

CAN HUMOUR DIFFUSE RISK IN COMPARATIVE ADVERTISING?

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Legal Briefings - By **Philippa Bergin-Fisher**

Comparative advertising is generally considered effective but high risk. It is high risk because the party being compared unfavourably may take umbrage and is more likely to challenge, plus the Courts generally expect particular care to be taken in such comparisons. The recent decision of *Telstra v Optus*¹ suggests that injecting humour into comparative advertising may help protect against a finding of misleading or deceptive conduct.

In *Telstra v Optus*, Telstra sought a permanent injunction to stop Optus circulating comparative advertisements like this:



Telstra alleged that the advertisement represented 'there has been a significant and permanent change in the relationship between the Telstra and Optus mobile networks with Optus now undisputedly operating a better mobile network overall than Telstra' (the **Representation**).

According to Telstra, the Representation was incorrect. The P3 study referred to in the advertisement was an annual study that found Optus scored higher than Telstra in the voice category, and Telstra scored higher than Optus in the data category. The overall results put Optus only three points ahead of Telstra out of a possible 1000 points.

The Court first identified the class of consumers who were likely to receive the advertisement as 'potential purchasers of mobile telephone services in Australia'. Although this class encompasses a broad cross-section of the Australian public, the Court attributed a degree of savvy to the reasonable members of this class by finding they would:

- know that there are three major players in the market (Telstra, Optus and Vodafone) and

that the market is highly competitive; and

- be aware of Telstra's own advertising, in which Telstra makes performance claims and says it has the 'best' mobile network.

Given this background knowledge and the use of humour in the advertisement, the Court found that the Representation was not conveyed. In fact, according to the Court:

'It would be fanciful to imagine that the humorous image of a Telstra phone box in a desert landscape would persuade a reasonable person that Telstra's strong position in the market has been permanently destroyed.'

But what about the reference to the P3 report? The Court accepted that the reference to the P3 report gave the advertisement a legitimising air. However this reference to a 'single report, the name and pedigree of which is unlikely to be widely recognised' was not enough to convey the Representation to a reasonable person.

It is interesting that, in this case, the use of humour was found to detract from consumers taking the advertisement literally. This is consistent with other case law - for example, when Samsung sued LG about a series of satirical advertisements for 3D televisions, the Court held that 'ordinary and reasonable viewers will make significant allowance for what is readily discernible as exaggeration and parody aimed at making the TVCs entertaining and engaging'. It appears that, in the Courts' view, comparative advertising is less likely to be found misleading if humour is incorporated.

However each case will depend on its facts, and it seems open to argue in other cases that the reverse is true; that humour is interpreted by the consumer as a way of identifying and magnifying the truth.

ENDNOTES

1. *Telstra Corporation Ltd v Singtel Optus Pty Ltd (No 2)* [2018] VSC 280.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



SUE GILCHRIST
PARTNER AND HEAD
OF INTELLECTUAL
PROPERTY,
AUSTRALIA, SYDNEY
+61 2 9225 5221
Sue.Gilchrist@hsf.com

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