

  <p data-bbox="616 338 751 412">Australian Competition & Consumer Commission</p>	<p data-bbox="818 203 1359 324"><i>Children and young people as vulnerable consumers – the ACCC's role</i></p> <p data-bbox="802 365 1359 443">Australian Council on Children and the Media conference</p> <p data-bbox="855 483 1359 577">Sarah Court, Commissioner 9 March 2012, Melbourne</p>
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Thank you Professor [Alan] Hayes and good afternoon everyone. I am delighted to be here at this third very important conference on children and the media.

It was only a few weeks ago that I presented on a similar topic, but to a very different audience, at a congress for the national association of advertisers, where I talked about the ACCC's vision for the future of advertising.

That vision, as I explained to that audience, is to get to a point where we have genuine truth in advertising, and a point where the need for the ACCC's enforcement role in the advertising space is much diminished.

However, I fear we have some way to go before that vision is likely to be achieved.

In my presentation this afternoon I propose to:

- briefly outline the role of the ACCC insofar as it relates to advertising
- look particularly at our approach to advertising to children and minors
- set out details of a compliance and enforcement approach recently taken by the ACCC that related specifically to protection of young consumers, and
- talk briefly about some of the challenges for the future.

The role of the ACCC

Turning first to the ACCC's role. Our primary objective, given to us by the parliament, is to improve consumer welfare. This of course includes improving the welfare of young consumers.

The ACCC primarily interacts with young consumers in the context of advertising and scams that are directed at children and teenagers.

Insofar as this role relates to advertising and the promotion of products, it is not the ACCC's role to determine which products or services are better than others, and nor it is our role to determine whether advertisements or promotions – or in fact anything that appears in the media – are appropriate or in good taste.

What the ACCC *is* concerned with is that there is fair competition in the market and that consumers are not exposed to misleading or deceptive marketing; that is, that advertising claims about products or services are honest and accurate, and do not mislead any potential buyer or user.

So how does the ACCC go about improving consumer welfare?

One way is to ensure that consumers receive the right information about the products and services they buy – before they buy them!

By ‘right’ information I mean information they can confidently rely on to make fully informed and considered purchasing decisions in what is often a crowded and complicated market place.

The perennial challenge for advertisers of course is how to get their client’s product or service noticed, particularly in a market of increasingly sophisticated and discerning consumers.

Let’s look at one sector by way of example – the food industry. So far as parents are concerned they might be attracted by promotional claims that foods for their children are fresher, healthier, organic, wholesome, better for the environment, lower in fat and so on.

We call these credence claims. Advertisers know that many parents are willing to pay a premium for foods promoted with these kinds of descriptors.

In these circumstances there is a temptation for advertisers to stretch the truth and unintentionally, or unfortunately in some cases intentionally, break the law to gain a competitive advantage.

That impacts unfairly on both the competitive process and consumer welfare.

The Australian Consumer Law

Over the past couple of years a new set of consumer protection laws has come into effect. It is called the Australian Consumer Law, or ACL, and it provides a national law where the ACCC and state/territory regulators work together to apply one set of national consumer protection laws.

At its heart, the provisions prohibit misleading or deceptive conduct, whether it be in advertising or more generally.

Put simply, the ACL demands truth in advertising.

This is not a radical departure from the law as it previously applied under the Trade Practices Act, but the ACL has provided some new enforcement and investigation powers for the ACCC, and created some new consumer protection laws.

I am not going to talk about the new laws in any detail, suffice to say that the ACL prohibits false or deceptive advertising, and for the first time pecuniary penalties and infringement notices now apply for this conduct.

The availability of these financial penalties for deceptive advertising marks a profound change in consumer law enforcement in Australia, and means the ACCC has an ample toolbox to deal with misleading and deceptive advertising.

The ACCC has wholeheartedly embraced these new powers and is using them widely.

Misleading advertising directed at children and young consumers

The ACCC has a compliance and enforcement policy available on our website, which sets out in broad terms the considerations the Commission gives when selecting matters for enforcement attention.

As a general rule, we are more likely to pursue cases of false or misleading advertising if:

- there is the potential for widespread public detriment
- the conduct involves a large trader or national advertising
- the conduct is particularly blatant, or
- the conduct is by a trader or business who has come to our attention previously.

Also, importantly for this audience, the ACCC lists in its enforcement priorities conduct that is detrimental to a vulnerable consumer group – and this of course includes children.

In this context it is important to note that it is not just the businesses selling products that can be penalised for deceptive claims: advertisers, media outlets and publishers can be – and have been – held liable for their involvement in the creation and publication of misleading advertising.

Problematic advertising - fine print qualifications and disclaimers

I want to move now to talk about one of the advertising issues the ACCC deals with on a regular basis, that of fine print qualifications or disclaimers.

You will all be familiar with this advertising style – an advertisement makes a large attention-grabbing headline and then proceeds to make a fine print disclaimer in tiny text somewhere near the bottom of the promotion.

Sometimes the headline claim has an asterisk or other symbol next to it which is apparently supposed to indicate to a reader that he or she should completely ignore the headline claim and focus instead on the tiny fine print disclaimer.

