

## SAY IT STR8: TELCO ACTIV8ME IN COURT FOR MISLEADING ADVERTISEMENTS

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Internet service provider Activ8me has come under the scrutiny of the ACCC for the second time this year, after allegedly making false or misleading representations when advertising their internet services.

Back in March, the telco provider paid a penalty of \$12,600 for promoting that its internet services were endorsed by the ACCC as being superior to those offered by other providers, based only on the release of the ACCC's report on the NBN wholesale market. That report obviously contained no endorsement of the sort claimed, so the ACCC was fast to act, issuing an infringement notice and clarifying that they do not endorse or approve particular businesses. The ACCC also explicitly noted that this should serve as a warning that they will act swiftly on this kind of conduct. Did Activ8me listen?

### What did Activ8me do next?

Of course Activ8me didn't listen, or else we would not be publishing a report. Later in the same year Activ8me proceeded to send thousands of advertisements via direct mail and publish online banners containing more false and misleading representations – this time about the speed of its internet offering, data limits and costs of its services, including its fibre-to-the-premises (FTTP) offering. An important takeaway here is that Activ8me's claims were not simply boldly misleading by express statement – they were misleading by omission. In other words, Activ8me made headline claims about a \$99.95 price and no set up fees, claims that were not properly clarified because set up fees were only waived if customers took up a 12 month plan.

As a result of the subsequent misleading conduct, the ACCC has now instituted proceedings in the Federal Court, seeking declarations, injunctions, pecuniary penalties, a corrective notice, consumer redress, a compliance program and costs, highlighting just how seriously it takes repeat offenders, and also indicating that the ACCC remains constantly vigilant within the market.

### ACCC crack downs on misleading internet speed claims

The ACCC has publicized its commitment to make misleading internet speed claims an enforcement priority, after being granted \$7 million by the Federal Government to monitor NBN broadband speeds across the country in early 2017.

As a result, Activ8me is not the only telco coming under fire, with other major providers such as Telstra, Optus, TPG, Dodo, iPrimus, Commander, MyRepublic, iiNet and Internode having had action taken against them recently in regard to misleading broadband speed claims.

### Lessons on avoiding misleading and deceptive conduct when making claims

In their pursuits, the ACCC has recognised the high levels of consumer complaint and dissatisfaction in this market and the need for easily comparable speed and performance information, which requires clear and accurate advertising and disclosures. Accordingly, the ACCC published their [Industry Guidance on Broadband Speed Claims](#), containing guiding principles, which in light of the Activ8me conduct, serve as an important reminder on some key considerations to avoid misleading consumers when advertising claims.

*Information about the performance of promoted products or services should be accurate and sufficiently prominent:*

The conduct of Activ8me provides a clear example of misleading representations as they promoted access to internet speeds of up to 100Mbps for \$59.95 per month when in fact, the advertised plan at that price only offered speeds of up to 12/1Mbps (12Mbps download, 1Mbps upload).

Although this appears a straightforward case of false information being presented, it is also important to remember claims do not have to be express to be considered misleading and deceptive, and the overall message delivered to the consumer is considered in assessing a breach. This includes omitting key clarifying information or only telling 'half truths'.

*Factors known to affect services or products should be disclosed to consumers:*

It is not just the primary message that must be considered when assessing a claim for misleading or deceptive conduct.

As above, Activ8me told consumers they could sign up to their advertised plan with no setup fee. What they failed to disclose was that, in fact, a set-up fee of \$99.95 applied if the customer did not sign up for a 'lock in' contract of 12-months.

Whilst Activ8me did not expressly make any claims on this set-up fee, their omission of such a detail could still be considered misleading and deceptive conduct, as we have seen in other recent [Federal Court Decisions](#). Leaving out such a qualification can affect the overall impression of the message, meaning that as the set-up fee was not mentioned in the advertisement, it would be reasonable for consumers to assume that such a fee did not apply. As this was not the case if they do not sign up to the lock in contract, the claim was therefore misleading or deceptive.

But what about the fine print?

Terms and conditions and asterisked claims are prevalent in the marketing and advertising of products and services, and especially in the telecommunications industry.

However, on most occasions you cannot simply rely on a disclaimer or exclusion clause to avoid liability for a potentially misleading and deceptive headline claim. In some instances, it may work to render the statement accurate, however it must be an express disclaimer that is prominently displayed to the extent that it forms part of the overall message. In other words, you cannot use a disclaimer to correct an otherwise misleading communication, but you can use a disclaimer to clarify some detail about the headline.

For instance, in the case at hand, Activ8me also told consumers that they would receive unlimited data when in fact Activ8me could suspend access or charge more for data use it deemed 'unreasonable'. Providing such a condition in small fine print or as an asterisked disclaimer would not deem the advertised claim accurate, as it is clearly inconsistent to that which is stated.

However, by way of contrast, if Activ8me advertised unlimited data, but imposed a condition that the speed of the internet slowed after a certain usage limit, they could detail such a restriction in the form of a disclaimer granted it was clearly displayed. The main claim remains true; the customer will receive unlimited internet, and they will continue to have access at the represented price but with a potential speed restriction that they need to be aware of in considering the purchase. It would also likely be necessary that the tethering/speed reduction only occur after a significant/substantial download limit.

*Information should be presented in a manner that is easily comparable by consumers, for example by adopting standard descriptive terms that can be readily understood and recognised:*

As is especially the case for providers of technical services, such as Active8me, language used in making claims are detailing the products should be easily understood by the reasonable consumer. This may depend on the technicality of the product. For example, it would be reasonable to use more technical language for a specialised computer system normally purchased by IT professionals, in comparison to a system marketed for home use.

## Key takeaways

The ACCC's guidelines for Broadband Speed Claims serve as an important reminder to advertisers to avoid misleading consumers with their advertisements, and care should be taken to:

- Provide information about the promoted products or services that is accurate;
- Disclose any onerous details, which would affect the overall message of the claims and prominently provide these to consumers;
- Use disclaimers only to qualify a statement, ensuring that they are sufficiently noticeable to form part of the overall message; and
- Present information in a manner that is easily comparable by consumers, and that can be readily understood and recognised.

## Contact us

If you would like further information on advertising claims and how they should be made, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with reviewing or clearing advertising material.

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