LTD
(ACN 068 383 737)**
Respondent

SUBMISSIONS OF THE APPELLANT

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ANNEXURE 1 – LEGISLATION

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Trade Practices Act 1974

Act No. 51 of 1974 as amended

This compilation was prepared on 30 August 2010
taking into account amendments up to Act No. 103 of 2010

Volume 1 includes: Table of Contents
Sections 1 – 119

The text of any of those amendments not in force
on that date is appended in the Notes section

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Volume 2 includes: Table of Contents
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Table of Amendments
Note 2
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

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Section 52

- (3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

52 Misleading or deceptive conduct

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- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).

53 False or misleading representations

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

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- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (aa) falsely represent that services are of a particular standard, quality, value or grade;
- (b) falsely represent that goods are new;
- (bb) falsely represent that a particular person has agreed to acquire goods or services;
- (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (d) represent that the corporation has a sponsorship, approval or affiliation it does not have;
- (e) make a false or misleading representation with respect to the price of goods or services;
- (ea) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;

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- (eb) make a false or misleading representation concerning the place of origin of goods;
- (f) make a false or misleading representation concerning the need for any goods or services; or
- (g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Note: For rules relating to representations as to the country of origin of goods, see Division 1AA (sections 65AA to 65AN).

53A False representations and other misleading or offensive conduct in relation to land

- (1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
 - (a) represent that the corporation has a sponsorship, approval or affiliation it does not have;
 - (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or
 - (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.
- (2) A corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.
- (2A) Nothing in this section shall be taken as implying that other provisions of this Division do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.
- (3) In this section, *interest*, in relation to land, means:
 - (a) a legal or equitable estate or interest in the land;
 - (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding

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Section 53B

- of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- (c) a right, power or privilege over, or in connexion with, the land.

53B Misleading conduct in relation to employment

A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

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53C Single price to be stated in certain circumstances

- (1) A corporation must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person (the *relevant person*); or
 - (b) the promotion by any means of the supply of goods or services to a person (the *relevant person*) or of the use of goods or services by a person (the *relevant person*);
 make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also:
 - (c) specifies, in a prominent way and as a single figure, the single price for the goods or services; and
 - (d) if, in relation to goods:
 - (i) the corporation does not include in the single price a charge that is payable in relation to sending the goods from the supplier to the relevant person; and
 - (ii) the corporation knows, at the time of the representation, the minimum amount of a charge in relation to sending the goods from the supplier to the relevant person that must be paid by the relevant person;
 specifies that minimum amount.
- (2) A corporation is not required to include, in the single price for goods, a charge that is payable in relation to sending the goods from the supplier to the relevant person.

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- (3) Subsection (1) does not apply if the representation is made exclusively to a body corporate.
- (4) For the purposes of paragraph (1)(c), the corporation is taken not to have specified a single price for the goods or services in a prominent way unless the single price is at least as prominent as the most prominent of the parts of the consideration for the supply.
- (5) Subsection (4) does not apply in relation to services to be supplied under a contract if the following apply:
- (a) the contract provides for the supply of the services for the term of the contract;
 - (b) the contract provides for periodic payments for the services to be made during the term of the contract;
 - (c) if the contract also provides for the supply of goods—the goods are directly related to the supply of the services.
- (6) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (7) In this section:

single price means the minimum quantifiable consideration for the supply concerned at the time of the representation concerned, including each of the following amounts (if any) that is quantifiable at that time:

- (a) a charge of any description payable by the relevant person to the corporation making the representation (other than a charge that is payable at the option of the relevant person);
- (b) the amount which reflects any tax, duty, fee, levy or charge imposed, on the corporation making the representation, in relation to the supply concerned;
- (c) any amount paid or payable, by the corporation making the representation, in relation to the supply concerned with respect to any tax, duty, fee, levy or charge if:
 - (i) the amount is paid or payable under an agreement or arrangement made under a law of the Commonwealth, a State or a Territory; and
 - (ii) the tax, duty, fee, levy or charge would have otherwise been payable by the relevant person in relation to the supply concerned.

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Example 1: A corporation advertises lounge suites for sale. Persons have the option of paying for fabric protection. The fabric protection charge does not form part of the single price because of the exception in paragraph (a).

