

CASE NOTE

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION v TPG INTERNET PTY LTD;*
FORREST v AUSTRALIAN SECURITIES
AND INVESTMENTS COMMISSION****

**MISLEADING CONDUCT ARISING FROM PUBLIC
STATEMENTS: ESTABLISHING THE KNOWLEDGE
BASE OF THE TARGET AUDIENCE**

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Despite the very substantial body of primary sources and secondary literature on Australia's much-litigated statutory provisions proscribing misleading or deceptive conduct, the courts have provided little in the way of assistance about how to establish the knowledge base of the target audience at whom the public statement was directed. The purpose of this case note is to compare and contrast two recent decisions of the High Court of Australia that highlight the difficulties faced by applicants in attempting to establish a contravention of the relevant legislation where conduct is directed at a segment of the public or the public as a whole.

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* (2013) 304 ALR 186.

** (2012) 247 CLR 486.

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I INTRODUCTION

Section 52 of the *Trade Practices Act 1974* (Cth) ('TPA') contained a prohibition of conduct in trade or commerce that was 'misleading or deceptive or [was] likely to mislead or deceive'. It provided the basis for a statutory cause of action for damages. It has been replaced by s 18 of the *Australian Consumer Law* ('ACL'). The ACL is located in sch 2 of the *Competition and Consumer Act 2010* (Cth). The legislative transition from the TPA to the ACL came about as a result of a desire to bring together in one place the consumer protection provisions of the former TPA and to have a single national generic consumer law that applies uniformly in all jurisdictions — Commonwealth, states and territories.¹ The catalyst for the ACL reforms was the two studies completed by the Productivity Commission: the 2006 report, *Review of the Australian Consumer Product Safety System*,² and the 2008 report, *Review of Australia's Consumer Policy Framework*.³

Section 52 of the TPA was the model for s 1041H of the *Corporations Act 2001* (Cth) ('Corporations Act').⁴ To determine whether conduct is misleading for the purposes of s 1041H, the courts apply the same principles that were

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6981 (Craig Emerson). The first stage of the ACL reforms, the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), was passed on 17 March 2010. The second stage of the ACL reforms, the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), was passed on 24 June 2010. For a consideration of the background and context of the reforms, see Luke Nottage and Justin Malbon, 'Introduction' in Justin Malbon and Luke Nottage (eds), *Consumer Law & Policy in Australia & New Zealand* (Federation Press, 2013) 1.

² Productivity Commission, 'Review of the Australian Consumer Product Safety System' (Research Report, 16 January 2006).

³ Productivity Commission, 'Review of Australia's Consumer Policy Framework' (Inquiry Report No 45, 30 April 2008).

⁴ *Forrest v Australian Securities and Investment Commission* (2012) 247 CLR 486, 522 [94], 525–6 [103] (Heydon J). See also Explanatory Memorandum, Corporations Bill 1988 (Cth) 724 [2961].

applied in relation to s 52 of the *TPA*, and now apply in relation to s 18 of the *ACL*.⁵ Section 52 of the *TPA* was also the model for s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'),⁶ which prohibits misleading or deceptive conduct in relation to financial services or financial products. Parliament did not define the term 'misleading or deceptive conduct' in s 52 of the *TPA*, and it is not defined for the purposes of s 18 of the *ACL*, s 1041H of the *Corporations Act* or s 12DA of the *ASIC Act*. In the absence of a statutory definition, the scope of the concept and the level of protection it affords are left to the judiciary. In 1993, Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* observed:

the evident purpose and policy underlying Pt V [of the *TPA*], which includes s 52, recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.⁷

There are limits to the scope of the protection available. In 1982 the High Court determined that s 52 did not protect the unusually stupid or obtuse, or those who did not take reasonable steps to protect their own interests. These principles were established in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* ('*Parkdale*'). In that case, Gibbs CJ held:

Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion by [sic] regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.⁸

⁵ See, eg, *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] ATPR ¶42-000, 48 714-15 [18]-[19] (Dowsett J), citing *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 81-7 [92]-[106] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

⁶ Section 12DA was inserted in 1998 by the *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth). It was enacted following the Wallis Inquiry's recommendation that consumer protection provisions analogous to those in the *TPA* should be applied to the financial services sector: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 1998, 5160 (Peter Costello).

⁷ (1993) 42 FCR 470, 503.

⁸ (1982) 149 CLR 191, 199. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 371 [22] (French CJ and Kiefel J).

These principles were subsequently confirmed by the High Court in *Campomar Sociedad Limitada v Nike International Ltd* ('Campomar'):

It is in these cases of representations to the public ... that there enter the 'ordinary' or 'reasonable' members of the class of prospective purchasers. Although a class of consumers may be expected to include a wide range of persons, in isolating the 'ordinary' or 'reasonable' members of that class, there is an objective attribution of certain characteristics.⁹

The High Court then stated:

Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class.¹⁰

According to this approach it is necessary to consider the message that was conveyed by the public statement to a reasonable member of the target audience. The test is a highly flexible one. The ordinary or reasonable consumer does not exist in the abstract, but depends on the specific context in which the public statement was made. It is open to widely differing views about the relevant target audience, and the level of knowledge to be imputed to a reasonable member of that target audience. The level of knowledge to be imputed to a reasonable member of the pleaded target audience will be crucial for the obvious reason that the more sophisticated and knowledgeable the audience, the more difficult it will be to prove that a reasonable member of that audience would be likely to be misled or deceived by the statement at issue.

Despite the very substantial body of primary sources and secondary literature on Australia's much-litigated statutory provisions proscribing misleading or deceptive conduct, the courts have provided little in the way of assistance about how to establish the knowledge base of the target audience at whom the public statement was directed. The purpose of this case note is to compare and contrast two recent decisions of the High Court of Australia that highlight the difficulties faced by applicants in attempting to establish a contravention of the relevant legislation where conduct is directed at a segment of the public or the public as a whole.

⁹ (2000) 202 CLR 45, 85 [102] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (citations omitted).

¹⁰ *Ibid* 85 [103].

In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* ('ACCC v TPG'),¹¹ the Australian Competition and Consumer Commission ('ACCC') was successful in the Federal Court at first instance, with the primary judge finding that an ordinary or reasonable member of the target audience would not have assumed that ADSL2+ services were bundled when this was not immediately apparent, and that the 'dominant message' of the advertisements was that the entire cost of the service was only \$29.99 per month.¹² The ACCC lost an appeal by TPG Internet Pty Ltd ('TPG') to the Full Federal Court. The Full Federal Court held that a reasonable consumer would have read the advertisement in its entirety, not just the dominant message, and that the bundling condition could not have been missed except on a 'perfunctory' viewing or listening.¹³ The High Court majority upheld the ACCC's appeal and agreed with the primary judge that TPG's advertising stratagems were misleading.¹⁴

In the second case, *Forrest v Australian Securities and Investment Commission* ('*Forrest v ASIC*'), the issue was whether Fortescue Metals Group Ltd ('FMG') and its Chief Executive Officer, Mr Forrest, had contravened s 1041H of the *Corporations Act*, by announcing to investors and potential investors in FMG shares in emphatic, unequivocal and unqualified terms that FMG had entered into 'binding contracts' with Chinese state-owned entities, when, in fact, the contracts were not legally binding.¹⁵ At first instance, Forrest and FMG were successful in the Federal Court,¹⁶ but lost an appeal by the Australian Securities and Investments Commission ('ASIC') to the Full Federal Court, which unanimously upheld the appeal.¹⁷ On a further appeal, the High Court unanimously found that FMG and Forrest had not engaged in misleading or deceptive conduct.¹⁸

In comparing and contrasting these two cases, attention will focus on:

¹¹ (2013) 304 ALR 186.

¹² *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR ¶42-383.

¹³ *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277.

¹⁴ *ACCC v TPG* (2013) 304 ALR 186.

¹⁵ (2012) 247 CLR 486.

¹⁶ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [No 5] (2009) 264 ALR 201.

¹⁷ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364.

¹⁸ *Forrest v ASIC* (2012) 247 CLR 486.

- first, how the relevant target audience was defined and the evidence relied upon in defining it;
- secondly, the level of knowledge imputed to a reasonable member of the target audience, and the evidence relied upon in imputing that level of knowledge; and
- thirdly, the message that was conveyed to a reasonable member of the target audience and the evidence relied upon to determine this.

