Advertising and trade practices law: A perspective of the Commission

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1. Introduction

Thank you for your time here today.

Today I would like to discuss the means by which, as well as protecting consumers and business, the *Trade Practices Act 1974* serves to protect the best and most creative minds in your industry from unscrupulous, unprincipled and unlawful practice. To do this, I will focus my discussion on three matters.

The first is the role of the Commission and the operation of the Trade Practices Act.

Secondly, I will discuss a few cases where advertising practice has run hard against the strictures of the law. I want to talk about advertising, the law, and how the law is applied when a desire for advantage in the market triumphs over requirements for truthful representation and factual accuracy.

Thirdly, I want to discuss the Commission's own advertising, and outline our efforts to communicate to businesses and consumers the requirements of the Trade Practices Act.

2. The role of the Australian Competition and Consumer Commission

The role of the Commission is to apply the Act in full, without exemption, and without fear or favour. As an institution we are scrupulously even-handed. We apply the Act to all, no matter how powerful they may be, and for the benefit of all.

In doing this we hope to ensure that the Act works to the benefit of both consumers and businesses. Firms have an interest in being supplied competitively and efficiently; and have an interest in selling to buyers who have to compete for output; they have an interest in the process of competition itself not being harming by anti-competitive behaviour by big players. They also have an interest in not losing profits to a competitor

who attracts sales with false advertising (and who thereby damages the industry's reputation).

Competition and consumer protection law provides an assurance to men and women in business that they have the opportunity to compete fairly for all possible business, and then, to keep the rewards of success.[1]

Competition and consumer protection laws mean that businesses can compete on the basis of ability to provide goods and services, and that they are given protection against false claims or sharp practice.

Advertising is important.

It is the most visible element of modern marketing and is an essential component of trading.[2] It provides valuable information about products and services, and thereby enables consumers to make informed choices about competing products and services.

The importance of advertising to industry is reflected by estimates that worldwide expenditure on advertising has grown faster than the world gross product.[3]

By allowing businesses to promote their goods and services and differentiate goods and services from those provided by their competitors, advertising is generally good for competition. (Although I am aware that, on occasion, advertising can be a barrier to entry, and thereby limit competition).

The key point here is that advertising and selling practices that are honest and accurate generate benefits for the community. This is recognised by the Advertising Federation,

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1 Shenefield, J.H. and Stelzer, I.M.: *The Antitrust Laws: A Primer* (The AEI press, Washington D.C., 1998)

2 Harker, D.: *Canadian Advertising Regulation: Lessons for Australia* (Canadian Journal of Communications, v23, 4, 1998)

3 Agrawal, M.: *Review of a 40 year debate in International Advertising* (International Marketing Review, v12, 1, pp26-48, 1995)

which has devised and implemented an agency code of ethics. I understand that this is the first such code for the industry, in any country – and for this, the Federation deserves to be acknowledged and congratulated.

False, misleading or deceptive advertising and selling practices is not part of fair competition. Such behaviour is also unlawful under the Trade Practices Act and also under State and Territory Fair Trading Acts.

The competition provisions of the Act are contained in Part IV, which prohibits practices such as price fixing and primary and secondary boycotts, misuse of market power, exclusive dealing, resale price maintenance and anti-competitive mergers

In Part IVA unconscionable conduct is prohibited.

And in Part IVB the Commission prevents contravention by corporations of applicable industry codes of practice.

Today however, I want mainly to canvass Part V, which safeguards the position of both individual and business consumers in their dealings with producers and sellers. Part V deals with unfair practice, misleading and deceptive conduct, product safety, country of origin claims and information standards.

There are other important provisions, but these are not of such burning interest to you in this discussion.

In summary, competition law is outlined in Part IV.

And consumer protection law, at the Commonwealth level, is contained in the relevant sections of Parts IVA, V and VA. (In the States and Territories Fair Trading Acts apply.)

These days, the Commission's involvement with the advertising industry arises mainly as a consequence of consumer protection law.

This was not always that case.

Prior to 1995 the Trade Practices Commission authorised the Media Council of Australia's system of accreditation for advertising agencies because we considered that the public benefits of the system outweighed any anti-competitive detriment. However, in 1995 we revoked our authorisation because we thought the public benefits were no longer there.

Since 1995, this has meant that the current system is more competitive, hopefully continuing to give benefit to the public, and is one that relies heavily on you, the advertising agencies, voluntarily following a code of ethics.

