

Advertising in the telecommunications industry

Sydney

BAKER & MCKENZIE

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Contacts

[James Halliday](#)

Partner

+61 2 8922 5187

james.halliday@bakernet.com

[Georgina Foster](#)

Partner

+61 2 8922 5329

georgina.foster@bakernet.com

[Linh Tran](#)

Associate

+61 2 8922 5457

linh.tran@bakernet.com

[Sheridan de Kruiff](#)

Associate

+61 2 8922 5758

sheridan.dekruiff@bakernet.com

Sydney

Baker & McKenzie
Level 27, AMP Centre
50 Bridge Street
Sydney NSW 2000

Melbourne

Baker & McKenzie
Level 19 CBW
181 William Street
Melbourne, VIC 3000

www.bakernet.com

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ACCC and the telecommunications industry

The ACCC has recently expressed concern in relation to advertising and other marketing practices in the telecommunications industry, and has also taken enforcement action against several telecommunications service providers under the *Trade Practices Act (TPA)* (some of these actions are discussed below).

This paper provides an overview of the prohibitions on misleading or deceptive conduct under the TPA, focusing on their application to telecommunications and content service providers. The prohibitions apply to all advertising and marketing activities undertaken by these organisations, as well as to their other commercial dealings.

Legislative framework

The TPA contains a range of consumer protection provisions. There has, in recent times, been a significant focus on the application of the misleading or deceptive conduct provisions to advertisements of telecommunications services. In addition, changes to the component pricing provisions in the TPA, which have a particular relevance to the industry, came into effect on 25 May 2009. These provisions are discussed below.

Failure to comply with the consumer protection provisions in the TPA can expose a company to potential fines of up to \$1.1 million and \$220,000 for individuals, in addition to civil remedies such as injunctions, declarations, corrective advertising and damages.

Misleading or deceptive conduct

Section 52 of the TPA prohibits a corporation, in trade or commerce, engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive.

Section 53 of the TPA contains specific prohibitions against specific types of false or misleading representations, including those in relation to:

- the price of goods or services;
- the standard, quality, value or grade of goods or services;
- the performance characteristics, sponsorship, approval, accessories, uses or benefits of goods or services; and
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 75AZC mirrors the prohibitions in section 53, imposing criminal liability for breach of those prohibitions. Equivalent provisions are also contained in State and Territory fair trading legislation.

General principles

When considering the application of the prohibitions on misleading or deceptive conduct it is important to be aware of the following general principles:

- Intention to mislead or deceive is irrelevant – honest and reasonable conduct can be misleading or deceptive in breach of the TPA.
- Silence and half truths can be misleading or deceptive – failure to disclose an important matter or qualification can make a representation misleading.
- Reasonable grounds are required if making a prediction (i.e. a representation as to a future matter) or expressing an opinion.

Practical tips

What is critical in complying with the laws against misleading or deceptive conduct is to consider the overall or dominant impression created by the advertisement. Below are some practical tips and key questions to ask when reviewing advertising material:

- Who is the potential audience and what is the dominant impression the advertisement will create for them?
- What is the representation being made? Is it truthful?
- Can the representation/dominant impression be substantiated?
 - Can technical and performance claims be supported?
 - Are there reasonable grounds for any predictions or opinions?
- Has anything been left out?
- Do not use fine print or disclaimers to disclose important qualifications to the representation.

Advertising strategies to handle with care

There are some types of advertising strategies that require particular care and should only be used after very careful consideration:

- Using words such as "free", "unlimited" or "cheapest" – make sure that the actual offer matches the claim.
- Two price or "was/now" advertising – make sure that prices being compared are genuine and accurate, and any savings claimed are real.
- Comparative advertising – make sure comparisons are clear, accurate and based on current and relevant information.
- Using words such as "green" or "environmentally friendly" – green claims should be clear, accurate and able to be substantiated.

Component pricing

On 25 May 2009, new rules came into effect regarding component pricing.

Component pricing is where the total price for goods or services is presented as the sum of its component parts. Under the new component pricing rules, businesses that use component pricing must also state prominently the total single price, i.e. the total minimum price that the consumer must pay inclusive of all fees, taxes and charges. In most cases, the total single price must be stated at least as prominently as the most prominent component price.

There are exceptions for price representations made exclusively to corporations, compulsory delivery charges (provided the minimum delivery charge is specified) and optional charges.

