ORIGINAL

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

ANNOTATED

APPELLANT'S REPLY

Filed on behalf of the Appellant by:

Australian Government Solicitor
Level 21, 200 Queen St, Melbourne, VIC 3000
DX 50 Melbourne

Date of this document: 24 October 2013

File ref: 13003700

Telephone: 03 9242 1247
Lawyer's E-mail: David.Ablett@ags.gov.au
Facsimile: 03 9242 1496

PART I INTERNET PUBLICATION

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

PART II CONCISE REPLY TO THE RESPONDENT'S ARGUMENT

Facts

2. The Appellant (**ACCC**) agrees with the factual matters set out in Respondent's (**TPG's**) Submissions (**RS**) [4(a)], [4(b)] and [4(d)]. None of those matters alter the ACCC's position.

General

3. As a general matter, TPG's submissions do not grapple with the real issues which arise in the appeal. TPG puts a contorted argument as to what the trial judge found. It then seeks to support the Full Court by attributing to it a process of fact finding which it did not adopt. TPG fails to justify the Full Court's finding that the trial judge fell into an error of principle by focussing on the dominant message to the exclusion of the totality of the advertisements and, in doing so, TPG continues to ignore paragraphs [57]-[119] of the primary judgment.[1] Finally, TPG fails in its attempt to suggest that the Full Court was guided by the centrality of deterrence despite the Full Court's failure to give it clear and explicit attention.

TPG's key propositions and short form answers

4. TPG's key propositions are that: (1) the trial judge 'implicitly' made the very finding of fact which the ACCC complains that the Full Court made without evidence (namely, that an ordinary and reasonable consumer would know that ADSL2+ services were commonly sold as part of a bundle);[2] (2) even if the trial judge did not make this finding, the Full Court did and was entitled to do so (in particular because the reasonable consumer would know that set-up fees apply, would do some research on a significant purchase and would have a significant degree of background knowledge about broadband internet services);[3] (3) the trial judge focussed erroneously on the dominant message and failed to look at the whole of the advertisements in their full context;[4] (4) the Full Court was correct in its approach in finding that the reasonable consumer would see, hear, and understand, the bundling condition in all the advertisements (other than the initial television advertisement);[5] (5) the Full Court correctly treated deterrence as a primary consideration on penalty and did not confine itself to a maximum penalty of $3.3 million;[6] (6) the Full Court's

1 *ACCC v TPG* [2011] FCA 1254 at [57]-[119] (AB 551-566).
2 RS [7], [17], [10]-[11], [28]-[29].
3 RS [30]-[32].
4 RS [33].
5 RS [34]-[38].
6 RS [40]-[50].

penalty of $50,000 could be seen as '*effectively the entire profit*' made by TPG while its initial television advertisement was shown.[7]

5. In summary, it is submitted that: (1) the trial judge made no such implicit finding and, quite to the contrary, found that an ordinary and reasonable consumer would not have a starting assumption about whether the service was bundled; (2) the Full Court had no basis to overturn the finding which the trial judge made and the matters referred to by TPG formed no part of the Full Court's reasoning and would not (even if advanced as a Notice of Contention) support the conclusion of the Full Court; (3) the trial judge undertook a detailed consideration of the whole of each advertisement, not just the dominant message[8] and the Full Court wrongly found error within the principles of *House v The King*;[9] (4) the Full Court's determination of consumer perceptions of each advertisement was tainted by its unfounded reversal of the trial judge's factual finding as to consumers' starting assumptions; (5) it is plain from the Full Court's approach and the penalty ordered that deterrence was not its primary consideration; (6) TPG's new mathematical justification for the Full Court's penalty is raised too late and is flawed in any event.

Consumers' background knowledge and starting assumptions

6. There was no proper basis for the Full Court's view that the reasonable consumer would know that ADSL2+ services are offered as either '*bundled*' or '*stand alone*'.[10] TPG wrongly suggests at RS [10] that the trial judge did not expressly consider whether ordinary consumers would be aware of the fact that ADSL2+ services are sold in several ways.[11] TPG contended at trial that the ordinary consumer would not assume that the service was other than bundled. In rejecting this contention, the trial judge considered evidence that ADSL2+ is available in a variety of different forms, with various different download limits, amidst a '*plethora*' of other internet options with a '*bewildering range*' of download limits, speed and pricing. This provided the factual basis for the trial judge's key finding that such consumers '*would not have a starting assumption about the service*' offered by TPG.[12]

7. It follows that there is no foundation for TPG's contention at RS [11], which attempts to explain the Full Court's contrary finding of fact[13] on the basis that it was dealing with a factual issue not considered by the trial judge.