While the code of ethics does not carry the full weight of law, the Commission is supportive of your efforts to regulate the conduct of your members.

Ultimately however, your conduct is subject to trade practices law.

On advertising and its value generally, the Commission has made a number of submissions to various State and Territory National Competition Policy Reviews in support of a removal of advertising restrictions from legislation regulating various professions. We believe that current laws and regulations prohibiting misleading and deceptive conduct such as the Trade Practices Act and state/territory fair trading laws can adequately deal with advertising that is not honest and accurate. I think those laws should be applied before any additional regulation is considered.

I would like to turn to case examples in the law, but as a final point before I do, I need to mention that the Commission focuses on misleading or deceptive conduct, not just misleading or deceptive advertising.

In particular, the Act covers agency activities on behalf of clients through legal principles known as 'accessorial liability' This means that that if an ad agency aids and abets, or is knowingly concerned in a contravention of an Act, it may face the same penalties as the client.

Parliament has signalled through provisions such as s. 75B(1)(a)-(d); s. 76(1)(c)-(f); and s. 80(1)(c)-(f) that achieving the public interest benefits of compliance with the Act by businesses may well require legal action for a wide range of 'accessorial' conduct.

There appears to be no basis for limiting the reach of those provisions by excluding certain persons or classes of persons from their ambit. Whilst the decision to join a professional adviser requires careful assessment of a number of relevant matters, there are public interest objectives that underpin the provisions of the Act. These work to ensure that business or professional advisers are held accountable for the supply of manifestly defective advice or services to businesses.

For it to be otherwise, would be to create a privileged class of persons that exists beyond the reach of the law. This, in my view, would be quite wrong.

In short, therefore, your conduct as advertising agents is covered by the Trade Practices Act.

3. Case examples

I want now to briefly summarise a number of cases that the Commission has initiated. By doing so, I hope to give you a feel for some of the legal consequences of misleading and deceptive conduct.

The first case I wish to canvass deals with mobile phones.

Nationwide News Ltd conducted a promotion in newspapers and on television and radio. The promotion concerned an offer to readers of a 'free' mobile telephone.

As a condition of receiving the phone, the reader was required to enter into a contract that involved a total expenditure of $2,294.90. Nationwide was convicted only on six charges and fined $120,000. It appealed against the conviction and level of fines. The Full Court of the Federal Court dismissed the appeal and said:

> 'An advertiser relies on common understandings (of the word 'free') at its peril. Any respect in which goods or services offered as 'free' may not be free should be prominently and clearly spelled out so that the magnetism of the word 'free' is appropriately qualified.
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> 'An offer to a newspaper reader of a 'free' mobile phone without any reference to conditions, was an offer to cause the reader to become the owner of such a phone without his or her first having to outlay money or to undertake to do so. The addition of the words 'conditions apply'…did not detract from that position…
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> '…a reader, viewer or hearer of the advertisement might reasonably have expected that there would be, for example, a limit on the number of free mobile phones on offer, a prescribed mode of and time for acceptance of the offer, and perhaps even an obligation to buy a small number of newspapers at their standard price, or to send a number of coupons from the newspaper. Conditions of that kind would not be understood to detract form the 'freeness' of the mobile phone.'

In this case, a reader, viewer or hearer of the advertisement would not have expected the conditions referred to in the advertisement to compel him or her to enter into a contract of a particular kind with a particular service provider requiring outlay.

In summary, in advertisements, 'free' actually means free.

The second example deals with the sale of women's clothing. The fashion house, **Cue**, was fined $75,000 for attaching misleading price tags to its garments.

Two companies in the Cue group were convicted in the Federal Court on 30 charges of having made false and misleading representations about the price of their garments, and were fined for breaches of section 53(e) of the Trade Practices Act, after the companies pleaded guilty to the charges.

As background, the Cue group designs and manufactures fashion garments for young women. It has a retail chain comprising 80 stores located across Australia. The charges involved Cue stores in Adelaide, Perth, Melbourne, Brisbane, Canberra and Hobart.

The Commission initiated the action against the fashion house, alleging that in the week before Christmas Cue released nationally a new range of shorts, skirts, vests and tops from its warehouse in Sydney. Swing tags attached to each garment showed two prices; the higher price was crossed out and prices ranging between $13 and $56 less were written underneath.