Component pricing in the telecommunications and ISP industry

Relevantly for the telecommunications industry, there is an exception to the equal prominence requirement for contracts for the supply of services over a specified term. For those contracts, the total single price must still be prominent but it does not need to be as prominent as the price of the component parts. For example, for a 2 year mobile plan, the monthly charge can be more prominent than the total minimum price over the 2 year term.

It is common in the ISP industry for ISPs to offer customers a fixed monthly plan which includes a corresponding fixed data download limit. Under most of these plans, customers are charged amounts for downloads beyond that limit on a per megabit basis, in addition to the fixed monthly fee. In such instances, the total *minimum* price that a consumer must pay under the plan should be prominently stated. Additional download charges should also be clearly brought to the consumer's attention.

Similarly, where a telecommunications provider offers a range of plans bundling broadband and home phone services the actual total price a consumer pays will be dependent on the consumer's choices. However, where a minimum price can be quantified that minimum price should be prominently disclosed, e.g. "*From \$595.00*".

Recent ACCC enforcement action

The recent enforcement action taken by the ACCC against Tel.Pacific Limited and Dodo Australia Pty Ltd are illustrative of how the above principles governing misleading or deceptive conduct have been applied in relation to the advertising of telecommunications services. These are summarised below.

ACCC v Tel.Pacific Ltd

The ACCC instituted proceedings in the Federal Court against Tel.Pacific for alleged breaches of sections 52 and 53 (and other provisions) of the TPA in relation to the sale of its international pre-paid phone cards. The ACCC alleged that Tel.Pacific represented:

- that consumers would have a specified amount of call time on certain phone cards when that was not the case; and
- that no fees other than timed call charges would apply when in fact other fees were charged.

The Federal Court found that Tel.Pacific's conduct was false, misleading and deceptive in breach of the TPA. Orders were made against Tel.Pacific to:

- restrain it from engaging in similar conduct in the future;
- provide information to retailers of its phone cards, its customers and its main competitors about the outcome of the proceedings and the fees applicable to using its phone cards;
- establish a trade practices law compliance program; and
- pay a fixed amount of the ACCC's legal costs in relation to the proceedings.

Investigation of Dodo Australia Pty Ltd

The ACCC conducted an investigation as a result of concerns that consumers were likely to have been misled or deceived by certain advertisements made by Dodo in relation to its 'FREE \$29.90 Mobility Cap Plan', 'FREE Fuel' and 'Cash Offer' 24

month mobile cap plans (*Free Offer Plans*). The advertisements included representations to the effect that consumers would receive either an Asus Eee PC, a fuel card or a cash payment for free or at no cost when they signed up to one of the Free Offer Plans.

The ACCC was concerned that these advertisements were misleading as they represented that consumers would receive the goods or cash for free when this may not be the case as the consumer was paying a higher monthly fee than it would under other plans sold by Dodo. Relevantly, Dodo offered other cheaper mobile cap plans (that did not include free goods or cash) that were comparable with the Free Offer Plans with respect to the value and services included. The monthly fee for those comparable plans was, in some cases, alleged to be up to \$30 per month lower.

The ACCC also raised concerns about representations Dodo had made to customers who had purchased handsets and other hardware outright to the effect that no refunds would be given on purchases and that faulty handsets would not be replaced after 14 days. The ACCC considered that these statements were likely to mislead consumers as to their statutory rights to refunds for faulty products.

In resolution of the its concerns, the ACCC accepted a court-enforceable undertaking from Dodo. Under that undertaking , Dodo is required to:

- write to the consumers affected by the conduct;
- pay refunds to consumers for the higher monthly fee they paid under the Free Offer Plans;
- reduce the monthly fee for the Free Offer Plans; and
- implement and maintain a revised trade practices compliance program.

Conclusion

The recent focus by the ACCC on advertising practices in the telecommunications industry has highlighted the importance of industry participants understanding and complying with consumer protection laws. Although the laws relating to misleading and deceptive conduct have been in place for more than 30 years, the continuing development of new technologies and services emphasises the need for renewed focus on the application of these laws. Industry participants should also be aware of the recent changes to the component pricing laws mentioned above and ensure that their advertising practices comply with those provisions.

In addition to these developments, companies should be aware that there are also planned reforms to Australian consumer law , in particular to address concerns about potentially unfair terms in standard-form consumer contracts.

Baker & McKenzie currently works with many of its clients (including those in the telecommunications industry) in assisting them to comply with consumer protection laws (including in developing compliance programs) and to understand related new developments. Please contact any of the persons listed on the front page if you would like further information.