ACCC v TPG and *Forrest v ASIC* provided the High Court with the opportunity to give some assistance about how to isolate the representative member of the class, which is the essence of the *Campomar* test. The only guidance provided is limited to general statements that it is a matter of drawing inferences from the facts and evidence, but it is not always clear which facts and evidence were relied upon by the Court in reaching its conclusions.

II GENERAL PRINCIPLES

The applicable principles are well settled. The approach adopted in cases involving statements directed at members of the public is first to identify the relevant audience.¹⁹ Then a determination must be made about what the statement conveyed to a hypothetical reasonable member of that target audience.²⁰ Ordinary or reasonable members of the target audience must be led into error, or be likely to be led into error; it is not sufficient that the particular conduct causes, or is likely to cause, confusion.²¹ This is a question of fact to be decided in the particular circumstances of each case.²²

The information may be directed at the public as a whole, or a segment of the public. Statements directed at a smaller, professional target audience arose for consideration in *AstraZeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* (*'AstraZeneca v GSK'*).²³ The advertisements and flyers were placed in *Australian Doctor*, a professional publication directed at general medical

¹⁹ *Weitmann v Katies Ltd* (1977) 29 FLR 336, 339–40 (Franki J), quoted in *Brock v Terrace Times Pty Ltd* (1982) 40 ALR 97, 99 (Bowen CJ and Franki J).

²⁰ *Campomar* (2000) 202 CLR 45, 84–5 [101]–[103] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Parkdale* (1982) 149 CLR 191, 199 (Gibbs CJ), 210–11 (Mason J).

²¹ *Campomar* (2000) 202 CLR 45, 87 [106] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Parkdale* (1982) 149 CLR 191, 198 (Gibbs CJ), 210–11 (Mason J).

²² *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2004) 208 ALR 459, 475 [49] (Gyles J) (*'ACCC v Telstra'*).

²³ [2006] ATPR ¶42-106.

practitioners by GlaxoSmithKline Australia Pty Ltd ('GSK') to promote the prescription by general practitioners of GSK's drug, Seretide. GSK claimed that virtually all or a majority of asthma patients would achieve total control of their symptoms if Seretide were prescribed.²⁴ The flyers and the advertisements were headed 'Seretide TOTAL CONTROL*'. The asterisk referred to the findings of 'The Gaining Optimal Asthma Control Study' ('GOAL study'), according to which only 41 per cent of patients achieved total control and 71 per cent achieved substantial relief from using Seretide.²⁵ The appellant, another pharmaceutical company, took exception to the representations made in the advertisements. The primary judge dismissed the appellant's application.²⁶ While the GOAL study did not include patients with significant concomitant diseases, smokers and patients under 12 years of age, the advertisements did not claim that the GOAL study patients were a representative sample of asthma patients.²⁷

The Full Court held that the representations contained in the advertisements and flyers 'were not made to identified individuals, nor were they made to the public at large'.²⁸ The section of the community towards whom the conduct had been directed was the community of general practitioners throughout Australia:

The task of the Court is to determine whether any misconceptions or deceptions alleged to arise or to be likely to arise from the conduct complained of are properly to be attributed to the ordinary or reasonable members of the section of the community towards whom the conduct has been directed. The Court may disregard assumptions drawn by persons to whom the conduct is directed, where those assumptions or their reactions are extreme or fanciful.²⁹

'Seretide TOTAL CONTROL' was nothing more than an alternative brand name and the 'elucidator'³⁰ was effective to clarify the extent of the control

²⁴ See *AstraZeneca v GSK* [2006] ATPR ¶42-106, 44 881-8 [13] (Wilcox, Bennett and Graham JJ).

²⁵ *Ibid* 44 880 [8], quoting Eric D Bateman et al, 'Can Guideline-Defined Asthma Control Be Achieved? The Gaining Optimal Asthma Control Study' (2004) 170 *American Journal of Respiratory and Critical Care Medicine* 836, 836.

²⁶ *AstraZeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* [2005] FCA 1645 (16 November 2005).

²⁷ *AstraZeneca v GSK* [2006] ATPR ¶42-106, 44 892 [48] (Wilcox, Bennett and Graham JJ).

²⁸ *Ibid* 44 891 [35].

²⁹ *Ibid* 44 891 [37] (citations omitted).

³⁰ This is how the Court described the footnote, distinguishing it from a disclaimer: *ibid* 44 888 [19].

that was achievable using Seretide. After carefully considering each of the advertisements and flyers in their entirety, the Full Court agreed with the primary judge that they were not misleading. None of the advertisements or flyers represented that the GOAL study patients were representative of the community at large: ‘the several footnotes clearly indicated that the study was based upon the observations of “3416 patients with uncontrolled asthma” and no more.’³¹

The use of an elucidator to clarify a bold headline statement in an advertisement was also at issue in *George Weston Foods Ltd v Goodman Fielder Ltd*.³² Bread packaging declared in large typeface: ‘Now Twice the Fibre*’. As regards the target audience, Moore J concluded:

The broadest description of the class is consumers of bread. However, in my opinion, the relevant class can more appropriately be described as consumers of bread who have some interest in the fibre content of bread.³³

Moore J held that an asterisk can be sufficient to draw the attention of a consumer to a qualification of a representation. Moore J observed that

the asterisk is prominent and would be taken to signify some qualification or explanation of the words used. One could expect a consumer interested in fibre content to seek out the qualification or explanation. Not only is the explanation within 2 cm of the words on the package (albeit in much smaller type) but it is repeated elsewhere on the packaging.³⁴

The effectiveness of elucidators to clarify a bold headline statement in an advertisement may depend on the medium used to convey the advertisement, and whether it allows a reasonable member of the target audience the opportunity to carefully consider the advertisement in its entirety.

In relation to the facts and evidence that can be relied upon to prove that the provision of incomplete information is likely to mislead or deceive ordinary or reasonable members of the target audience, the Full Federal Court observed in *AstraZeneca v GSK*:

For s 52 of the [TPA] to be enlivened it is sufficient that the conduct complained of, in all the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or is likely to mislead or deceive. It is un-

³¹ Ibid 44 892 [48].

³² (2000) 49 IPR 553.

³³ Ibid 568 [37].

³⁴ Ibid 571–2 [46].

necessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception. That is not to say that evidence of actual misleading or deception and of steps taken in consequence thereof is not likely to be both relevant and important on the question of whether the relevant conduct in fact answers the statutory description and as to the relief, if any, which should be granted.³⁵

In misleading or deceptive conduct cases involving a statement directed towards a specific individual, the court may be assisted by receiving evidence pertaining to this issue from that person. Similarly, where the statement was directed towards a target audience of prospective purchasers, evidence of this nature may be given by members of that audience.

For example, in *National Exchange Pty Ltd v Australian Securities and Investments Commission* ('*National Exchange v ASIC*'),³⁶ ASIC led evidence concerning the reactions of shareholders to the two dollar offers, two of whom were confused or misled at least temporarily.³⁷ As regards this evidence, Dowsett J stated:

There is evidence that both Mr Locke and Ms Normoyle were at least temporarily misled by the offer. It is not clear whether this was as a result of the impact upon them of the format of the offer or as a result of their not giving sufficient attention to the payment provision. It would be wrong to place great weight on their having been misled. Further, there is no evidence of any substantial number of people having been misled [sic].³⁸

If evidence is led that members of the target audience have actually been misled by the public statement, the task of the court is to ascertain whether they were 'reasonable' members of the target audience, or whether they were misled because they made assumptions that were extreme or fanciful.³⁹

³⁵ *AstraZeneca v GSK* [2006] ATPR ¶42-106, 44 890 [33] (Wilcox, Bennett and Graham JJ), citing *Taco Bell Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 199 (Deane and Fitzgerald JJ).

³⁶ [2004] ATPR ¶42-000.

³⁷ ASIC led evidence that a third shareholder had also been confused or misled: *ibid* 48 712 [7] (Dowsett J). However, Dowsett J considered that it would be unfair to give that evidence any weight due to its ambiguity: at 48 716 [29].

³⁸ *Ibid* 48 719 [41].

