

**Senate Economics Legislation Committee**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Budget Estimates, 31 May to 2 June 2005

**Question: Bud 4**

**Topic: ACCC – Misleading and Deceptive Conduct Investigations**

**Hansard Page: Written**

Senator Conroy asked:

1. It has been reported that the ACCC has been examining a couple of stories in broadcasts on *Today Tonight* in relation to the *wildly wealthy women* mentoring program. Is this investigation continuing?
2. Does the ACCC have any other investigations of this type (ie examinations about whether misleading news and current affairs are in fact advertisements and subject to the TPA) story on foot? If so, how many cases?
3. Has the ACCC previously taken any action against broadcasters or newspaper proprietors for misleading and deceptive conduct? Can you outline the circumstances?
4. Does the ACCC do any ongoing monitoring in this area or do you rely on complaints from the public?

**Answer:**

1. The ACCC's investigation of two items featuring the Wildly Wealthy Women Millionaire Mentoring Program (the WWW Program) broadcast on Channel Seven's *Toady Tonight* television program has resulted in the ACCC instituting legal proceedings, on 26 September 2005, against Seven Network Limited and a number of related companies as well as the principals of the WWW Program, Ms Dymphna Boholt and Ms Sandra Forster.

The ACCC's investigation received some media attention as a result of a number of court hearings on challenges made by Seven Network to the use of the ACCC's statutory information-gathering powers to compel information and documents from Seven Network. These challenges also resulted in delays in the ACCC's investigation.

In the legal proceedings the ACCC alleges that Seven Network (or its wholly owned subsidiaries), Ms Boholt and Ms Forster made misleading representations, in contravention of s52 of the *Trade Practices Act*, as to the results that could be expected by participants in the WWW Program, and that Ms Forster was a millionaire and Ms Boholt owned in excess of 60 properties.

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The alleged misrepresentations were made during items broadcast on *Today Tonight* on 31 October 2003 and 30 January 2004.

It is further alleged that the company, Universal Prosperity Pty Ltd made misleading representations, in contravention of the *Trade Practices Act*, on the website [www.wildlywealthywomen.com.au](http://www.wildlywealthywomen.com.au) as to the results that could be expected by participants in the WWW Program; and that Ms Boholt and Ms Forster were knowingly concerned in or parties to the contraventions.

The ACCC is seeking:

- declarations that the respondents breached the *Trade Practices Act*;
- injunctions restraining the respondents from making the representations or any representations to substantially the same effect as any of them;
- corrective notices; and
- costs.

A directions hearing has been set down for 8 November 2005 before Justice Bennett.

2. The ACCC does not comment on detail of matters it may or may not be investigating.
3. The ACCC has on five previous occasions taken action against broadcasters or newspaper proprietors for misleading and deceptive conduct since 1 July 1991. Four of those cases were resolved after the institution of court proceedings by the ACCC and the fifth was resolved on an administrative basis through court enforceable undertakings, as detailed below.

#### **Litigation**

***ACCC v Nationwide News Pty Ltd (1996) ATPR 41-519; Nationwide News Pty Ltd v ACCC (1997) ATPR 41-543 (Appeal)***

In July and August 1994 Nationwide News Pty Ltd (“Nationwide”) ran a print, radio and television promotion offering a “free” mobile telephone to readers of its newspapers, the *Daily Telegraph Mirror* and *Sunday Telegraph*. The advertisements noted simply that “conditions applied” to the promotion. In fact in order to receive the “free” phone readers had to sign up to a call plan

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with Smartcom Telecommunications Pty Limited ("Smartcom") under which the person would pay a connection fee of \$65, a delivery charge of \$19.95, a security deposit of \$260, and \$130/month in advance for at least 15 months in for access to the Vodafone Mobile Digital Network.

The ACCC took criminal proceedings against Nationwide in the Federal Court of Australia under sections 53(e), 53(g) and 54 of the *Trade Practices Act 1974*, and against Smartcom, for aiding and abetting of Nationwide's alleged contraventions.

The Court found Nationwide to be in breach of s53(g) of the Act and ordered it to pay fines totalling \$120,000, as well as the ACCC's costs. The case against Smartcom was dismissed.

Nationwide appealed the Federal Court's decision but the appeal was dismissed by the Full Federal Court.

#### ***ACCC v Network Ten Limited (Channel 10) (1996-1997)***

From approximately June to September 1993 a company known as Gold Coast Property Sales Pty Ltd ("GCPS") promoted land in Maryvale, Queensland in advertorials on the Channel 10 television program "Good Morning Australia" ("GMA"). The promotion took the form of interviews between the host of GMA and a representative of GCPS.

On 17 March 1994 the Trade Practices Commission instituted proceedings against GCPS and Television & Telecasters Limited (Channel 10) for contraventions of sections 52 and 53A of the Act in relation to alleged misrepresentations made about the land promoted in the advertorials.

The matter was settled between the ACCC and GCPS by way of consent orders restraining GCPS from engaging in further similar conduct.

On 23 August 1996 the ACCC commenced a representative action against Network Ten on behalf of two consumers who had allegedly suffered loss due to the representations made about the land. The matter was resolved prior to hearing by way of court-enforceable undertakings from Network Ten to the effect that Network Ten would maintain a trade practices compliance program with respect to advertorials.