The Commission alleged this would lead shoppers to believe that the garments had previously been offered for sale at the higher prices and had now been discounted. In fact, the garments had never been offered before.

Now there is another angle to the Cue case, which I will discuss when I canvass the Commission's own promotional efforts.

The Commission instituted proceedings against the **Nissan Motor Company** and **Thomas Wightman** over a number of representations made in an advertising campaign. Accessorial liability was a relevant consideration when the Commission instituted proceedings in this matter.

In this case, a vehicle described as a Patrol RX Turbo Diesel was advertised for sale at a price of $39,990. But, the vehicle **displayed** in the advertisement was a Nissan Patrol RX 4.2 Litre Diesel.

That is, what was displayed in the advertisement was a 4.2 Turbo, but what was offered was the less powerful 2.8 Turbo. In short, the pictorial representation of the vehicle advertised showed the wrong vehicle.

The second charge in this matter arose out of a television broadcast on Channel 7 in Adelaide. The representation was that consumers would save:

> 'a whopping $6,290 on a brand new RX Turbo Patrol at only $39,990 including free air-conditioning'.

$6,290 was described as 'end of year' savings.

In fact, the advertisement was false or misleading in that the only true 'end of year' saving was the value of the free air conditioning, being $2,195.

The third charge arose out of further advertisements concerning a Patrol RX 2.8, which was again depicted in an advertisement, and, again, was erroneously described as for sale at $39,990. The advertisement contained, in small print, the disclaimer that the picture was for 'illustration purposes only'.

The point here is that the Federal Court found depiction of the vehicles described here to be misleading or deceptive, and this feature was not removed by a disclaimer such as the one used in this instance.

In judgement, Justice Von Doussa said:

> '…in submissions before the Court, Mr Wightman's counsel accepted that the advertisement appeared in the form that it did with the disclaimer against the wrong pictorial representation of the Patrol vehicle, not because of the pressure of events…but because Mr Wightman considered that the insertion of the disclaimer would 'cover us legally'…Mr Wightman added that he intended to correct the picture when he returned from overseas, but in the meantime he did not consider the advertisement was misleading, because of the disclaimer. Mr Wightman returned from overseas prior to the end of the October advertising campaign, but the photograph used in the remaining advertisements was not altered.'

Importantly, Von Doussa J accepted Mr Wightman's evidence that he was under the belief at the time that the disclaimer would have the consequence that no breach of the law occurred. But the Judge went on to say:

> 'However, that belief was the result of a want of adequate thought or consideration of the circumstances on his part. In the advertising industry, advertising agents are 'gatekeepers' who have a responsibility to consider whether advertising material prepared by them for their clients, complies with consumer protection legislation. I do not think that the basis for Mr Wightman's belief, that such a disclaimer could be used in the case of a new vehicle, justified his belief. Had he reflected on the situation he should have realised that the disclaimer he inserted in the advertisement would not draw attention to the misleading or deceptive features of the representation of the vehicle. Notwithstanding Mr Wightman's character and antecedents, I consider that a conviction should be recorded, and a punishment imposed. There will be a conviction recorded and fine of $10,000.'

Fines totalling $140,000 were made for breaches of s. 53(a).

I want to alert agencies, and clients, on the need to disclose the terms and conditions of offers. For example, the inclusion of an asterisk to direct attention to a qualifying footnote will not always be sufficient to ensure full disclosure of the restrictions on an offer. In addition, there are dangers in using words and phrases such as: 'free', 'no cost', 'unique', 'guaranteed result' and 'money back, no questions asked.'

In judging misleading or deceptive advertising cases, the Federal Court has imposed fines, but it also has ordered that corrective advertisements be made.

Last year, for example, **Target Australia**, was found to have engaged in misleading and deceptive conduct, and made false and misleading representations during a television and newspaper campaign. The case brought by the Commission concerned the advertising by Target of discounted prices for all clothing and all housewares when such universal discounts did not exist.

To Target Australia's credit, it made sincere apology. The Commission acknowledges that Target's co-operation in resolving the matter saved considerable time and cost.

But that said, apologies as a result of court action are sometimes expensive to make. Target was required by court order to broadcast and publish corrective advertisements in all states and territories. Furthermore, Target was required to institute a Trade Practices Compliance Program and was required to pay the Commission's costs of the litigation.

The financial costs and the cost to Target's good reputation of not complying with the Act were therefore high.

The Commission believes that agencies which knowingly contravene the Act should not be immune from prosecution.