³⁹ *AstraZeneca v GSK* [2006] ATPR ¶42-106, 44 891 [37] (Wilcox, Bennett and Graham JJ), citing *Campomar* (2000) 202 CLR 45, 85-6 [104]-[105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

As regards the message conveyed to a reasonable member of the target audience, the High Court held in *Campomar* that where there is an intention to deceive, ‘the court may more readily infer that the intention has been or in all probability will be effective.’⁴⁰

III *ACCC v TPG*

The advertising stratagem deployed by TPG was to adopt a bold headline statement that was very attractive in terms of price and hooked prospective consumers, but which was qualified by small print. In such circumstances the courts adopt a two-stage approach. The first stage is to identify what representations are made by the advertisement in its dominant message to the intended audience, since a consumer may take in only the advertisement’s general thrust. The second stage is to determine whether the corrective information was sufficiently prominent to dispel the false dominant message. There was considerable support for this two-stage approach in cases decided prior to *ACCC v TPG*.⁴¹

At first instance, Murphy J had to consider whether TPG had misled or deceived consumers in advertisements for its Unlimited ADSL2+ broadband internet service.⁴² TPG was an internet service provider which made available a range of internet products to residential customers across Australia,

⁴⁰ (2000) 202 CLR 45, 63 [33] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). This principle has been applied in subsequent cases: see, eg, *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd [No 3]* (2010) 276 ALR 102, 107–8 [15]–[17], where Perram J inferred that Optus intended its misleading advertising campaign to have a substantial impact in the broadband market, based on the amount of money which Optus spent on the campaign, and concluded that the effect of the campaign was substantial.

⁴¹ See *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] ATPR ¶41-908, 46 538–9 [26]–[27] (Stone J); *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17–18 [35]–[39] (Stone J), with whom Mansfield J agreed: at 11 [17]. Both of these cases are authority for the principle that the qualifying material must be sufficiently prominent or conspicuous to prevent the headline statement from being misleading. See also *ACCC v Telstra* (2004) 208 ALR 459, 475–8 [49]–[62] (Gyles J); *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177 (29 October 2010) [28]–[29] (Perram J); *National Exchange v ASIC* [2004] ATPR ¶42-000, 48 724–5 [48]–[59] (Jacobson and Bennett JJ); *Australian Competition and Consumer Commission v Panasonic Australia Pty Ltd* (2010) 269 ALR 622, 631–4 [43]–[58], where Mansfield J held that it was misleading to publish promotional material informing the purchasers of television sets that they would receive a ‘Bonus Wii’, but failed to convey the fact that matters outside the control of the purchaser (such as the delivery time for televisions paid for at a retail store) could disqualify the purchaser from receiving the Bonus Wii.

⁴² *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR ¶42-383.

including the Unlimited ADSL2+ service. The ADSL2+ service was available from TPG or its competitors in a variety of different forms. It was available as part of a ‘bundled’ package with a home telephone, ‘naked’, which requires a landline to be present but not connected, or on a ‘stand alone’ basis, which means that it was provided using a telephone line rented from another provider.⁴³

The ACCC alleged that TPG’s advertising campaign across various media was misleading or deceptive because it represented that the Unlimited ADSL2+ service could be acquired at a cost of \$29.99 per month without obligation to acquire an additional home telephone service and without obligation to pay any monthly charges or set-up charges.⁴⁴ The ACCC’s case concerned two phases in TPG’s advertising campaign: the *initial advertisements* before the ACCC’s intervention which made no reference to the bundling condition of renting a home telephone line from TPG at an additional cost of \$30 per month, and the *revised advertisements* which were altered by TPG, after receiving complaints from the ACCC, to include a reference to the bundling condition.

A *Reasons of the Primary Judge*

TPG’s advertisements were directed at the broad class of Australian consumers around mainland capitals who were users or potential users of broadband internet services.⁴⁵ The members of this target audience had a certain degree of background knowledge about basic internet usage.⁴⁶ They knew that ADSL2+ was a broadband internet service. The class did not include people who knew little or nothing about such services.⁴⁷ They included first-time as well as more experienced users, since some first-time users were likely to purchase Unlimited ADSL2+ even if unsure as to how much download capacity they needed.⁴⁸

The parties made various submissions as to the knowledge of the target audience with regard to broadband internet services. TPG’s General Manager for Consumer Products, Marketing and Sales, Mr Levy, gave evidence

⁴³ Ibid 44 687 [32].

⁴⁴ Ibid 44 683 [6]–[7].

⁴⁵ Ibid 44 685 [23].

⁴⁶ Ibid 44 686 [30].

⁴⁷ Ibid 44 686 [27].

⁴⁸ Ibid 44 686 [29].

concerning what members of the target audience knew about available broadband internet services. However, while Mr Levy was knowledgeable about the offerings of TPG's competitors, he did not conduct surveys or market research about the level of knowledge consumers had about available broadband internet services. Accordingly, Murphy J did not afford his views much weight in relation to the knowledge of the target audience about broadband internet services.⁴⁹

Murphy J stated that '[t]he degree of knowledge to be imputed to the class, and thus to the ordinary or reasonable consumer, is a matter of inference from the evidence'.⁵⁰ Based on the available evidence, Murphy J found that the level of knowledge to be imputed to the target audience included knowledge that ADSL2+ was 'a faster and more desirable form of service than ADSL1 or dial-up internet', but this did not 'impute a high level of knowledge about broadband internet'.⁵¹ TPG contended that the ordinary or reasonable consumer would have a starting assumption that the advertisements referred to a bundled service. Murphy J did not accept the hypothetical reasonable consumer would have made this assumption. His Honour held:

In my view, whilst bundling is one available option, the array of available internet options is such that the ordinary or reasonable consumer would not have a starting assumption about the service. He or she can be expected to simply rely on the advertisement for relevant information as to the type of service offered.⁵²

Murphy J adopted the two-stage approach to determine how a reasonable member of the target audience would have understood the advertisements. First, Murphy J sought to establish whether each advertisement in the different media had the same dominant message; and secondly, to determine whether this corrective information was sufficiently prominent to dispel the false dominant message. As regards the first stage his Honour stated: 'Identifying the dominant message is an important first step in determining what representations are made by an advertisement, as a consumer may take in only this general thrust'.⁵³ In relation to TPG's *initial television advertisement*, Murphy J found that television advertisements 'are transient, and consumers

⁴⁹ Ibid 44 686 [26].

⁵⁰ Ibid 44 686 [25].

⁵¹ Ibid 44 686 [28].

⁵² Ibid 44 686 [31].

⁵³ Ibid 44 688 [43].

frequently pay them low attention.⁵⁴ The advertisement consisted of a voice over by an excited young female voice which stated: ‘TPG gives you Unlimited ADSL2+ for \$29.99 a month. Yep, unlimited ADSL2+ for \$29.99 a month.’⁵⁵

The voice over, which was the most important part of the advertisement, did not mention at all the requirement to bundle Unlimited ADSL2+ with a home telephone line rental from TPG at an additional cost of \$30 per month and to pay a set-up fee. TPG contended that the voice over was accompanied by the following qualifying information on-screen: ‘When bundled with TPG home phone line rental (\$30 per month).’⁵⁶

The second stage in Murphy J’s analysis was to determine whether this corrective information was sufficiently prominent to dispel the false dominant message in the voice over. Murphy J stated: ‘Any purported corrective or qualifying information must be sufficiently clear and sufficiently prominent if it is to prevent an inaccurate primary message from being misleading or likely to mislead.’⁵⁷

Murphy J concluded that both the voice over and the main on-screen words and graphics stated the dominant message with a prominence that far outweighed the corrective information.⁵⁸

As regards TPG’s *revised television advertisement*, the voice over and the main on-screen words and graphics were essentially the same as the initial one except that the corrective information was in a larger font that made it more noticeable. Nevertheless, Murphy J found that the voice over did not mention the bundling condition and, although the corrective information was in larger font, it was still not clear enough or prominent enough to correct the false impression left by the dominant message.⁵⁹

⁵⁴ Ibid 44 690 [65], citing *Telstra Corporation Ltd v Optus Communications Pty Ltd* (1996) 36 IPR 515, 523–4 (Merkel J) and *Australian Competition and Consumer Commission v Global One Mobile Entertainment Ltd* [2011] FCA 393 (21 April 2011) [53] (Bennett J).

⁵⁵ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR ¶42-383, 44 688 [44] (Murphy J).

⁵⁶ Ibid 44 690 [66].

⁵⁷ Ibid 44 689 [58], citing *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J), *National Exchange v ASIC* [2004] ATPR ¶42-000, 48 724 [51] (Jacobson and Bennett JJ), *Singtel Optus Pty Ltd v Telstra Corporation Ltd* [2004] FCA 859 (6 July 2004) [41] (Jacobson J) and *Australian Competition and Consumer Commission v Global One Mobile Entertainment Ltd* [2011] FCA 393 (21 April 2011) [50] (Bennett J).

⁵⁸ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR ¶42-383, 44 690–1 [67].