Example 2: The GST may be an example of an amount covered by paragraph (b).

Example 3: The passenger movement charge imposed under the *Passenger Movement Charge Act 1978* may be an example of an amount covered by paragraph (c). Under an arrangement under section 10 of the *Passenger Movement Charge Collection Act 1978* airlines may pay an amount equal to the charge that would otherwise be payable by passengers departing Australia.

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54 Offering gifts and prizes

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

55 Misleading conduct to which Industrial Property Convention applies

A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

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55A Certain misleading conduct in relation to services

A corporation shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

56 Bait advertising

- (1) A corporation shall not, in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of

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Part VI—Enforcement and remedies

75B Interpretation

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- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 95AZN, shall be read as a reference to a person who:
 - (a) has aided, abetted, counselled or procured the contravention;
 - (b) has induced, whether by threats or promises or otherwise, the contravention;
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - (d) has conspired with others to effect the contravention.
- (2) In this Part, unless the contrary intention appears:
 - (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
 - (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
 - (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

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76 Pecuniary penalties—restrictive trade practices etc.

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- (1) If the Court is satisfied that a person:
 - (a) has contravened any of the following provisions:
 - (i) a provision of Part IV (other than section 44ZZRF or 44ZZRG);
 - (ii) section 95AZN; or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

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(f) has conspired with others to contravene such a provision; the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

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Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (*Boycott conduct* is defined in subsection 87AA(2).)

- (1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:
- (aa) for each act or omission to which this section applies that relates to section 44ZZRJ or 44ZZRK—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the court can determine the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission—3 times that total value;
 - (iii) if the Court cannot determine the total value of those benefits—10% of the annual turnover (within the meaning of Division 1 of Part IV) of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and
 - (a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—\$750,000; and
 - (b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:
 - (i) \$10,000,000;
 - (ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly

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Section 76

and that is reasonably attributable to the act or omission—3 times the value of that benefit;

- (iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the act or omission occurred; and

- (c) for each act or omission to which this section applies that relates to section 95AZN—\$33,000; and
 (d) for each other act or omission to which this section applies—\$10,000,000.

Note: For *annual turnover*, see subsection (5).

- (1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed:
- (a) for each act or omission to which this section applies that relates to section 95AZN—\$6,600; and
 (b) for each other act or omission to which this section applies—\$500,000.
- (2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.
- (3) If conduct constitutes a contravention of two or more provisions of Part IV (other than section 44ZZRF or 44ZZRG), a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.
- (4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which 2 or more of the limits in paragraphs (1A)(aa), (a) and (b) apply is an amount up to the highest of those limits.

Annual turnover

- (5) For the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate

related to the body corporate, have made, or are likely to make, during that period, other than:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
- (b) supplies that are input taxed; or
- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on; or
- (e) supplies that are not connected with Australia.

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- (6) Expressions used in subsection (5) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

76A Defence to proceedings under section 76 relating to a contravention of section 95AZN

- (1) In this section:

contravention, in relation to a section, includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of the section.

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- (2) In proceedings against a person (the *respondent*) under section 76 in relation to an alleged contravention of section 95AZN, it is a defence if the respondent establishes:
 - (a) that the contravention in respect of which the proceedings were instituted was due to reasonable mistake; or
 - (b) that the contravention in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
 - (c) that:
 - (i) the contravention in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the respondent's control; and
 - (ii) the respondent took reasonable precautions and exercised due diligence to avoid the contravention.

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Section 76E

Definitions

(3) In this section:

contravention of subparagraph 45(2)(a)(i) or (b)(i) includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of subparagraph 45(2)(a)(i) or (b)(i).

proceedings means proceedings instituted under:

- (a) this Part or section 163A; or
- (b) section 21 or 23 of the *Federal Court of Australia Act 1976*; or
- (c) section 39B of the *Judiciary Act 1903*.

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76E Pecuniary penalties—consumer protection etc.