And advertising agencies that knowingly participate in false or misleading campaigns put themselves at risk. Federal Court action has already been taken successfully against one agent and we have two others in court. I will discuss those matters in a moment.

The Commission does not necessarily expect agencies to independently check the technical claims made about a product, but if they are complicit in an obviously misleading presentation, and fine print is used to obscure an offer's restrictions, then difficulties start to arise.

In July 2000, the Government introduced Lifetime Health Cover, which was a significant change to health insurance policy. Given that almost one million people were making decisions on appropriate health coverage, we believed that it was important for health insurance companies to be measured and accurate in the representations they made.

This is why we instituted action against **Medibank Private**, and in a separate action, against **MBF Australia** and its advertising company, **John Bevins Pty Ltd**.

We allege that Medibank Private advertised that rates for the Package Plus insurance products would not increase, when in fact they did. We further allege that call centre operators made representations that were not true.

We also allege that Medibank Private failed to disclose, or adequately disclose, the conditions that applied on switching to Medibank from another fund.

To rectify this, we are seeking court orders including: injunctions that restrain Medibank from behaving in the same way in the future; the waiving of all waiting periods for affected customers; refunds to those customers who switched from another fund; corrective advertising; a review of compliance programs by Medibank; and costs.

This matter is now in court and Medibank Private is defending the case.

In the case of MBF, we allege false, misleading and deceptive advertising of health insurance products. In this case, we seek court orders requiring the: publication and broadcasting of corrective advertisements; a waiver of the waiting period for pregnancy related services; a restraining of the making of similar misrepresentations in the future; and that MBF be required to review its compliance program.

Because we allege that the MBF's advertising agency was knowingly concerned in MBF's conduct, we are also seeking similar orders against John Bevins Pty Ltd. Both MBF and John Bevins Pty Ltd are also defending the case.

Further to these cases, we have taken action against **NRMA Health**, **SGIC Insurance**, **SGIO Insurance** and its agency **Saatchi and Saatchi Australia**. In these matters we also allege misleading and deceptive advertising of health insurance products.

We allege that, in print advertisements, NRMA, SGIC and SGIO depicted a woman nursing a new born baby, and made representations guaranteeing 'free delivery', 'no matter how advanced your pregnancy is' in an endeavour to entice consumers. The advertisements contained two fine-print disclaimers, which we allege were inadequate and unlikely to come to the attention of consumers.

It is clear that that knowledge of and compliance with the Act is important. Knowledge of the principles of accessorial liability is important.

And ignorance of and contempt for the provisions of the Act is risky for you, for your firm and for your clients. Ignorance of the law is no defence and neither is a 'contract' that some ad agencies ask their clients to sign to waive their legal responsibilities.

Businesses frequently tell us that they rely totally on the agency. Businesses frequently tell us that the agencies 'are the professionals' and that: 'We pay them huge fees'. However, the corollary of huge fees is huge responsibility. Clearly, clients want effective

campaigns, but when they stop to think about it, most of them want campaigns that are lawful.

The point is that the law is what is important here, and arguments of what you **perceive** to be your responsibility, carry very little weight.

The risks to you, and to clients, of brand damage; fines of up to $1 million for companies and to $220,000 for individuals; legal costs and appearances in court; declarations of unlawful conduct; convictions; injunctions and orders (including to make corrective advertisements and refunds); and the payment of damages and/or compensation make a close understanding of the relevant provisions of the Act well worthwhile.

Where do false advertising issues arise the most?

It is hard to generalise, but the incidence is often highest in newly deregulated sectors where there is an outbreak of (welcome) competition that is not matched, however, by careful advertising.

4. Public relations and the Commission

I want now briefly to discuss the Commission's approach to public relations.

We have the strong view that information about the Act and about the activities of the Commission itself should be widely disseminated. This is the intent of Parliament, which in s. 28 defined the functions of the Commission to include the provision to the public of information about the activities of the Commission, and matters of interest to consumers.

The reasons for the broadcast of information are well worth stating

The provision of information and educational materials to the public about the nature and benefits of competition and fair trading, or at least the detriment of unlawful anti-

competitive behaviour or of behaviour in breach of the fair trading provisions of the Act is to the public benefit.

It is sometimes desirable to respond, where appropriate, to businesses, media and community debate, discussion and criticism relating to the Act and the Commission.