⁵⁹ Ibid 44 691 [73].

Similarly, TPG's radio, newspaper and internet advertisements for its Unlimited ADSL2+ broadband internet service used between September 2010 and November 2011 were found to be misleading because they conveyed the impression that the service could be acquired at a cost of \$29.99 a month when, in fact, that price was only available as a bundled service including a home telephone line for an additional charge of \$30 per month.⁶⁰

His Honour concluded:

I am satisfied that the choice TPG made in its advertisements — particularly its decision to strongly emphasise the component price of \$29.99 and to de-emphasise the actual price of \$59.99 and the requirement to also rent a home telephone line — is an unfair trade practice. It is an unfair trade practice to require consumers to find their way through to the truth past advertising stratagems which have the effect of misleading or being likely to mislead them.⁶¹

B *Reasons of the Full Court*

The Full Court (Jacobson, Bennett and Gilmour JJ) rejected the primary judge's two-stage approach of first identifying the dominant message and then examining whether the corrective information was effective to dispel the false dominant message. In their joint reasons, their Honours stated that there was only one question, and that was 'whether ... the ordinary or reasonable consumer would be led into error by the advertisements, read or viewed as a whole, in their full context'.⁶²

The Full Court overturned the primary judge's finding that an ordinary or reasonable consumer would not have a starting assumption that the service was offered for sale as a bundle. According to the Full Court, consumers to whom the advertisements were directed must be taken to have had some familiarity with the market for broadband services and to know that services such as ADSL2+ may be offered for sale as bundled services.⁶³ It held that the primary judge's emphasis on the dominant message led him into error:

to approach the question as one based solely upon the 'dominant message' does not take into account the need to have regard to the attributes of the hypothetical reader or viewer. As we have said, these attributes include knowledge of the

⁶⁰ Ibid 44 692–4 [81]–[92].

⁶¹ Ibid 44 697 [116].

⁶² *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277, 289 [100]; see also at 289 [103].

⁶³ Ibid 288 [98].

‘bundling’ method of sale commonly employed with this type of service, as well as knowledge that set-up charges are often applied.

This is the prism through which the critical question of the overall impact of the commercials on the ordinary and reasonable consumer must be considered. It produces a different answer to that reached by the primary judge in almost all of the advertisements because the consumer must be taken to have read or viewed the advertisements with knowledge of the commercial practices of bundling and set-up charges.⁶⁴

The Full Court held that as regards the *initial television advertisement*, Murphy J had erred by not paying sufficient attention to the attributes of the hypothetical reader or viewer, which included knowledge of the ‘bundling’ method of sale commonly employed with this type of service, as well as knowledge that set-up charges are often applied. The Full Court concluded:

Once the attributes of the hypothetical ordinary or reasonable viewer are taken into account, we doubt that such a person would be misled. As we have said, that person is taken to know that the service may be offered as bundled with another and that some form of connection is required to receive the service. He or she is also taken to know that set-up charges are often made.

Nevertheless, we accept that the matter may be one of fact and degree, so that in considering the fleeting nature of the advertisement, and giving appropriate respect and weight to the primary judge’s finding of fact, we are not convinced he was wrong in coming to the view that the advertisement was misleading.⁶⁵

However, having regard to this more sophisticated hypothetical ‘ordinary’ viewer, the *revised television advertisement* was not misleading. The larger font in which the bundling condition and the minimum charge were depicted could not be missed.⁶⁶ Nor were the advertisements in the other media. An ordinary or reasonable consumer would have known that these services are commonly bundled and that set-up charges are often applied. The Full Federal Court observed that in assessing the impact of an advertisement on a reasonable member of the target audience a ‘degree of robustness is required’ and that ‘[t]he legislation does not operate for the benefit of those who fail to take

⁶⁴ Ibid 289 [105]–[106].

⁶⁵ Ibid 290 [111]–[112].

⁶⁶ Ibid 290 [113].

care of their own interests.⁶⁷ The bundling condition could not be missed except by ‘perfunctory’ viewing or listening.⁶⁸ Alternatively an ordinary or reasonable viewer or listener would know that ADSL2+ services may be offered as a bundle.⁶⁹

C Reasons of the High Court Majority

The High Court majority (French CJ, Crennan, Bell and Keane JJ) held that the Full Court erred in two respects: first, the Full Court erred in holding that the primary judge was wrong to place importance on the dominant message of the advertisements; and secondly, the Full Court erred in considering that the tendency of TPG’s advertisements to mislead was neutralised by the Full Court’s attribution of a higher level of knowledge to members of the target audience that ADSL2+ services may be offered as a bundle.⁷⁰

The High Court emphasised the importance of the context in which the advertisements were broadcast and contrasted it with the context in which the alleged misleading conduct arose in *Parkdale*:

TPG’s target audience did not consist of potential purchasers focused on the subject matter of their purchase in the calm of the showroom to which they had come with a substantial purchase in mind. Here, the advertisements were an unbidden intrusion on the consciousness of the target audience. ... [W]hile the attention of the audience might have been arrested, it cannot have been expected to pay close attention to the advertisement ...⁷¹

The High Court concluded that even with this attributed level of knowledge of the bundling method of sale, TPG’s advertisements still had a tendency to mislead because the target audience was ‘left only with the general thrust or dominant message’.⁷²

The High Court accepted that viewers cannot realistically be expected to absorb and digest the small print in cases involving bold headline statements

⁶⁷ Ibid 290 [110], citing *Parkdale* (1982) 149 CLR 191, 199 (Gibbs CJ) and *Campomar* (2000) 202 CLR 45, 85 [102] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

⁶⁸ *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277, 290–1 [113]–[124].

⁶⁹ Ibid 290 [114], 290 [116], 290 [118], 291 [119].

⁷⁰ *ACCC v TPG* (2013) 304 ALR 186, 195 [45].

⁷¹ Ibid 196 [47].

⁷² Ibid 197 [53].

of attractive prices, especially in television advertisements where the opportunity to do so is fleeting. The High Court majority observed:

As the primary judge said, the vice of TPG's advertisements was that they required 'consumers to find their way through to the truth past advertising stratagems which have the effect of misleading or being likely to mislead them.'⁷³

The High Court held that TPG intended to emphasise the most attractive component of its offer and to downplay the less attractive components, rather than give equal prominence to each component of the package. In such circumstances it may properly be inferred that the advertisement had the effect of leaving the target audience with the general thrust or dominant message.

The High Court stated:

It has long been recognised that, where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect. Such an inference may be drawn more readily where the business of the representor is to make such representations and where the representor's business benefits from creating such an impression. ...

It cannot be denied that the terms of the message and the manner in which it was conveyed were such that the impression TPG intended to create was distinctly not that which would have been produced by an advertisement which gave equal prominence to all the elements of the package it was offering to the public. In this regard, it is significant that, as the primary judge noted, TPG considered deploying just such an advertisement and chose not to adopt it, evidently opting to continue with its headline strategy.⁷⁴

D *Dissenting Judgment of Gageler J*

The ACCC argued that the Full Court, in exercising its appellate function, had no basis to overturn a finding of fact by the trial judge that the fine print was not sufficient to dispel the 'dominant message' conveyed by the headline in the advertisements.⁷⁵ The High Court majority held that it was not open to the

⁷³ Ibid 197–8 [54], quoting *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] ATPR ¶42-383, 44 697 [116] (Murphy J).

⁷⁴ *ACCC v TPG* (2013) 304 ALR 186, 198 [55], 198 [57] (citations omitted).

⁷⁵ Ibid 188 [7] (French CJ, Crennan, Bell and Keane JJ).

Full Court, in the proper exercise of its appellate function, to hold that TPG's advertisements were not misleading.⁷⁶

Gageler J, in his dissenting reasons for judgment, stated that the question whether the TPG advertisements were likely to lead the ordinary or reasonable member of the target audience into error was a question of fact, and that the Full Court did not err in the exercise of its appellate function in making a finding of fact.⁷⁷ The question of fact as framed by the Full Court was not whether the fine print was sufficient to dispel the dominant message of the headline statement, but whether the ordinary or reasonable consumer of broadband internet services, looking at the whole of the advertisement, would be likely to have been misled.⁷⁸

His Honour stated:

the essential difference between the Full Court and the primary judge concerned the level of sophistication each attributed to the ordinary and reasonable consumer or potential consumer of broadband internet services during the period of TPG's advertising campaign in 2010 and 2011.