Of course the inclusion of an asterisk does not remove the potential for a headline to be misleading.

This kind of advertising has been endemic in the telecommunications sector, among others.

Telecommunications advertising has been a particular area of interest – and concern – to the ACCC for some years. The industry generates high consumer complaint numbers and they are continuing to rise.

The products and services sold are highly complicated and the various phone plans on offer with their combinations of calls, internet access and so-called ‘included value’ are unintelligible to most of us.

It is extremely difficult for consumers to decipher what it is they are buying – and even more difficult for consumers to compare products.

Young consumers are eager purchasers in this sector and are common – and easy – targets for advertisers.

This is because they are often keen for the very latest product, plan or app, and not very keen to spend time deciphering the fine print qualifiers about the products and services on offer.

Advertising standards in the telco sector have been problematic for many years, and the ACCC has attempted to deal with these issues with a variety of strategies, which include, but are not limited to, formal legal action. I want to talk briefly about one such strategy that related specifically to young people.

Mobile premium services

You are probably all familiar with mobile premium services. These are essentially premium rate 'extras' for mobile phones such as ringtones and wallpapers, as well as interactive services such as quizzes and competitions.

Between 2004 and 2009 the ACCC (and other regulators) received increasing numbers of complaints regarding what we now call 'bill shock' involving mobile premium services; that is, complaints from consumers who had received unexpectedly high mobile phone bills or the instant loss of pre-paid credit.

Many of these consumers claimed they had never purchased an MPS service or, if they had, were completely unaware that they had signed up to any kind of ongoing subscription.

The ACCC was particularly interested in this emerging problem because MPS proved to be very popular in particular with younger consumers. Popular television programs and teen magazines were crammed with often questionable advertisements for various forms of mobile premium services.

Very fine print and distracting graphics and audio were a feature of MPS advertisements across all media, and the problematic conduct was exacerbated by the fact that many of the service providers were difficult to identify and based overseas.

The Australian mobile phone carriers reaped significant financial gain from carrying these services, but often distanced themselves from the issue when customers complained about their high bills, and left frustrated consumers attempting to sort out the problem with elusive overseas content providers.

The ACCC's analysis of complaint information indicated that many of the advertising practices in this area were aimed at young consumers, and that younger consumers were particularly vulnerable to such practices.

We had complaints about children as young as 9 responding to these advertisements in magazines for mobile premium services.

This means children this young were actually unknowingly entering into ongoing subscription contracts.

The ACCC took a multi-pronged approach to try to remedy the problem, and many other agencies were also involved.

The approach included educating consumers about the pitfalls of mobile premium services, dealing with the telcos indicating that the ACCC would hold them accountable for MPS costs incurred by consumers on their networks, and working with other regulators to gain a regulatory fix, such as the 'double opt-in' requirement now included in the telecommunications consumer code.

On the enforcement side we targeted two key areas: teen magazine advertising and television advertising during family viewing times.

On the teen magazine side we took on not only the providers of the MPS content, but the publishers of two teen magazines who were publishing the misleading MPS advertisements – *Dolly* and *Girlfriend* magazines.

The ads we were concerned about were deliberately targeted at a young and vulnerable audience, did not clearly state the nature and cost and of the MPS, and nor did they indicate that people would be subscribing to the service rather than purchasing a one-off ringtone.

The ACCC action resulted in the publishers of those magazines providing the ACCC with court-enforceable undertakings not to publish further misleading advertising for mobile premium content services.

They also ran articles to inform their teenage readers of the nature, cost and characteristics of the mobile premium services that had been advertised in their magazines.

In another matter the ACCC took legal action against a content provider of MPS in relation to several television advertisements for MPS marketed directly at young consumers. One of these advertisements featured a ringtone of the well-known young teen pop idol Justin Bieber.

The ACCC alleged that the advertisement represented that a consumer could purchase this ringtone at a one-off cost, when in fact by texting the number in the advertisement the consumer was unwittingly requesting access to an ongoing premium-rate mobile subscription.

The court made some interesting observations about the Justin Bieber ad. The ACCC was particularly concerned about the promotion as, we submitted, was directly aimed at young people. The promoter contested this assertion.

It is worth reading out some of the findings of the court in that regard. Her Honour stated:

The Justin Bieber advertisement was primarily broadcast outside of school hours or during school hours during the school holiday period. ... It was shown during a variety of shows that included “The Simpsons” and “American Idol”, ...

It is not in dispute that Justin Bieber is a very successful young singer who, at the time of the Justin Bieber advertisement, was approximately 15 years old and who was and is extremely popular with young girls in the 13 to 15 year old age group.

Mr Robertson [witness for Global One] was adamant that, for him, the target audience for the Justin Bieber advertisement was women in the 18 to 24 year old age group. ... Bearing in mind the acknowledged appeal of Justin Bieber to under 15 year olds and the timing of the Justin Bieber advertisement, it is inconceivable that [Global One] would not have been aware of the likelihood that under 15 year olds would be watching when the Justin Bieber advertisement was broadcast and would be attracted by the prospect of having a Justin Bieber ringtone on their mobile phones.