8. The ACCC does not dispute the principles cited at RS [13], if taken at a level of generality, but what is in issue is their application to misleading headline pricing information. Thus, RS [13(c)] needs unpacking: '*robustness*' taken too far can lead to error as demonstrated by the Full Court here. RS [13(h) and (i)] deal only with qualifications in print advertisements and do not address the

---

7 RS [55]-[57].

8 *ACCC v TPG* [2011] FCA 1254 at [57]-[119] (AB 551-566).

9 [1936] HCA 40; (1936) 55 CLR 499.

10 *TPG v ACCC* [2012] FCAFC 190 at [98] (AB 687).

11 RS [10].

12 *ACCC v TPG* [2011] FCA 1254 at [31]-[32] (AB 545).

13 *TPG v ACCC* [2012] FCAFC 190 at [98] (AB 687).

difficulties of appropriate qualifications in television and radio advertisements. RS [13(j)] refers to "*significant purchasing decisions*", but the purchasing decision here concerns technical services, where reasonable reliance would be placed on the information provided by the supplier, most particularly the headline information. Any further research may be *after* the misleading advertisement has enticed consumers into the "*marketing web*".[14] RS [13(k)] refers to those astute in the area of internet services, but carries little weight as it cites the interlocutory decision of Ryan J in this proceeding as well as two cases decided many years before the publication of the relevant advertisements. Contrary to RS [14], the ACCC does not seek to insert new legislative provisions, it merely seeks to prevent consumers being misled by incomplete headline pricing which is not appropriately qualified.

9. While the trial judge made the various findings about the target audience referred to at RS [15], TPG cherry picks only some of the total findings. Thus his Honour also found that: the target audience "*still includes most adults in Australia*";[15] although more knowledgeable than the general class of internet users, "*this does not impute a high level of knowledge about broadband internet to the ordinary or reasonable consumer*";[16] the audience "*includes first time as well as more experienced users*";[17] consumers may do some research before purchase[18] but not necessarily before seeing the advertisements; and the audience includes young people likely to have less interest in a home phone.[19]

No inconsistency between consumers' knowledge of set-up costs and no starting assumption as to bundling

10. Contrary to RS [17] there was no finding, nor is it implicit, that consumers had background knowledge of bundling of internet and telephone services: the trial judge found there was no such starting assumption.[20] This stands in contrast to the trial judge's clear finding that such a consumer would know that set-up fees are usually charged for contracts less than 24 months.[21] TPG asserts a perceived inconsistency between these findings,[22] but it is illusory. The trial judge identified a factual basis for consumers' knowledge that set-up fees are usually charged: evidence that TPG and its competitors always require set-up fees for ADSL2+ service contracts of less than 24 months.[23] This factual premise contrasts to the many and varied forms of ADSL2+ with a "*bewildering*" range of limits, speed and pricing which led the trial judge to conclude that consumers had no starting assumption about bundling.[24] It

---

14 See *ACCC v Singtel Optus Pty Ltd (No. 3)* [2010] FCA 1272; (2010) 276 ALR 102 at [6] and [19]; *Tec & Thomas (Australia) Pty Ltd v Matsumiya Computer Co Pty Ltd* (1984) 1 FCR 28 at 38; *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 at 340.

15 *ACCC v TPG* [2011] FCA 1254 at [27] (AB 544).

16 *ACCC v TPG* [2011] FCA 1254 at [28] (AB 544).

17 *ACCC v TPG* [2011] FCA 1254 at [29] (AB 545).

18 *ACCC v TPG* [2011] FCA 1254 at [30] (AB 545).

19 *ACCC v TPG* [2011] FCA 1254 at [33] (AB 546).

20 *ACCC v TPG* [2011] FCA 1254 at [31]-[32] (AB 545).

21 *ACCC v TPG* [2011] FCA 1254 at [34] (AB 546).

22 See e.g. RS [27].

23 *ACCC v TPG* [2011] FCA 1254 at [34] (AB 546).

24 *ACCC v TPG* [2011] FCA 1254 at [31]-[32] (AB 545).

follows that there is no logical force to TPG's argument at RS [30]-[32] that the finding of consumers' knowledge of set-up fees ought to have led the trial judge, and did entitle the Full Court, to find that consumers also had background knowledge of bundling.

Trial judge's consideration of the whole of each advertisement, not just the 'dominant message'

11. TPG does not attempt to reconcile, on the one hand, the Full Court holding that the trial judge erroneously emphasised the "*dominant message*"[25] with, on the other hand, the many authorities cited by the trial judge which applied a comparable approach.[26] Nor does TPG recognise the trial judge's detailed consideration of the whole of each advertisement: being not just the "*dominant message*",[27] but also the smaller font, rapid pace speech and fine print which are glossed over at RS [21] and [24]. This wrongly perceived error provided no proper basis to overturn the trial judge's decision within the principles of *House v The King*.[28]

Full Court's failure to consider or apply deterrence

12. TPG contends now that *House v The King* was beside the point,[29] but the Full Court itself recognised its relevance, particularly on the question of penalty.[30] RS [50] quotes selectively from the Full Court's decision at [155]. A full reading of [155] makes clear that it wrongly assessed penalty against a maximum of $3.3 million without due consideration of the overarching principle of deterrence.[31] The issue of "*innocence*" in RS [52] arises from the Full Court's reference to TPG not acting deliberately or covertly[32] when TPG's public advertising could not have been inadvertent or covert.