The Commission endeavours to keep the public record straight on the facts of Commission matters. If information is not correct, then we strive to respond.

To provide information, the Commission is engaged an extensive public discourse.

We make comment to the media.

Commissioners and staff give speeches like this.

We issue discussion and information papers.

We publish technical papers and make available detail of our technical modelling.

To better inform small business about their rights and obligations under the *Trade Practices Act*, the Commission's Small Business Unit operates an Outreach program. And to inform rural businesses and consumers we run a rural and regional program. (In this, we make a similar effort to the Federation, which I understand is relaying this address, through the Seven Network to members in other States.)[4]

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[4] We are further developing what we call the Competing Fairly Forum, which is a satellite broadcast via the Sky Television Business Channel. Hosted by George Negus, the Competing Fairly Forums provide the opportunity for small business operators and consumers to talk directly to trade practices and business experts.

The Commission maintains over twenty public registers that detail matters arising from the operation of the *Trade Practices Act 1974*, the *Prices Surveillance Act 1983* and the *ASIC Act 1989*. We also maintain a number of 'voluntary' public registers.

We cooperate with organisations such as the Advertising Federation in holding seminars.

If I can digress for a moment, I want acknowledge here the recent efforts made by the Federation and member agencies to ensure compliance with the Act. In the words of Rob Clarke 'the Advertising Federation of Australia has been working cooperatively with the ACCC over the last six months to help agencies implement or update compliance programs'. Last year, in concert with the AFA, the Commission gave presentations on trade practices law and advertising in Sydney, Melbourne, Brisbane, Adelaide and Perth.

The Commission has been, and is appreciative of the efforts of the AFA. Wherever possible we were happy to assist. Such programs are an important part of our armoury.

The Commission has also issued guidelines on the advertising and selling provisions of the Act. Some of these have been generic, for example, the Commission's wildly popular publication, *Advertising and Selling*, was released in 2001. Others have been specific to various sectors (for example, the health insurance, and medical and health sectors).

In a democracy, citizens have a right to be informed. Journalists have the role of informing the public of how justice is administered. The court audience extends far beyond those in the courtroom and it is important to alert potential offenders as to what may await them. There is also a substantial public interest in the enforcement activities of regulators, which buttresses the need for open court proceedings and media releases.

This is a proposition clearly expressed by Hedigan J:

> '…citizens in a democracy depend to a substantial extent upon accurate and published reporting of what takes place…In an open and truly democratic society,

> the right of various forms of the media to be present (at court proceedings) and publish is generally regarded as being in the public interest...'.[5]

For these reasons, the behaviour in the market of companies and individuals is an important matter of public interest. My view is that information needs to be provided to the media in a way that facilitates accurate, truthful and honest reporting.

The Commission commonly refers to court cases because we generally find that, when promoting the benefits of complying with the Act, the best examples come from cases. The practice is to make reference to cases and respondents that are on the public record.

Most of our publicity concerns cases that have been finally resolved by the courts. However, we do, with Court endorsement of the practice, issue releases about allegations once we have lodged a case in Court.

Earlier I discussed with you the Cue case. In his judgement, Justice O'Loughlin[6] accepted that Cue's sales had suffered from adverse publicity originating from a media release, but said that: '…the attendant publicity was a consequence of the defendant's conduct', and refused to reduce penalties. He said the Commission's statement was 'accurate' and its conduct 'reasonable'.

For this reason, I do not accept that the Commission acts irresponsibly or recklessly when it makes a precise statement of facts; or outlines by careful argument and description the issues that arise as a consequence of the operation of the Trade Practices Act; or makes public allegations it has made and proceedings it has commenced against a party.

I am aware that some have a view that the conclusion is immediately drawn that 'investigation', or 'allegation', means 'guilty'. This is not my view. I believe that most people are fair minded, and, if given the facts, make a decision that is based on the facts.

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5 *Herald and Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 9 (at 278-9).
6 [1996] ATPR 41-475 (at 41,834-41,836).

Our practice, is to discuss the facts of cases, so as to give practical force to technical and abstract issues. This is, I believe, a practice that should be continued.

5. Conclusion

I have talked about the benefits of fair competition, and the dangers of unlawful behaviour. I talked about the provisions of the Act dealing with advertising, and highlighted some cases. And I outlined for you the reasons the Commission seeks to publicise the facts of matters relevant to the Act.

I hope this has provided some answers and, perhaps, has prompted some questions. Thank you for your time today.