- (1) If the Court is satisfied that a person:
 - (a) has contravened any of the following provisions:
 - (i) a provision of Part IVA;
 - (ii) a provision of Division I or IAAA of Part V (other than section 52);
 - (iii) subsection 65C(1) or (3), 65D(1) or 65F(8), section 65G or subsection 65Q(9), (9C) or (10) or 65R(1);
 - (iv) section 87ZN or 87ZO; or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) has conspired with others to contravene such a provision;
 the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.

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Section 76E

- (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
 - (b) the circumstances in which the act or omission took place; and
 - (c) whether the person has previously been found by the Court in proceedings under Part VC or this Part to have engaged in any similar conduct.
- (3) The pecuniary penalty payable under subsection (1) is not to exceed the number of penalty units worked out using the following table:

Number of penalty units		
Item	For each act or omission to which this section applies that relates to ...	the number of penalty units is not to exceed ...
1	a provision of Part IVA	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
2	a provision of Division 1 or 1AAA of Part V (other than section 52)	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
3	subsection 65C(1) or (3) or 65D(1)	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
4	subsection 65F(8)	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
5	section 65G	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.

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Section 76E

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Number of penalty units		
Item	For each act or omission to which this section applies that relates to ...	the number of penalty units is not to exceed ...
6	subsection 65Q(9)	(a) if the person is a body corporate—200; or (b) if the person is not a body corporate—40.
7	subsection 65Q(9C)	(a) if the person is a body corporate—300; or (b) if the person is not a body corporate—60.
8	subsection 65Q(10)	(a) if the person is a body corporate—600; or (b) if the person is not a body corporate—120.
9	subsection 65R(1)	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
10	section 87ZN	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
11	section 87ZO	(a) if the person is a body corporate—250; or (b) if the person is not a body corporate—50.

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in paragraph (1)(a):
- (a) a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions; but
 - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

87B Enforcement of undertakings

- (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).
- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a clearance or an authorisation under Division 3 of Part VII.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
- (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
- (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.

87C Enforcement of undertakings—Secretary to the Department

- (1) The Secretary to the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has a power or function under this Act.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary to the Department.

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Competition and Consumer Act 2010

Act No. 51 of 1974 as amended

This compilation was prepared on 1 January 2011
taking into account amendments up to Act No. 148 of 2010

Volume 1 includes: Table of Contents
Sections 1 – 119

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

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Volume 2 includes: Table of Contents
Sections 10.01 – 178

Volume 3 includes: Table of Contents
Schedules 1 and 2
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Table of Acts
Act Notes
Table of Amendments
Notes 2 and 3
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

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Section 18

Chapter 2—General protections

Part 2-1—Misleading or deceptive conduct

18 Misleading or deceptive conduct

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- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

19 Application of this Part to information providers

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- (1) This Part does not apply to a publication of matter by an information provider if:
 - (a) in any case—the information provider made the publication in the course of carrying on a business of providing information; or
 - (b) if the information provider is the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation or the holder of a licence granted under the *Broadcasting Services Act 1992*—the publication was by way of a radio or television broadcast by the information provider.
- (2) Subsection (1) does not apply to a publication of an advertisement.
- (3) Subsection (1) does not apply to a publication of matter in connection with the supply or possible supply of, or the promotion by any means of the supply or use of, goods or services (the *publicised goods or services*), if:
 - (a) the publicised goods or services were goods or services of a kind supplied by the information provider or, if the information provider is a body corporate, by a body corporate that is related to the information provider; or
 - (b) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who

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Chapter 3—Specific protections

Part 3-1—Unfair practices

Division 1—False or misleading representations etc.

29 False or misleading representations about goods or services

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
- (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
 - (b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
 - (c) make a false or misleading representation that goods are new; or
 - (d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
 - (e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or
 - (f) make a false or misleading representation concerning:
 - (i) a testimonial by any person; or
 - (ii) a representation that purports to be such a testimonial; relating to goods or services; or
 - (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or
 - (h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or
 - (i) make a false or misleading representation with respect to the price of goods or services; or

- (j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or
- (k) make a false or misleading representation concerning the place of origin of goods; or
- (l) make a false or misleading representation concerning the need for any goods or services; or
- (m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or
- (n) make a false or misleading representation concerning a requirement to pay for a contractual right that:
 - (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
 - (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

Note 1: A pecuniary penalty may be imposed for a contravention of this subsection.