The Full Court considered that an ordinary consumer of broadband internet services who was sufficiently aware of DSL broadband internet services potentially to be misled by those advertisements would also be aware that DSL broadband internet services were often bundled with home telephone line rental and commonly had a setup fee. The consumer would not form an impression, merely from a headline reference to 'Unlimited ADSL2+ \$29.99 per month', that what was being advertised was a stand-alone DSL service for a stand-alone price of \$29.99 per month. The consumer would look to the whole of the advertisement in the first place.⁷⁹

IV *FORREST v ASIC*

The prohibition on misleading or deceptive conduct in the *Corporations Act* is aimed at investor protection rather than consumer protection. Section 1041H of the *Corporations Act* deals with misleading or deceptive conduct in connection with any dealings in securities by a person. Section 1041H(1) of the *Corporations Act* provides: 'A person must not, in this jurisdiction, engage

⁷⁶ Ibid 198 [58].

⁷⁷ Ibid 200 [73], 201 [78].

⁷⁸ Ibid 201 [78].

⁷⁹ Ibid 201 [75]–[76].

in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive’.

Listed disclosing entities are required to provide information to the Australian Securities Exchange (‘ASX’) pursuant to their continuous disclosure obligations contained in s 674(2) of the *Corporations Act*, namely information that a reasonable person would expect, if it were generally available, to have a material effect on the price of the entity’s securities. ASIC closely scrutinises announcements to the market to ensure that they are not misleading.

Forrest v ASIC concerned representations by FMG and Forrest made in announcements to the ASX and media releases to investors and potential investors about the content of documents signed by FMG.⁸⁰ FMG had rights to mine iron ore in the Pilbara region of Western Australia. It developed a plan to build a railway to transport the ore to Port Hedland and build a port facility there. In 2004 FMG entered into agreements with three Chinese state-owned entities, China Railway Engineering Corporation (‘CREC’), China Harbour Engineering Company (Group) (‘CHEC’), and China Metallurgical Construction (Group) Corporation (‘CMCC’). Each bore the heading ‘Framework Agreement’.⁸¹

On 23 August 2004, the ASX received a letter from FMG’s Chief Financial Officer under the heading ‘China Signs to Build Railway’ (‘the ASX letter’). The key passage in the letter stated:

Fortescue Metals Group Ltd (‘FMG’) is pleased to announce that it has entered into a binding contract with China Railway Engineering Corporation (CREC) to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project.⁸²

FMG also published a longer summary in a media release on its website entitled ‘China Signs to Build Fortescue Metal’s Multi-User Iron Ore Railway in the Pilbara’, which stated that FMG had entered into a ‘binding agreement’ with CREC to build and finance the railway component of the Pilbara Iron Ore and Infrastructure Project (‘the media release’). It also stated: ‘Under the terms of the contract, CREC will take full risk under a fixed price agreement on the rail project.’⁸³

⁸⁰ (2012) 247 CLR 486.

⁸¹ *Ibid* 495 [3] (French CJ, Gummow, Hayne and Kiefel JJ).

⁸² *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 375 [23] (Keane CJ). The letter is set out in full in the judgment of Keane CJ in the Full Federal Court proceedings: at 375–6 [23].

⁸³ *Ibid* 377 [25]. The media release is set out in full in the judgment of Keane CJ: at 376–8 [25].

The information provided to actual and potential investors in FMG shares was incomplete. The actual terms of the CREC Framework Agreement were not disclosed to the public since it was claimed that they were confidential. ASIC drew attention to the statement that the 'terms of the contract' included a 'fixed price' and required CREC to take the 'full risk'. The agreement contained no such terms.⁸⁴ On 23 August 2004, at a press conference, Mr Forrest stated that the 'fixed price agreement' relating to the railway line and rolling stock was 'confidential' but 'competitive'.⁸⁵

A ASIC's Pleadings

ASIC's first principal allegation was that FMG had engaged in misleading or deceptive conduct contrary to s 1041H of the *Corporations Act*. First, it alleged that FMG had falsely represented the content of the CREC Framework Agreement. FMG represented that it had entered into a contract with CREC 'to build and finance' a railway, when the CREC Framework Agreement did not state that CREC would do those things. ASIC submitted that under the CREC Framework Agreement:

- a) CREC was not obliged to actually build or transfer the railway to FMG;
- b) there was no agreed price in the agreement nor any mechanism to achieve or confirm a price;
- c) there was no definition of the scope of the works to be performed;
- d) there was no provision for choice of contractors or the selection of materials;
- e) there was no definition of 'practical completion';
- f) there were no specifications for any design elements of the infrastructure.⁸⁶

ASIC's second principal allegation was that FMG had falsely represented that the CREC Framework Agreement was a legally 'binding contract'.⁸⁷

While ASIC was not required to prove that FMG intended to engage in misleading or deceptive conduct to establish a contravention of s 1041H,

⁸⁴ Ibid 378 [26].

⁸⁵ Ibid 398 [87].

⁸⁶ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [No 5] (2009) 264 ALR 201, 265 [281] (Gilmour J).

⁸⁷ See *ibid*.

ASIC pleaded that FMG and Forrest had intended to mislead investors and potential investors in FMG shares.⁸⁸ The information in FMG's announcements to the ASX was intended to encourage reasonable investors to invest in FMG. They were 'emphatic, unequivocal and unqualified'.⁸⁹ The information provided by FMG was incomplete, and FMG's partial disclosures were misleading by reference to 'a reasonable member of the relevant class, namely, common investors'.⁹⁰

In relation to the ASX letter, ASIC alleged that FMG 'did not have a genuine and/or reasonable basis' for making the statement that the CREC Framework Agreement was a binding contract.⁹¹ ASIC justified the inclusion of this plea on the basis that it anticipated FMG would allege that the impugned statements were expressions of opinion rather than fact. If they were expressions of opinion they would be misleading if they were not genuinely held or, if genuinely held, that there was no reasonable basis for them.⁹²

B *Reasons of the Primary Judge*

The approach adopted by the primary judge, Gilmour J, was to recognise, and give effect to, the fact/opinion distinction in the pre-existing case law.⁹³ The impugned statement that the CREC Framework Agreement was a binding contract to build and finance the railway line was held to be a statement of opinion. The disclosures made by FMG and Forrest constituted mixed fact and law, and the assertion as to the meaning and legal effect of the agreement was an opinion.⁹⁴ Having identified the impugned statement as an opinion, Gilmour J then inquired into the mental state of the maker of the statement to determine whether the opinion was honestly held, and also whether it was reasonable for the maker of the statement to hold that opinion. His Honour stated:

⁸⁸ Ibid 337 [670].

⁸⁹ Ibid 337 [669].

⁹⁰ Ibid 339 [674].

⁹¹ Ibid 216 [60].

⁹² Ibid 213 [42].

⁹³ See, eg, *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ), cited in *Australian Securities and Investment Commission v Fortescue Metals Group Ltd [No 5]* (2009) 264 ALR 201, 341 [682].

⁹⁴ *Australian Securities and Investment Commission v Fortescue Metals Group Ltd [No 5]* (2009) 264 ALR 201, 341 [684].

However the disclosures are characterised, a question as to the reasonableness of the underlying opinion and, in this case, whether or not it was honestly held, arises.⁹⁵

His Honour concluded that

it was reasonable, objectively, for FMG by Forrest and other members of FMG's Board to hold the opinion, which it and they honestly held, that the framework agreements were binding upon each of the Chinese contractors to build, finance and transfer the project infrastructure.⁹⁶

Mr Forrest chose not to give evidence.⁹⁷ Accordingly, he could not be examined as to whether he honestly believed that the framework agreements were binding. However, ASIC submitted that an email dated 27 October 2004 from Forrest to Heyting (FMG's Project Manager of Infrastructure) and Huston (FMG's legal advisor) regarding further negotiations for the execution of a more detailed agreement with CREC ('Advanced Framework Agreement') was evidence that Forrest did not believe that the original CREC Framework Agreement was a binding agreement.⁹⁸ Counsel for ASIC submitted that Forrest knew that without agreement on these additional matters, including a fixed price and performance specifications, there was no binding agreement.⁹⁹ Gilmour J did not explain what he made of this email.

C *Reasons of the Full Court*

Keane CJ, who delivered the principal judgment in the Full Court, was critical of the approach adopted by the trial judge. His Honour stated that an approach which distinguishes between statements of opinion and fact 'artificially limits the protection afforded to the investing public' by the *Corporations Act* because 'a statement presented as a statement of historical fact, could be avoided by the representor on the basis of reservations not apparent to the persons to whom the statement was published'.¹⁰⁰

⁹⁵ Ibid.

