Australian Association of National Advertisers

Achieving truth in advertising: the regulator's hope for the future

Sarah Court, Commissioner
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Good afternoon everyone. Thank you very much to Inese Kingsmill, Chair of the association, and to Scott McClellan, CEO, for the kind invitation to attend and present at today's congress. I am delighted to be here speaking to you this afternoon.

The theme for this congress is 'Over the Horizon'. In that context I want to talk to you about a regulator's vision for the future – and that is to get to a time where we have genuine 'truth in advertising', a time when the need for the ACCC's enforcement role in the advertising space would be much diminished.

However, as will become evident in the course of this presentation, I fear we have some way to go before that vision might be achieved.

The ACCC has many roles that span both competition and consumer protection laws – and our primary objective, given to us by parliament, is to improve the welfare of consumers.

So how do we do that?

One way is to ensure that consumers receive the right information about the products and services that they buy.

By 'right' information I mean information they can confidently rely on to make fully informed and considered purchasing decisions in what is an increasingly crowded and complicated market place.

The people in this room are critical intermediaries in making sure that such information is provided, because advertising can – and should – be an important ingredient to both the competitive process and to consumer welfare.

As we all know it is a testing time for Australian businesses. The slump in the global economy, online trading creating greater competition in our domestic market, and several other factors has led to a downturn in many sectors.

The challenge for advertisers, as always, is how to get their client's product or service noticed, particularly in a market of increasingly sophisticated and discerning consumers?

Is it fresher, healthier, organic, better for the environment, lower in fat, cheaper to run? Will it give the buyer better coverage or faster access? How is your client's product to be differentiated as against all others?

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

This impacts unfairly on both the competitive process and consumer welfare. It is not the ACCC's role to determine which products or services are better than others, but it is our role to ensure there is fair competition in the market and that consumers are not exposed to misleading or deceptive marketing.

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 Commonwealth and state/territory regulators work together to apply one set of national consumer protection laws.

At their 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 (i.e. the old section 52 of 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. Criminal sanctions are also available.

False representations in advertising might include statements about:

- the standard or quality of goods or services
- the composition, style, model or previous history of a good
- whether the goods are new
- the sponsorship, performance or characteristics of a good
- the price
- where the goods were made or assembled
- any condition, warranty or guarantee about the product or service.

The ACL also provides the ACCC with a new investigation power – that of a substantiation notice. The ACCC can issue a substantiation notice in circumstances where a trader makes a 'claim or representation' promoting or intending to promote goods or services.

This is a broad definition – advertising falls squarely within it. Thus when providing instructions about claims and promotions they wish to make in the advertising or promotion of their products, businesses need to be aware that the ACCC can issue a substantiation notice at any time which requires them to provide, within 21 days, information and documents capable of supporting their claims about the product.

For example, a business seeking to promote its plastic bags as ‘100% biodegradable’ in its advertising or on its packaging needs to be able to substantiate that claim. This would usually require scientific evidence, test reports and the like.

Similarly, a business claiming that its solar panel products can save customers significant sums from future electricity bills needs to be able to readily substantiate that assertion.

The substantiation notice power is an important early investigation tool for the ACCC. All that is required in order to issue a notice is that the claim or representation is made – we do not need to have any evidence or reason to suspect that the claim is untrue.

The ACCC’s enforcement and compliance approach

I would like to move on now to give you an understanding of the type of concerns the ACCC comes across regarding the marketing of products and services, and the type of matters we generally elect to pursue.

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 liable for their involvement in the creation and publication of misleading advertising.

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 if those representations are relied on
- the conduct involves a large trader and national advertising
- the conduct is particularly blatant
- it is by a trader or business who has come to our attention previously.

This can occur in any industry and across products of all kinds. Sometimes there are industries that warrant particular attention. For example, the telecommunications sector is one to which the ACCC has paid particular attention in recent years.

One of the ACCC’s primary objectives in taking enforcement action is deterrence; that is, specific deterrence to deter the particular trader from engaging in similar conduct again and, as importantly, general deterrence to send a message to the wider industry that false, misleading or deceptive claims about products run the risk of strong regulatory action.

So regardless of the particular sector in which you may operate, there is always a broader message or lesson from an ACCC enforcement action that will be relevant to your business.

Before I move on, a word about the ACCC’s approach to compliance, as opposed to strict enforcement.

We would of course prefer to see compliance from businesses than take them to court. Accordingly we spend a significant amount of time involved in outreach, liaison and providing education to business groups.

Delivering compliance will rarely rely on just one measure. Rather, effective approaches to problematic conduct often involve a combination of compliance activities such as education, consultation and voluntary industry codes, with a dose of enforcement action such as court enforceable undertakings, infringement notices or court action.

The liability of those involved in creating and publishing advertisements

As I have already noted, it's not just the companies selling products that can be penalised under the ACL: advertisers, media outlets and publishers can be liable for creating and publishing misleading advertising.

In the past the ACCC has taken court action against traders making claims and included the media groups making the representations.

