

ACCC secures court enforceable undertakings from Telstra, Optus and Vodafone to change industry advertising practices

In a move which has the potential to change the face of advertising in the Australian telecommunications industry, on 14 September 2009 the Australian Competition and Consumer Commission (ACCC) accepted court enforceable undertakings pursuant to section 87B of the *Trade Practices Act (TPA)* from the 3 major telecommunications carriers, Telstra, Optus and Vodafone (now VHA) (and their subsidiaries).

Not only are the undertakings a significant step for the telecommunications industry, they also demonstrate that the ACCC is prepared to use all the weapons in its armoury to effect changes to practices which it regards as being a breach of the TPA. This is nowhere more apparent than in clause 30 of the undertakings in which Telstra, Optus and VHA explain the purpose for their provision of the undertakings as being:

“In recognition of their position as market leaders in the telecommunications industry in Australia, and in order to set a new industry benchmark for ‘truth in advertising’ going forward...”

What advertising practices are covered by the undertakings?

There are 12 advertising practices which are the subject of the undertakings but, in an important rider on the undertakings, those practices are only subject to the undertakings where, in all the circumstances, the advertising is misleading and deceptive, likely to mislead or deceive or involve the making of false representations. The practices are:

1. using **headline representations as to price or offer** in circumstances where the overall impression of the price or offer is subsequently qualified by fine print terms and conditions that make it unlikely or impossible that a consumer, by the ordinary use of their service, could reasonably achieve the benefits offered in the headline representation;
2. using the term **‘unlimited’** in an unqualified manner when referring to usage, unless the ordinary use of the service in Australia is genuinely unlimited and not subject to exclusions including exclusions for various types of calls or usage, or selected part of the network;
3. using the terms **‘no exceptions’** or **‘no exclusions’** or **‘no catches’** without sufficient disclosure when referring to a price or service offer, unless there are genuinely no exceptions to the offer;
4. using the term **‘free’** to promote or advertise a handset or other hardware product or service unless the cost of the handset or other hardware product or service is not recovered from the consumer over the life of the contract by way of higher costs including by way of higher call charges, higher network access fees, higher early termination fees or higher unlock fees compared to the costs that would be payable by the consumer over the life of the contract were the handset or other hardware product or service not provided free of charge;
5. using headline representations as to a **price per minute** for mobile phone calls or calls made using phone cards in circumstances where there is insufficient disclosure of extra charges including flag fall or call connection fees or for non-standard calls;
6. using headline representations as to price for a particular product or service unless that product or service is available for purchase at the advertised price without being part of a

bundled product or service, or the advertised price is clearly identified as the price for that product or service when purchased as part of a bundled product or service;

7. using headline representations as to price for **phone plans** unless any exclusions are prominently stated;
8. using unqualified headline representations as to ongoing **prices for specified data allowances** in circumstances where the price for that data is likely to increase within a reasonable use period;
9. using headline representations as to the minutes of call time available on **phone cards** unless those minutes can be achieved by consumers with ordinary use of the card;
10. advertising or promoting headline **broadband speeds** unless those speeds are or will be generally available to consumers on the network on a regular basis;
11. advertising or promoting **network coverage** unless the network coverage is available to consumers throughout the claimed coverage area on a regular basis; and
12. advertising or promoting a periodic price to be paid for a product or service without also stating, in a prominent way (but not necessarily as prominent as the periodic price) and as a single figure, the **full minimum quantifiable price** payable by a consumer for a product or service over the term of the contract which is subject of the promotion.

What have Telstra, Optus and VHA undertaken to do?

Among other things the three carriers have undertaken to immediately stop creating any new advertising using the practices identified above, to review all current advertising and to cease using such advertising by 13 November 2009. Any party controlled by any of the carriers or with whom they have commercial agreements which allow them to control advertising and promotion of their goods and services will also fall within the scope of the undertakings.

What will be the likely impact of the undertakings?

On one view of it, nothing much changes by the giving of these undertakings. The undertakings simply reflect what is the law – advertising which is misleading and deceptive, likely to mislead or deceive or which is false is prohibited by the TPA.

The significance of the undertakings lies in the acknowledgement that the types of practices referred to may give rise to misleading and deceptive conduct and that the 3 major carriers have agreed to review their practices to ensure that they do not engage in such conduct. This will have ramifications not just for those carriers but for the industry generally, as the ACCC has signalled a clamp down on these practices starting with the next layer of carriers. If nothing else, the undertakings provide a very clear roadmap as to what conduct will come under ACCC scrutiny.

It is an entirely appropriate focus for the ACCC to ensure that terms, conditions and pricing elements of access to telecommunications services are readily ascertainable and clearly and unambiguously presented so that consumers can make informed choices. Whether this will be achieved any more effectively by reason of these undertakings remains to be seen.

One thing is certain and that is that the telecommunications industry is a complicated and complex area which is nowhere more apparent than in the advertising and promotion of telecommunications services. Factors such as variability in download speed, cell coverage and average usage will exist regardless of the ACCC's attempts to drive a "*new industry benchmark*". The challenge for the

industry and for the ACCC will be in identifying what aspects of these practices amounts to misleading and deceptive conduct.

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