⁹⁶ Ibid 341 [686].

⁹⁷ Ibid 221 [85].

⁹⁸ Ibid 297 [455]–[456].

⁹⁹ Ibid 297 [456].

¹⁰⁰ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 406 [116].

All three Justices of the Full Court held that the ‘real question’ in a misleading or deceptive conduct case is not the ‘mental state’ of the maker of the statement, but the effect of a statement upon its audience — whether the statement is apt to mislead those to whom it is published. Keane CJ stated:

the issue which arises under s 1041H of the [*Corporations*] Act and s 52 of the TPA is what ordinary and reasonable members of the investing public would have understood from FMG’s announcements. It is the effect of a statement upon the persons to whom it is published, rather than the mental state of the publisher, which determines whether the statement is misleading or deceptive, or likely to mislead or deceive.¹⁰¹

Keane CJ concluded that the CREC announcement was not expressed to be an opinion, but a statement as to the legally binding effect of the agreement. Accordingly, it was likely to be construed as a statement of historical fact.¹⁰² His Honour treated the statements that the parties to each framework agreement had made a binding contract as conveying to the intended audience more than the message that the parties intended that the agreements would be binding upon them. It treated the statements as conveying to the intended audience that the parties had made what an Australian court would decide to be binding contracts in the event of a dispute between the parties.¹⁰³ Keane CJ also drew attention to the representations that a ‘fixed price’ had been agreed and that the Chinese parties had accepted the ‘full risk’ of the construction of the project in the event of any price increase.¹⁰⁴ Keane CJ defined the intended audience as ‘ordinary and reasonable investors,’¹⁰⁵ and ‘ordinary and reasonable members of the investing public.’¹⁰⁶ Emmett J also defined the target audience as ‘ordinary and reasonable members of the investing public.’¹⁰⁷

Keane CJ relied upon the email dated 27 October 2004 from Forrest to Heyting and Huston regarding the execution of the Advanced Framework Agreement, and the terms of the draft Advance Framework Agreement, in

¹⁰¹ Ibid 403 [106]; see also at 430 [215] (Emmett J), 431 [218] (Finkelstein J).

¹⁰² Ibid 406–7 [117].

¹⁰³ See *ibid*.

¹⁰⁴ Ibid 415–16 [150].

¹⁰⁵ Ibid 407 [118].

¹⁰⁶ Ibid 407 [119].

¹⁰⁷ Ibid 430 [215].

finding that the representations as to ‘full risk’ and ‘fixed price’ were misleading.¹⁰⁸ Keane CJ observed:

The Chinese rejected provisions that would have allocated to them the full risk of the construction of the Project. The differences also show that price is left at large for further negotiation and that the parties still had competing conceptions of what constituted the ‘value of the works’. These differences also show that there was no reasonable basis for the claim in the ASX letters and associated media releases that the initial framework agreements contained a ‘fixed price’ under which CREC had assumed ‘100 per cent of the risk’. As is apparent, these issues were still very much a subject of negotiation as between the parties.¹⁰⁹

Keane CJ held on the basis of this email that Forrest did not regard the contracts as legally binding:

Forrest’s own document, his email of 27 October 2004 ... shows that he knew that further steps were necessary to reach agreement on the scope, financing, subject matter and price of the Project. This email shows that Forrest knew that FMG was still involved in a bargaining process with the Chinese. At the time when this email was written, Forrest plainly did not entertain, and it may be inferred had never entertained, reasonably or at all, the opinion that the terms of the framework agreements were effective as binding agreements to build, finance, and transfer the infrastructure involved.¹¹⁰

Emmett J held:

I agree with the detailed analysis of the [CREC] framework agreement in the reasons of the Chief Justice. An ordinary and reasonable member of the investing public would not understand the announcements as stating the subjective opinion of Fortescue or its directors. An ordinary and reasonable reader of the announcements would understand them to say that a binding agreement has been entered into between Fortescue and [CREC] and that that agreement imposed upon [CREC] a binding obligation, enforceable by Fortescue, to construct and transfer to Fortescue a railway adequate to serve Fortescue’s Pilbara iron ore project. The [CREC] framework agreement did not have that effect. Accordingly, the announcements were, at least, likely to mislead or deceive an

¹⁰⁸ *Ibid* 411–15 [136]–[149].

¹⁰⁹ *Ibid* 415–16 [150].

¹¹⁰ *Ibid* 426 [194].

ordinary and reasonable member of the investing public who read the announcements.¹¹¹

Finkelstein J agreed with the reasons of Keane CJ.¹¹²

D *Reasons of the High Court Majority*

The High Court majority (French CJ, Gummow, Hayne and Kiefel JJ), in their joint reasons, did not endorse the approach of the trial judge which gave effect to the fact/opinion distinction. The High Court majority did not think that it was helpful or necessary first to characterise statements about the content of documents as statements of fact or statements of opinion:

it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.¹¹³

The majority's approach is contained in two general propositions. According to the first general proposition:

What message is conveyed to the ordinary or reasonable member of the intended audience cannot be determined without a close and careful analysis of the facts. In this, as in so many other areas, the facts of and evidence in the particular case are all important.¹¹⁴

In other words, whether conduct is misleading is always going to be context-specific.

According to the second general proposition:

for the purposes of a claim of misleading or deceptive conduct, if a person seeks to characterise a public statement as a representation about the content of a document, the critical question will be what the statement conveyed to its intended audience, not what the party concerned says that it was intended to

¹¹¹ Ibid 430 [215].

¹¹² Ibid 431 [218].

¹¹³ *Forrest v ASIC* (2012) 247 CLR 486, 505 [33].

¹¹⁴ Ibid 514 [69] (citations omitted).

convey. Concerns about dishonesty provide no reason to distort settled understandings about misleading or deceptive conduct.¹¹⁵

The High Court majority rejected ASIC's first principal allegation that the CREC Framework Agreement was not one to build and finance the railway or a 'Build and Transfer' contract.¹¹⁶ The majority held that cl 3 of the CREC Framework Agreement was 'aptly described in the announcement as CREC agreeing to "build and finance" the railway',¹¹⁷ and that the expression 'build and transfer' was used by the parties in the recitals and in cl 1 of the agreement, and was 'an accurate general description of the agreement they had then made'.¹¹⁸

The High Court majority then focused on whether the impugned statement that the parties to the CREC Framework Agreement had made a 'binding contract' was misleading. This turned on what the impugned statement conveyed to the intended audience. The High Court majority identified the target audience in very broad terms as 'investors (both present and possible future investors) and, perhaps, as some wider section of the commercial or business community'.¹¹⁹ As regards the effect of the statements on a reasonable member of the target audience, the majority observed:

It is, however, necessary to bear firmly in mind that the impugned statements were made to the business and commercial community. What would *that* audience make of the statement that Fortescue had made a binding contract with an entity owned and controlled by the People's Republic of China?¹²⁰

The High Court majority concluded:

The impugned statements conveyed to their intended audience what the parties to the framework agreements said they had done — make agreements that they said were binding — and no more. ASIC did not demonstrate that members of the intended audience for the impugned statements would have taken what was said as directed in any way to what the parties to the agreements could do if the parties were later to disagree about performance. ASIC did not demonstrate that the impugned statements conveyed to that audience that such a disagree-

¹¹⁵ Ibid 514–15 [70].

¹¹⁶ Ibid 499–500 [14]–[17].

¹¹⁷ Ibid 500 [15].

¹¹⁸ Ibid 500 [16].

¹¹⁹ Ibid 506 [36].

¹²⁰ Ibid 509 [48] (emphasis in original).

ment could and would be determined by Australian law. And given that the impugned statements did accurately convey what the parties to the framework agreements had said in those agreements, it *would* be extreme or fanciful for the audience to understand the impugned statements as directing their attention to any question of enforcement by an Australian court if the parties later disagreed. Such an extreme or fanciful understanding should not be attributed to the ordinary or reasonable member of the audience receiving the impugned statements.¹²¹

The essential difference between the joint reasons of the High Court majority and the Full Federal Court is that the Full Federal Court considered that the impugned statement would have conveyed to the intended audience a representation about the legal enforceability of the CREC Framework Agreement in the Australian courts.¹²² The High Court majority held that the intended audience would not regard them as statements about the legal effect of the agreements under Australian law or any other law. They were statements about what the parties understood they had done, and intended would happen in the future.¹²³

As regards the significance of Forrest and FMG conducting further negotiations with CREC, their Honours held that a binding commercial agreement between parties does not prevent the same parties from trying to strike a better deal:

When commercial enterprises make an agreement which records that it is intended to be a binding contract, those parties can be assumed, unless fraud is proved, to expect and to intend that the agreement will be performed. But it by no means follows that the parties will thereafter refrain from any attempt to strike a better bargain. And the fact that one or both of the parties tries to strike a better bargain does not, without more, show that the parties are not bound to the bargain that has been made. Nor does it show that the parties did not intend to be bound to that bargain.¹²⁴

Their Honours concluded:

The letter which Fortescue sent to the ASX about having made the framework agreement with CREC was not misleading or deceptive and was not likely to

¹²¹ Ibid 510 [50] (emphasis in original) (citations omitted).