13. Both the Full Court and TPG misunderstand the trial judge's use of the s 87B Undertaking.[33] His Honour was entitled to refer to the s 87B Undertaking on an assessment of TPG's awareness of a real risk that its campaign may involve misleading conduct,[34] and to show TPG's "*past similar conduct*".[35] His Honour did not treat the s 87B Undertaking as proof of any prior breach by TPG.

---

25 *TPG v ACCC* [2012] FCAFC 190 at [104] (AB 688).

26 *ACCC v TPG* [2011] FCA 1254 at [58]-[59] (AB 551), citing *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [37]; *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90; (2004) 61 IPR 420 at [50]-[51], [55]; *Singtel Optus Pty Ltd v Telstra* [2004] FCA 859 at [41]; *ACCC v Global One Mobile Entertainment Pty Ltd* [2011] FCA 393 at [50]; *ACCC v Signature Security Group* [2003] FCA 3; (2003) ATPR 41-908 at [27]; *ACCC v Boost Tel Pty Ltd* [2010] FCA 701 at [77] to [81].

27 *ACCC v TPG* [2011] FCA 1254 at [57]-[119] (AB 551-566).

28 [1936] HCA 40 (1936) 55 CLR 499 at 504-505; *TPG v ACCC* [2012] FCAFC 190 at [23] (AB 677).

29 RS [42], [46], [48].

30 *TPG v ACCC* [2012] FCAFC 190 at [134] (AB 693).

31 *TPG v ACCC* [2012] FCAFC 190 at [155] (AB 696).

32 *TPG v ACCC* [2012] FCAFC 190 at [163] (AB 699); *TPG v ACCC (No 2)* [2013] FCAFC 37 at [11(f)] (AB 734).

33 RS [53].

34 *ACCC v TPG (No 2)* [2012] FCA 629 at [103] (AB 627).

35 Ibid at [108]-[109] (AB 628).

TPG's dubious new mathematical justification for the Full Court's penalty

14. At RS [55]-[57] TPG seeks to justify the size of the Full Court's penalty by way of a new mathematical analysis which was never put below. The Court should not entertain a factual enquiry into a matter squarely within TPG's knowledge that it chose not to advance at trial or on appeal. In any event, TPG artificially attributes a standard profit of $20,000 to each of the 408 days of its whole campaign. TPG then focusses on only 4 days of television advertising, ignoring the fact that the contravening conduct as found by Full Court extended for 13 days.[36] Further, the analysis ignores all of the other non-quantitative aspects of the contraventions and fails to address the real issue of whether such a penalty is no more than a cost of doing business. $50,000 was self-evidently inadequate to secure general or specific deterrence in the context of a large national advertising campaign.[37]

Appropriate Orders

15. If the appeal succeeds, the appropriate order would ordinarily be that the Full Court's orders of 4 April 2013 be set aside, and in lieu thereof orders made that the appeal to the Full Court be dismissed.[38] This would reinstate the trial judge's orders. However, the ACCC accepts that with the passage of time and TPG's refraining from the relevant conduct it is now unnecessary to reinstate the injunctions, corrective advertising and compliance programs ordered by the trial judge. The orders sought are found in the proposed amended notice of appeal (attached), repeated in the annotated submissions of the Appellant.

16. Contrary to RS [58], the appeal process in the Full Court was completed by the making of final orders by that Court, which the present appeal seeks to set aside. TPG has not filed any Notice of Contention or cross appeal that the Full Court ought to reconsider any outstanding issues and there is no basis for remitter (save if the Court considers a remitter is necessary to determine the quantum of penalty).

Dated: 24 October 2013

.....
Justin Gleeson SC
Solicitor-General
Telephone: 02 6141 4147
Facsimile: 02 6141 4099
Email: Ben.Gauntlett@ag.gov.au

.....
Colin Golvan SC

.....
Edward Heerey

36 See the declarations numbered 2 and 3 in *TPG v ACCC (No 2)* [2013] FCAFC 37 (AB 730).

37 See Appellant's Submissions [73]-[76].

38 See e.g. *Green v The Queen; Quinn v The Queen* [2011] HCA 49; (2011) 244 CLR 462 at [81] per French CJ, Crennan and Kiefel JJ; *Munda v Western Australia* [2013] HCA 38 at [138] per Bell J.