



AUSTRALIAN ADVOCACY INSTITUTE

ACCC

v

Porter's Plumbing Services Pty

Ltd

Teaching notes

NOT TO BE DISTRIBUTED TO STUDENTS

COPYRIGHT 2004

Australian Advocacy Institute

These case study materials (ACCC v Porter's Plumbing Services Pty Ltd) are copyright. Subject to the Copyright Act 1968, they and any part of them may not be reproduced in any material form, performed in public, broadcast, transmitted by subscription, cable service, or adapted without the prior written permission of the Australian Advocacy Institute.

Revised by Professor The Hon. George Hampel AM QC, 30 April 2009

Teaching Notes (for Instructors Only)

Issues relevant to the Application for the Injunction

1. Serious issue to be tried

The question is whether the advertisement may breach S 52 of the TPA.

Does the advertisement really promise a plumber from the specific local area?

Is it reasonable to infer that plumbers will operate in the one area or operate from the area in which they either live or where their business is situated?

The test under S 52 is objective. Specific complaints are only illustrations.

The issue may be whether the complainant, Mrs Costa, is representative of the public and therefore whether a member of the public, without her particular disposition may have been misled by the advertisement.

The injunction should be granted only where the Court is satisfied that a person has engaged, or is proposing to engage in conduct that constitutes a breach of section 52 (see section 80 TPA).

ICI Australia Operations Pty. Ltd. V TPC (1992) 110 ALT 47

2. Balance of convenience

An issue may be the cost of the promotional campaign as against whether many people would be misled by the advertisement.

The Court may have to consider what the economic consequences of the restraint would be on the company.

Glev Pty. Ltd. V Kentucky Fried Chicken Pty. Ltd. (1994) ATPR 41-229

Factors to be taken into account include:

- Porter's Plumbing has just started to trade at a profit
- The bulk of the business is as a response to advertisement
- Cost of changing the advertisement
- Problem about the advertisement being in the Yellow Pages already distributed.

- Whether any undertakings may be given to alleviate the problem. For example, informing the customer that the plumber will not necessarily be a local one.

Where the defendant had given undertaking not to republish the advertisement, it was unnecessary to enjoin further publication.

Tobacco Institute of Australia v Australian Federation of Consumer Organisations Inc (1992) 111 ALR 61

Is there a problem with the remedy if the advertisement has six months to run in a publication which, for all practical reasons, cannot be withdrawn.

Could a remedy be in extracting an undertaking that the customers be told that a plumber may not necessary be available from that area.

3. Discretion

Section 80 is a public interest provision and should be given the widest possible powers.

ICI Australia Case

Where there is an element of public interest involved, the court should be slower to withhold relief.

Glev v KFC

Have there been previous contraventions and/or are the contraventions part of deliberate pattern?

ICI Australia Case

Is the conduct likely to be repeated?

ACCC v Telstra Corporation Ltd. (1997) ATPR 41-540

Has the Respondent failed to respond to and heed previous warning?

Commodore Business Machines v TPC (110) 92 ALR 563

Has the breach has caused harm to member of public?

Consider the issue of the administration fee and its amount depending on location of the customer.

4. Delay

Should the injunction be refused because the ACCC has delayed in applying for a remedy, although it was aware of the advertisement, it took no further steps.