¹²² Ibid 505–6 [35].

¹²³ Ibid 508 [43].

¹²⁴ Ibid 511–12 [56].

mislead or deceive. That letter accurately recorded what the framework agreement provided. The letter did not convey to its intended audience any message about whether an Australian court would conclude that the agreement could be enforced. It conveyed to its intended audience that the framework agreement between Fortescue and CREC was what those parties had described (and a commercial audience would describe) as a 'binding contract'.¹²⁵

Given the High Court majority's finding as to the effect of the impugned statement on a reasonable member of the intended audience, it was irrelevant that the Framework Agreement did not fix the work to be done or the price for the work to be done, or that the contract may not have been legally enforceable in Australia if it were governed by Australian law and the matter came before an Australian court.¹²⁶

E Approach of Heydon J

Heydon J reached the same conclusion as the majority that FMG's statements were not misleading or deceptive, but his approach differed from that of the majority. His Honour adopted the fact/opinion distinction.

As regards ASIC's first principal allegation, Heydon J held that FMG's announcement to the ASX and its media release that it had entered into a binding contract with CREC were accurate summaries of the CREC agreement. Independently of whether it was contractually binding, all of the parties intended to be bound.¹²⁷ It compelled the parties *to conduct further negotiations* and was 'calculated to ensure' that CREC built and financed a railway.¹²⁸ Heydon J did not find it necessary to decide whether the agreement was a contractually binding contract *to build a railway* in the sense that all of the essential terms had been agreed and it was enforceable in a court of law, because to describe a contract as binding was a statement of opinion rather than fact.¹²⁹

In relation to ASIC's second principal allegation, the announcement that FMG had entered into a binding contract with CREC was a statement of opinion. For ASIC to succeed it needed to prove either that FMG *knew* that it was not a binding contract to build a railway, or if FMG *believed* it was a

¹²⁵ Ibid 512 [58].

¹²⁶ See *ibid* 509–10 [49]–[51].

¹²⁷ Ibid 521 [90].

¹²⁸ Ibid 518 [85].

¹²⁹ Ibid 521 [93].

binding contract, to prove that there was no reasonable basis for such a belief.¹³⁰ His Honour held that

so far as Fortescue had represented that there was a ‘binding contract’ to build the railway, the statement was one of opinion, and only fell within s 1041H if ASIC established that Fortescue did not hold that opinion, or, if it did, that it had no reasonable basis for stating it. ASIC did not establish either proposition.¹³¹

Heydon J held that the evidence, including the board minutes and other contemporary internal communications, supported the view that FMG *genuinely* believed that the agreement was binding to build a railway.¹³² Accordingly, this part of ASIC’s allegation was not proved.

As regards the second part of ASIC’s case, Heydon J considered that the existence of reasonable grounds to support an opinion had come to be expected in the pre-existing case law. Heydon J observed:

It is also often said that to state an opinion which one does hold implies that one has reasonable grounds for holding it. In some circumstances that may be so, but why should it be so in all? Assume that two people are asked: ‘In your opinion, is that document a contract?’, one answers ‘Yes’, and the other answers ‘Yes, and I have reasonable grounds for that view’. The two answers are different. The first answer does not imply the second, unless there are special circumstances indicating that it should.¹³³

Heydon J cast doubt on the existence of a requirement that there be any grounds or reasonable grounds for an opinion:

As noted above, the case which originated the fact/opinion distinction in this field offered no support for the requirement that there be grounds, let alone reasonable grounds, for an opinion if it were not to be misleading. ... The matter calls for examination on some future occasion.¹³⁴

Heydon J held that the question whether FMG had reasonable grounds for saying what it did depends on what it said: ‘What it should be taken to have

¹³⁰ Ibid 522 [95].

¹³¹ Ibid 522 [85].

¹³² Ibid 524 [99].

¹³³ Ibid 525 [102] (citations omitted).

¹³⁴ Ibid 525 [103], citing *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ).

said [depended] on what its audience must have understood it to have said.¹³⁵ In order to test this, Heydon J first had to define the intended audience. Heydon J found:

Fortescue's remarks were not directed to the public as a whole. They were directed to a section of the public. It comprised superannuation funds, other large institutions, other wealthy investors, stock brokers and other financial advisers, specialised financial journalists, as well as smaller investors reliant on advice. This was not a naive audience. ... The audience was sufficiently tough, shrewd and sceptical to know something of the difficulties of 'forcing' a builder to build and finance anything.¹³⁶

As regards the likely effect of the representation on this narrower segment of the general investing public, Heydon J held:

the target audience probably took the representation to be that there was a binding contract containing machinery capable of procuring the result that CREC would voluntarily design, build, transfer and finance the railway even if it was impossible to force it to do so. The agreement was a binding contract containing that machinery — duties to conduct future negotiations leading to future agreements.¹³⁷

For this reason Heydon J concluded there were reasonable grounds for FMG's representation.¹³⁸

V COMPARING AND CONTRASTING THE TWO DECISIONS

What do the two decisions have in common and what is different about them?

First, and most obviously, what the two cases have in common is that in each the orthodox approach to establishing whether a public statement is misleading or deceptive adopted by the High Court in *Campomar* was applied.¹³⁹

In *ACCC v TPG*, there was a difference of views as to the knowledge base to be attributed to a reasonable member of the target audience. There was also a difference of views as to whether the impugned conduct viewed as a whole

¹³⁵ *Forrest v ASIC* (2012) 247 CLR 486, 526 [104].

¹³⁶ *Ibid* 526 [105].

¹³⁷ *Ibid* 528 [107].

¹³⁸ *Ibid*.

¹³⁹ See above nn 9–10 and accompanying text.

in the context of the case had a tendency to lead members of the target audience into error. The High Court acknowledged:

It may be accepted that if the hypothetical reasonable consumer is taken to know that ADSL2+ services may be sold as part of a bundle with telephony services, then, if he or she brings that knowledge to bear in a conscious scrutiny of the terms of TPG's offer, he or she might be less likely to form the impression that the offer was of an ADSL2+ service available without a requirement to take and pay for an additional service from TPG.¹⁴⁰

Nevertheless, even with this heightened level of knowledge, the advertisements still had a tendency to lead viewers into error. It is unclear what facts and evidence the High Court relied upon in assuming this heightened level of knowledge.

A similar difference of views as to the knowledge base to be attributed to the ordinary or reasonable investor arose in *Forrest v ASIC*. ASIC submitted that the question whether FMG's disclosures were misleading was to be judged by reference to 'common investors'.¹⁴¹ The High Court majority defined the target audience as 'investors (both present and possible future investors) and, perhaps, as some wider section of the commercial or business community'.¹⁴² Such a disparate class embraced a rich diversity of the investing community from the most astute and well-informed bank or institutional investor at one end of the spectrum, to less well-informed investors who may have been vulnerable because of their age, investing experience or educational attainment at the other end of the spectrum. According to Heydon J the statements were directed at a narrow subset of investors and advisors who were 'tough, shrewd and sceptical'.¹⁴³

A second feature the two cases have in common relates to the failure of the regulators in each case to call evidence that some actual members of the target audience had been misled by the conduct at issue. The High Court majority in *Forrest v ASIC* noted that no evidence had been led by ASIC which would demonstrate that the intended audience would understand 'binding contracts' to mean contracts enforceable in a court. The majority stated:

¹⁴⁰ *ACCC v TPG* (2013) 304 ALR 186, 197 [53] (French CJ, Crennan, Bell and Keane JJ).

¹⁴¹ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]* (2009) 264 ALR 201, 339 [674] (Gilmour J).

¹⁴² *Forrest v ASIC* (2012) 247 CLR 486, 506 [36] (French CJ, Gummow, Hayne and Kiefel JJ).

¹⁴³ *Ibid* 526 [105].