For example, in 2003 the ACCC instituted legal proceedings against the Seven Network, as well as the company involved, for a segment aired on *Today Tonight* about the Wildly Wealthy Women millionaire property investment program.

The ACCC alleged that the company and the Seven Network made misleading representations as to the results that could be expected from participating in the program.

The court found that the Channel Seven broadcasters had uncritically adopted – and indeed "embraced and advanced" – the propositions of concern and held them liable under the Act.

In another matter, *Dolly*, *Girlfriend* and *TV Hits* magazines published misleading advertisements placed by UK and Bulgarian companies in relation to mobile premium services.

The publishers of those magazines provided the ACCC with court enforceable undertakings ancillary to proceedings the ACCC took against the businesses involved.

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

The publishers, ACP Magazines and Pacific Magazines, provided court enforceable undertakings that they would in future not publish ads unless the ads provided much clearer disclosure about the services its readers would be signing up to.

Both publishers also ran articles to inform their readers of the nature, cost and characteristics of the mobile premium services advertised in their magazines.

These examples indicate that it is not only the company advertising itself that may fall foul of the law – the law provides that parties who are knowingly involved in the contravention can similarly be held liable.

Current issues of concern

I want to move now to some of the current issues the ACCC considers on a regular basis, and to provide some examples of recent advertisements of concern. The areas I want to address are:

- reliance on fine-print qualifications or disclaimers to caveat a headline offer or representation
- credence claims – about food or goods
- the use of testimonials.

I will speak briefly about each of these in turn.

Fine-print qualifications and disclaimers

This issue arises in circumstances where 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 beside it which is apparently supposed to indicate to a reader that he or she should ignore what the headline claims and refer instead to the disclaimer.

It is important to note at the outset that the inclusion of the asterisk does not remove the potential for a headline to be misleading.

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

Telecommunications is a particular area of interest – and concern – to the ACCC. The industry generates a high level of complaints and they are continuing to rise.

The products and services sold are highly complicated and it is difficult for consumers to decipher what it is they are buying – and even more difficult for consumers to compare products.

The ACCC has attempted to deal with these kinds of issues in the telecommunications sector with a variety of strategies.

Back in 2009 former ACCC Chairman Graeme Samuel placed the telecommunications industry on notice of our concerns, telling the telcos that their consistently poor behaviour in regard to misleading advertising was in the ACCC's sights.

We consulted with the three major telcos (Telstra, Optus and Vodafone Hutchison Australia) and received a public and court enforceable undertaking from each of them that contained a commitment about their advertising practices, with the promise that they would each lift their game. Each telco played a very constructive role in this engagement.

We made it clear that we had higher expectations and little tolerance for continued poor advertising standards.

This message was then delivered to the industry at large. We met with advertising and marketing executives from all the second-tier players in the industry to put them on notice of the issues.

We sought to use this creative compliance approach designed to address industry-wide practices of concern by dealing primarily with the market leaders.

Despite these significant efforts we have found it necessary to take several recent enforcement actions in the telco sector, involving much the same issues of concern as those we dealt with in the undertaking.

I want to talk briefly about two recent court decisions in this area, involving Optus and TPG.

Optus

In 2010, the year following the undertaking I have referred to, Optus engaged in a widespread advertising campaign for various broadband internet plans. These were called the 'Think Bigger' plans.

The advertising for each plan had a common feature – each was advertised as consisting of a peak usage allowance and an off-peak usage allowance, with those two allowances totalling the size of the plan.

For example, the 120GB Think Bigger plan was said to consist of 50GB peak usage and 70GB off-peak allowance. It was in that manner that the plans were advertised.

The court said: "In fact, however, that was by no means an accurate description of any of the plans' operations. Rather than providing two distinct usage allowances – one peak, one off-peak – available to customers to use in their respective entireties, the situation was altogether different: upon a customer exhausting all of his or her peak allowance the service would be throttled back to 64kbps and that languid speed would apply, not only as one would expect to the peak usage but, rather surprisingly, to the off-peak usage and – more importantly – even if the off-peak allowance had not been exhausted…. Each advertisement was accompanied by a small-print explanation: 'Speed limited once peak data exceeded'.

This was a widespread, national multi-media campaign. Optus was penalised $5.26 million in the highest pecuniary penalty thus far imposed under the ACL. It is important to note that the penalty amount is currently the subject of an appeal by Optus.

TPG

Also in 2010 TPG ran a multi-media campaign with headline representations claiming that unlimited ADSL2+ broadband internet service could be acquired at a cost of $29.99 per month.

In the ACCC's view this representation was to the effect that a consumer could purchase this service without any obligation to pay anything more than $29.99 per month.

However, this was not the case. In fact a consumer could only access this product if he or she also rented a home phone line from TPG at the cost of another $30 a month, and in addition there were a range of set-up fees also payable.