#### ***ACCC v inthebigcity.com Pty Ltd, APN Newspapers Pty Ltd & ors (2001-2002)***

Between July 2000 and April 2001 advertisements appeared in various newspapers throughout regional Queensland and New South Wales promoting an employment service offered by inthebigcity.com Pty Ltd ("ITBC") where callers to a 1900 premium rate telephone service (at \$2.48 per minute) would be guaranteed work, and be entitled to discounts on accommodation and removalist costs.

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The proceeds generated by the 1900 service were paid to APN Newspapers Pty Ltd ("APN"), the publisher of the newspapers in which the advertisements had appeared. APN then passed 50% of the proceeds of the 1900 service onto ITBC.

On 2 April 2001 the ACCC instituted Federal Court proceedings against ITBC and directors, as well as APN and its Group Product Development Manager, alleging that representations made in the advertisements breached sections 52, 53(c), 53(d) and 53B of the Act. The ACCC alleged that there were no guarantees of employment or discounts available, the recorded information provided was inaccurate, dated or totally false and consumers were not informed that available positions were commission only.

On 9 April 2001 the ACCC secured interlocutory orders closing down the phone line and the matter was subsequently resolved through court-enforceable undertakings from all parties. The undertakings provided for the payment of refunds to consumers for the cost of their calls (a total of \$60,000), corrective newspaper advertisements and the implementation of trade practices compliance programs.

***ACCC v Crackerjack Productions Pty Ltd, Network Ten Pty Ltd (2002-2003)***

In January and February 2001, Crackerjack Productions Pty Ltd ("Crackerjack") advertised casual jobs in the New South Wales regional city of Dubbo, and in Melbourne, seeking a 'Self Starting Girl/Boy Friday' for five days' work. Crackerjack also placed vacant positions with several job agencies in Dubbo. Its purpose in placing these advertisements was to lure job seekers to an "interview" and then film them after asking them to help out in fictitious situations. The job seekers were not told their actions were being filmed by Crackerjack for possible use in a candid camera style television show it was making called 'Mind Games- A Real Life Adventure', which screened on Network Ten on 4 August 2001.

On 6 May 2002 the ACCC instituted proceedings against Crackerjack and its producer for misleading and deceptive conduct in connection with false employment advertisements. The ACCC also joined Network Ten to the proceedings, alleging it participated in the façade by misleading one of the two "successful" applicants during the week by leading the applicant to believe that he was working as an assistant to a film crew. The ACCC also alleged that Network Ten had been knowingly concerned in Crackerjack's breaches of the Act by commissioning Crackerjack to produce the television show despite being fully aware of what Crackerjack proposed to do.

The matter was resolved by consent orders including permanent injunctions against Crackerjack and its producer, orders that Crackerjack and producer pay the ACCC's costs, send a letter of apology to the affected jobseekers and put in practice a compliance program. Network Ten was also required to implement a trade practices program and pay costs to the ACCC, and was restrained from engaging in similar conduct for a period of two years.

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#### Administrative Settlement

##### **Foxtel Management Pty Ltd**

In November and December 1996 Foxtel Management Pty Ltd ("Foxtel"), as part of the promotion of its pay television services, distributed an advertisement in the form of a special offer known as the "Braveheart Promotion" which appeared in the form of a postcard distributed by hand and mail to a total of 680,000 homes in the metropolitan regions of Sydney, Melbourne, the Gold Coast, Brisbane and Adelaide.

The Braveheart Promotion post cards advertised the fact that those who signed up for Foxtel pay television services would also be able to sign up for Telstra "Flexi-plan" discounts on local, STD and international telephone calls. In a small-print footnote at the bottom of the postcard was the statement "Telstra Flexi-plans are available to all Telstra customers. They are not restricted to persons accepting this promotion. An additional monthly fee charged by Telstra may also apply."

The ACCC advised Foxtel that it had formed the view that statements used in the Braveheart promotion were in breach of the Act as they failed to sufficiently bring to the attention of the reader the fact that Telstra Flexi-plans were available to all Telstra customers regardless of whether or not the customer subscribed to Foxtel.

In order to satisfy the ACCC's concerns with respect to the Braveheart Promotion, Foxtel provided undertakings to the ACCC that for a period of two years it would not engage in similar promotions, would implement a trade practices compliance program and that it would review all future promotions to ensure that they were not misleading. Foxtel also undertook to engage in a corrective advertising campaign in relation to the Braveheart Promotion.

4. The ACCC does not engage in continuous monitoring of news and current affairs broadcasts. However, the ACCC does subscribe to media monitoring services. These services provide the ACCC with media content that meets a certain set of criteria or keywords. Other complaints about broadcasts may come from the public and other sources.

ACCC enforcement staff have periodically undertaken 'campaigns' of monitoring current affairs and other 'infomercial' broadcasts for set periods of time. There is not currently a systematic review on foot.

Where a possible area of concern is identified (either through complaints from the public or the ACCC's own initiative) ACCC staff will establish active monitoring of the relevant media outlets. In addition, ACCC staff have access to media monitoring services whereby a copy or transcript of a broadcast relating to a matter of interest can be obtained on request.