There was no evidence led at trial to show that investors or other members of the business or commercial community (whether in Australia or elsewhere) would have understood the references in the impugned statements to a 'binding contract' as conveying not only that the parties had agreed upon what they *said* was a bargain intended to be binding, but also that a court (whether in Australia or elsewhere) would grant relief of some kind or another to one of the parties if, in the future, the opposite party would not carry out its part of the bargain.¹⁴⁴

It is unclear why ASIC did not lead evidence that investors and potential investors in FMG had actually been misled by FMG's announcements and media releases, as it did in *National Exchange v ASIC*.¹⁴⁵

Similarly, in *ACCC v TPG*, Gageler J appears to have drawn an inference from the absence of any evidence that actual members of the target audience had been misled. His Honour stated:

Telling also in favour of the Full Court's conclusion that the hypothetical ordinary and reasonable consumer would not be likely to have been misled (although obviously not determinative of that conclusion) was the dearth of evidence of any actual consumer being misled by any advertisement, even to the point of doing no more than contacting TPG to make an inquiry, despite TPG's advertisements having run nationally for a period of some 13 months.¹⁴⁶

The most striking difference between the two cases is the greater willingness on the part of the High Court majority to protect the relevant class of prospective purchasers in *ACCC v TPG*. Mass advertising programs are now a common feature of the complex consumer society in which we live. Advertisements sometimes contain small print footnotes or disclosures that attempt to limit or modify attractive or favourable claims made in headline statements in the advertisement. In assessing whether a public statement misleads by omitting or concealing information the courts have regard to the effect of the public statement in its entirety, including the manner of its presentation, on an ordinary or reasonable member of the target audience at whom it was directed.¹⁴⁷ The High Court noted in *ACCC v TPG* that the ordinary or reasonable consumer cannot be expected to 'find their way through to the truth' where information is presented in a way that is ambiguous or unclear or

¹⁴⁴ *Ibid* 507 [39] (emphasis in original).

¹⁴⁵ [2004] ATPR ¶42-000, 48 712 [7] (Dowsett J).

¹⁴⁶ *ACCC v TPG* (2013) 304 ALR 186, 202 [81].

¹⁴⁷ *Parkdale* (1982) 149 CLR 191, 199 (Gibbs CJ), 210–11 (Mason J).

incomplete.¹⁴⁸ Such disclosures can be effective if the qualifying information is located in a place, and is sufficiently prominent, that consumers will read it.¹⁴⁹ However, accurate information in a footnote is unlikely to remedy a false headline statement in circumstances where a reasonable member of the target audience may glance only at the headline.¹⁵⁰

The High Court's reasons for judgment in *ACCC v TPG* will be welcomed by those seeking to promote consumer protection. There is now a substantial body of literature that questions the ability of consumers to absorb and assess disclosed information and to act rationally upon it.¹⁵¹ It is unrealistic to take the view, as the Full Court in *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* did, that the ordinary or reasonable consumer will not be misled by a bold and attractive headline statement because the relevant information is all there in the small print if they look hard enough to find it.¹⁵²

The High Court was less protective of the ordinary or reasonable investor in *Forrest v ASIC*. FMG and Forrest were economical with the truth about the content of the documents signed with CREC. FMG claimed that it withheld relevant information in its announcements to the ASX and in its media

¹⁴⁸ (2013) 304 ALR 186, 197 [54] (French CJ, Crennan, Bell and Keane JJ).

¹⁴⁹ See *AstraZeneca v GSK* [2006] ATPR ¶42-106, 44 892 [48] (Wilcox, Bennett and Graham JJ); *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553, 571-2 [46] (Moore J).

¹⁵⁰ See, eg, *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17-18 [35]-[39] (Stone J).

¹⁵¹ See, eg, Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 *Harvard Law Review* 1420. See generally Cass R Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press, 2000). On 8 and 9 August 2007, the Productivity Commission convened a roundtable on the topic 'Behavioural Economics and Public Policy' in Melbourne. Behavioural economics is 'a relatively new field that applies insights from psychology to economic issues and analysis': Productivity Commission, *Behavioural Economics and Public Policy* <<http://www.pc.gov.au/research/conference-proceedings/behavioural-economics>>. Participants at the roundtable 'discussed the contribution that behavioural economics can make to a broader understanding of people's motivation and behaviour in markets and the implications for policy and regulatory approaches'. The Productivity Commission acknowledged that behavioural economics has 'particular relevance to consumer policy', and that 'the insights gained through the Roundtable made a useful contribution to the Commission's inquiry on Australia's consumer policy framework'. See especially Joseph P Mulholland, 'Behavioural Economics and the Federal Trade Commission' in Productivity Commission, *Behavioural Economics and Public Policy: Roundtable Proceedings* (2008) 67; Eldar Shafir, 'A Behavioural Background for Economic Policy' in Productivity Commission, *Behavioural Economics and Public Policy: Roundtable Proceedings* (2008) 9; Chris Field, 'Having One's Cake and Eating It Too — An Analysis of Behavioural Economics from a Consumer Policy Perspective' in Productivity Commission, *Behavioural Economics and Public Policy: Roundtable Proceedings* (2008) 89.

¹⁵² (2012) 210 FCR 277.

releases because the information contained in the contracts was confidential. However, it is well settled that a listed entity must comply with its disclosure obligations under r 3.1 of the ASX's *Listing Rules* and s 674 of the *Corporations Act*, even where it is party to a confidentiality agreement, unless it can bring itself within the scope of one of the carve-outs from disclosure in r 3.1A of the *Listing Rules*,¹⁵³ none of which applied in the case of the FMG announcements on 24 August 2004.

In the absence of a duty of confidentiality, why was there not a 'reasonable expectation of disclosure' that the CREC agreements were not legally binding since this was material to the decision of investors and potential investors as to whether to hold or buy FMG shares?¹⁵⁴ FMG's share price rose over the period covered by the announcements from a price of \$0.59 on 23 August 2004, prior to the letter from FMG's Chief Financial Officer being received by the ASX, to a price of \$1.93 at the close of trading on 9 November 2004.¹⁵⁵ Subsequently, FMG's share price fell in March 2005, following the publication of an article in the *Australian Financial Review* in which it was asserted that the framework agreements did not impose legally binding obligations on the Chinese state-owned entities.¹⁵⁶ This suggests that a considerable number of investors may have construed FMG's announcement to the ASX to mean that legally binding obligations had been entered into with CREC, and that since the agreements were not legally binding the shares were not as valuable as they had been led to believe by the incomplete information released by FMG and Forrest.

VI CONCLUSION

Establishing the knowledge base of the target audience in misleading or deceptive conduct cases involving public statements is a question of fact for the court, and involves the drawing of inferences from the evidence led by the parties. That knowledge base will be critical in determining whether the

¹⁵³ See ASX, *Guidance Note No 8 — Continuous Disclosure: Listing Rules 3.1–3.1B*, 1 May 2013, 29 [4.22].

¹⁵⁴ See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32 (Black CJ); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 369–70 [18]–[20] (French CJ and Kiefel J). The courts have held that there is no reasonable expectation of disclosure where one party is under a duty of confidentiality: see *Kabwand Pty Ltd v National Australia Bank Ltd* [1989] ATPR ¶40-950, 50 376–7 (Lockhart J).

¹⁵⁵ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 370 [7] (Keane CJ).

¹⁵⁶ *Ibid* 370 [8].

impugned statement has a tendency to lead a reasonable member of the target audience into error. Gyles J observed in *ACCC v Telstra*:

Reading the numerous cases in this field makes it perfectly apparent that individual judges vary considerably in their assessments of the effect of advertising. Some take a robust view and credit consumers with a fair amount of cynicism about advertisements and a fair amount of ability to make their own judgments. Others are convinced of the power of advertisements and are protective of the consumer. Neither side is right or wrong — it is a matter of opinion.¹⁵⁷

In relation to s 18 of the *ACL* and its predecessor s 52 of the *TPA*, courts have generally taken the view that ordinary or reasonable consumers are able to take care of themselves and are able to digest and act upon information provided to them. It is apparent that the High Court in *Forrest v ASIC* credited the reasonable investor with a greater ability to comprehend FMG's media releases than ASIC did. There is always a risk that if a court sets the 'reasonable investor' or the 'reasonable consumer' test too high it will disregard the reality of consumer behaviour. The courts should be prepared to recognise the limitations of consumers and investors to act rationally in their best interests and to read public statements closely and critically.

¹⁵⁷ (2004) 208 ALR 459, 475 [50].