Note 2: For rules relating to representations as to the country of origin of goods, see Part 5-3.

- (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in subsection (1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary.
- (3) To avoid doubt, subsection (2) does not:
 - (a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or
 - (b) have the effect of placing on any person an onus of proving that the representation is not misleading.

30 False or misleading representations about sale etc. of land

- (1) A person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:

Part 5-2—Remedies

Division 1—Pecuniary penalties

224 Pecuniary penalties

- (1) If a court is satisfied that a person:
- (a) has contravened any of the following provisions:
 - (i) a provision of Part 2-2 (which is about unconscionable conduct);
 - (ii) a provision of Part 3-1 (which is about unfair practices);
 - (iii) section 66(2) (which is about display notices);
 - (iv) a provision (other than section 85) of Division 2 of Part 3-2 (which is about unsolicited consumer agreements);
 - (v) a provision (other than section 96(2)) of Division 3 of Part 3-2 (which is about lay-by agreements);
 - (vi) section 100(1) or (3) or 101(3) or (4) (which are about proof of transactions and itemised bills);
 - (vii) section 102(2) or 103(2) (which are about prescribed requirements for warranties and repairs);
 - (viii) section 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5), 119(1) or (2), 125(4), 127(1) or (2), 128(2) or (6), 131(1) or 132(1) (which are about safety of consumer goods and product related services);
 - (ix) section 136(1), (2) or (3) or 137(1) or (2) (which are about information standards);
 - (x) section 221(1) or 222(1) (which are about substantiation notices); or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

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(f) has conspired with others to contravene such a provision; the court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate.

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- (2) In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:
 - (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
 - (b) the circumstances in which the act or omission took place; and
 - (c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

- (3) The pecuniary penalty payable under subsection (1) is not to exceed the amount worked out using the following table:

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Amount of pecuniary penalty		
Item	For each act or omission to which this section applies that relates to ...	the pecuniary penalty is not to exceed ...
1	a provision of Part 2-2	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.
2	a provision of Part 3-1 (other than section 47(1))	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.
3	section 47(1)	(a) if the person is a body corporate—\$5,000; or (b) if the person is not a body corporate—\$1,000.

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Amount of pecuniary penalty		
Item	For each act or omission to which this section applies that relates to ...	the pecuniary penalty is not to exceed ...
4	section 66(2)	(a) if the person is a body corporate—\$50,000; or (b) if the person is not a body corporate—\$10,000.
5	a provision of Division 2 of Part 3-2 (other than section 85)	(a) if the person is a body corporate—\$50,000; or (b) if the person is not a body corporate—\$10,000.
6	a provision of Division 3 of Part 3-2 (other than section 96(2))	(a) if the person is a body corporate—\$30,000; or (b) if the person is not a body corporate—\$6,000.
7	section 100(1) or (3) or 101(3) or (4)	(a) if the person is a body corporate—\$15,000; or (b) if the person is not a body corporate—\$3,000.
8	section 102(2) or 103(2)	(a) if the person is a body corporate—\$50,000; or (b) if the person is not a body corporate—\$10,000.
9	section 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5) or 119(1) or (2)	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.
10	section 125(4)	(a) if the person is a body corporate—\$16,500; or (b) if the person is not a body corporate—\$3,300.

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Section 224

Amount of pecuniary penalty		
Item	For each act or omission to which this section applies that relates to ...	the pecuniary penalty is not to exceed ...
11	section 127(1) or (2)	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.
12	section 128(2) or (6), 131(1) or 132(1)	(a) if the person is a body corporate—\$16,500; or (b) if the person is not a body corporate—\$3,300.
13	section 136(1), (2) or (3) or 137(1) or (2)	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.
14	section 221(1)	(a) if the person is a body corporate—\$16,500; or (b) if the person is not a body corporate—\$3,300.
15	section 222(1)	(a) if the person is a body corporate—\$27,500; or (b) if the person is not a body corporate—\$5,500.

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in subsection (1)(a):
- (a) a proceeding may be instituted under this Schedule against a person in relation to the contravention of any one or more of the provisions; but
 - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.