Her Honour also noted that while there was reference to a 'subscription' in the advertising, the writing was:

...in small text and is difficult to read. At the same time that the writing is on the screen, the Justin Bieber advertisement shows Justin Bieber singing and young girls responding. The voiceover is distracting. ...

This would be the case for an adult viewer. It is..., highly unlikely that a person under the age of 18, let alone under the age of 15, would notice, read or concentrate sufficiently to be able to read the writing....

The use of the word "subscribe", in my view, was totally inadequate to inform the adult viewer, let alone a viewer under the age of 18, that what was being offered was a subscription to a broader service.

The court went on to impose a penalty of \$375,000 for the advertising. However, it is important to note that the matter is currently under appeal.

Further regulatory challenges

Of course the internet and technology world is ever-changing, and one challenge for regulators like the ACCC is simply to keep up with new ways of enticing and misleading young consumers.

The number of complaints about mobile premium services is now in rapid decline – the technology has simply moved on. The new frontier is 'apps' and the new world of 'in-app purchases'.

You may remember the Smurfs' Village saga last year, when many parents received bills for hundreds of dollars after their kids played this supposedly 'free' game app on iPad and iPhone platforms.

The idea of the game is to build up a village, which includes constructing buildings and bridges, growing gardens, and playing mini-games to create things like potions and cookies. The scam lay in the cost of in-app purchases.

Because (somewhat bizarrely you may think), a feature of the game is that you can buy things within the game with an 'in-game currency' to make the game experience better – except that the money that is used to buy the things within the game is not game money, it is real money – and it shows up on your credit card!

Apple introduced the practice of in-app purchases about two years ago, letting developers use the iTunes billing system to sell items and add-ons in their games and applications.

And developers then started to use this feature as the main revenue stream in a number of games, many of them specifically developed to appeal to children.

One has to wonder about such a practice aimed specifically at children, who legally speaking of course cannot enter into binding contracts or agreements, whether on-line or otherwise. But the on-line world readily circumvents this legal protection.

False testimonials

Finally, as I mentioned earlier in relation to promotional claims around food, another endemic advertising issue often aimed at young people and their parents, is the use of ‘testimonials’. This is where businesses promote their products by way of positive and glowing endorsements from others, often high-profile people.

Of course, not all consumers believe everything an advertiser may tell them. But more credibility is often given to what other customers or trusted or high-profile members of society may have to say about a product.

In this regard, testimonials and similar endorsements can be very powerful and effective marketing tools used to gain consumer trust.

One recent example of this was the promotion by Coca-Cola using actor Kerry Armstrong in a large nationwide campaign featuring a full-page colour advertisement headed ‘*Kerry Armstrong on motherhood and myth-busting*’.

The testimonial started with the chatty line from Ms Armstrong: ‘As a mum I am often bombarded with conflicting messages about food and drinks ... I want my family to have good health, and I also want them to have fun. ... When I was approached to speak out in favour of one of the world’s largest brands it became clear that it was surrounded by all kinds of myths and conjecture. Now that I’ve found out what’s myth and what isn’t, it’s good to know that our family can continue to enjoy one of our favourite drinks. Now my boys call me Mum the Myth Buster’.

The full-page advertisement went on to list a number of so-called myths about Coca Cola – in particular such outrageous myths that Coke ‘makes you fat’, ‘rots your teeth’ and is ‘packed with caffeine’.

The ACCC believed the messages in this testimonial were likely to mislead consumers by creating an impression that Coke *could not* contribute to weight gain, obesity and tooth decay, and it represented that a responsible parent could include Coke in a family diet without any regard whatsoever to the potential for weight gain or tooth decay.

In resolving the matter with the ACCC, Coca-Cola agreed to publish corrective advertisements, of a similar size – and this time the heading, rather than myth-busting, was ‘setting the record straight’. That corrective advertisement stated:

“We recently published some ‘myth busting advertisements’ ... we certainly did not intend our messages to be misleading or to convey an impression that Coca-Cola cannot contribute to weight or to cavities and other dental problems”.

The ad went on to state that all kilojoules count and all products containing sugar have the potential to contribute to tooth decay.

It concluded: *“We said that these two ‘myths’ about Coca-Cola were ‘busted’. The fact is, we realise we should have been clearer.”*

This is just one example of some of the cases we’ve taken on that concern the impact of problematic advertising on young people and their families.

Conclusion

As this audience well knows, messages and images in the broader media have an enormous influence over what young people believe and understand. They also significantly influence parents who are trying to do the right thing by their kids.

As new markets and industries develop, so do new opportunities for marketing activities that push the boundaries to mislead or confuse consumers.

As has been discussed at length today, young people as a demographic are an easy, attractive and profitable target for advertisers.

The ACCC is very keen to play its part in ensuring that while the market place is fair and competitive for business, young consumers are not exposed to misleading or deceptive conduct.

Thank you for your time this afternoon.