The Court found that:

> *"the choice TPG made in its advertisements – particularly its decision to strongly emphasise the component price of $29.99 and to de-emphasise the actual price of $59.99 and the requirement to also rent a home telephone line – is an unfair trade practice. It is an unfair trade practice to require consumers to find their way through to the truth past advertising stratagems which have the effect of misleading or being likely to mislead them."*

It concluded that most of the advertisements across a wide range of media were misleading or deceptive for similar reasons. We are waiting on the court's decision on penalty.

Of course the inappropriate use of small print or tricky disclaimers is not unique to the telecommunications sector. Another recent matter involved one of Australia's best known retailers, **Harvey Norman**.

Last year the Federal Court penalised Harvey Norman $1.25 million for misleading advertising in a case the court described as "seriously misleading and deceptive on a significant and far-reaching scale".

One of the issues of concern involved catalogues which were distributed across Australia, and which gave the clear impression that the products and prices in the catalogue were available at Harvey Norman stores generally.

However, there was a fine-print condition at the very back of the catalogue that sought to disclaim that the products and prices were available nationally, and instead asserted that the offers were made by one particular store only.

Thus if a consumer who had received the catalogue in Adelaide went down to his or her local store to purchase the product, a response may have been, relying on the fine-print disclaimer that the catalogue, despite being distributed in Adelaide, applied only to products sold by its Sydney store.

In summary, the advertising practice of fine-print qualification is one the ACCC is tired of correcting.

In the context of the new penalty provisions we will take an increasingly aggressive approach to send the message as necessary that this kind of misleading advertising will not be tolerated.

Credence claims

Now, from the perennial use of small-print qualifiers to the temptation to take advantage of the evolution of things that matter to consumers.

Many consumers increasingly want to ensure that they engage in what I might loosely call 'responsible purchasing. They want to buy food that is healthy for them and their families, they might want to buy organic foods, or products that do not harm or have not been tested on animals, or products that do not harm the environment.

Claims made about these kinds of products we call 'credence claims'. They are designed to increase the attraction to consumers of the particular product.

Many consumers are prepared to pay a premium for these kinds of products, and advertisers are of course well aware of this.

Clearly this is an opportunity for advertisers to differentiate their clients' products. However, the ACCC has seen a number of examples where we consider that advertising has overstepped the line.

One recent example that has drawn media attention is the ACCC's action against some chicken processors and their claims that their chickens are 'free to roam'. The reality is that the chickens are reared indoors with high density stocking that significantly restricts their ability to roam.

We consider that statements of this kind convey a particular impression of farming practices and are powerful representations that influence many consumer purchases and food choices.

One producer has admitted the contravening conduct and received a penalty from the Federal Court. The case is continuing against the other respondents.

The ACCC has also taken enforcement action against producers of eggs claimed to be free range when they are not, and in relation to meat represented to be from King Island when it is not. There are many other similar examples.

False testimonials

Sometimes associated with credence claims are false testimonials, 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. More credibility though 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, but they must be genuine.

One relatively recent example of this was the promotion by Coca-Cola using actor Kerry Armstrong. In 2008 Coca-Cola published an ad featuring the actor called *Kerry Armstrong on motherhood and myth-busting*.

The ad listed a number of so-called myths about Coca-Cola, in particular, the alleged myths that Coke made people fat, rotted teeth and was packed with caffeine.

The ACCC believed the messages were likely to mislead consumers by creating an impression that Coke didn't contribute to weight gain, obesity and tooth decay, and had the potential to mislead parents about the consequences of consuming the drink.

Coca-Cola agreed to publish corrective ads, which were widely reported on.

Conclusion

There are many other examples I could of course give of our concerns about advertising practices.

A final message I would like to leave with you is that the ACCC is looking for higher standards in advertising. In simple terms we are still looking for ‘truth in advertising’.

Marketing and advertising professionals are critical to achieving this, and have enormous influence over what consumers believe and understand.

There is often an internal debate within corporations between the legal and compliance area and the marketing department, in respect of a particular campaign. Is it misleading? Does it sail too close to the wind?

No doubt external advertising agencies get tangled up in these debates. And no doubt sometimes the legal area wins, no doubt sometimes the marketing department does.

But one of the things I have learned in this role is that all the court proceedings and penalties and the like are perhaps not the biggest deterrent of misleading advertising for major and reputable companies.

Perhaps the biggest deterrent is the risk of reputational damage resulting from a court finding that a major corporation has engaged in false or deceptive advertising, and the associated publicity.

As new markets or industries develop (think telecommunications) or new issues arise (think carbon pricing), so do new opportunities for advertising and promotional activities that push the boundaries.

Regardless of the medium your advertisement is presented through – be it television, magazines, billboards, websites, social media, the sides of buses, door-to-door – the same rule applies: don’t mislead or deceive.

You have among the most creative minds in the country and sometimes creativity walks a fine line.

But products should sell themselves – you shouldn’t need to resort to using methods that risk being false or misleading to gain a competitive advantage. This is unfair to both the competitive process and to consumers.

Thank you. I’d be happy to take questions.