Trade Practices in 2003 and a spotlight on the Dawson Inquiry
Advertising, Selling and Marketing
Emma Marsh, Senior Associate, Rachel Nemes, Lawyer
and Jennifer Neale, Lawyer
Allens Arthur Robinson
27 February 2003

1. Introduction

Whilst the Australian Competition and Consumer Commission (ACCC) is perhaps best known as Australia’s ‘competition watchdog’ – vigorously regulating the activities of Australia’s corporate giants and ensuring that our businesses compete fairly - it also plays a major role in protecting consumers.

These two roles reflect the object of the Trade Practices Act 1974 (Cth) (TPA) which is to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’\(^1\).

This paper aims to remind you of the consumer protection provisions contained in the TPA in so far as they relate to advertising, selling and marketing, and to update you on some of the recent decisions, issues and trends in this area of the law. In particular, we examine:

- the ACCC’s recent focus on the practices of online businesses;
- the targeting of misleading advertising by health insurance companies;
- the ACCC’s continued focus on fine print, disclaimers and hidden charges;
- the Full Federal Court’s decision in Gillette relating to comparative advertising;
- the ACCC’s increasing focus on country of origin claims;
- recent amendments to the pyramid selling provisions of the TPA; and
- consequences of breaching the consumer protection provisions including the Criminal Code regime and the extension of liability for those ‘knowingly involved’ in misleading or deceptive conduct.

\(^1\) Section 2 of the TPA.
2. Legislative overview

Part V of the TPA relates to consumer protection and contains a number of provisions — each regulating different aspects of the activities between business and consumers including misleading and deceptive conduct, false representations and country of origin claims.

Part VC of the TPA sets out the offences relating to unfair practices prohibited by the provisions of Part V. Part VC has been introduced as a result of the introduction of the Commonwealth Criminal Code. Whilst breach of certain sections of Part V has always been a criminal offence, Part VC imposes higher penalties and sets out whether an offence is, for example, one of strict liability. The Criminal Code and penalties for breach of the consumer protection provisions are discussed in further detail at the end of the paper.

2.1 Sections 52 and 53

Undoubtedly, the most popular section of the TPA (both in terms of the best known and most litigated) is section 52 which prohibits a corporation from engaging in misleading or deceptive conduct. Section 52 is most commonly used by competitors, even though it aims to protect consumers. However, misleading and deceptive advertising continues to be the ACCC’s enforcement priority in the protection of consumers, with the misuse of fine print and deceptive pricing of special concern.\(^2\) In fact, 25% of complaints received by the ACCC for 2001-2002 related to potential breaches of section 52.\(^3\)

Section 52 claims are often pleaded together with claims relating to the tort of passing off. In addition, in many cases, whether commenced by the ACCC or a competitor, a claim of breach of section 53 will be pleaded as well.

Section 52 provides:

> A corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

Section 53 provides:

> A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services:

> (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

> (aa) falsely represent that services are of a particular standard, quality, value or grade;

> (b) falsely represent that goods are new;

> (bb) falsely represent that a particular person has agreed to acquire goods or services;

> (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

> (d) represent that the corporation has a sponsorship, approval or affiliation it does not have;


(e) make a false or misleading representation with respect to the price of goods or services;

(ea) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;

(eb) make a false or misleading representation concerning the place of origin of goods;

(f) make a false or misleading representation concerning the need for any goods or services;

or

(g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 75AZC sets out the offences relating to a breach of section 53.

2.2 Other unfair practices

There are a number of other unfair practices prohibited by Part V of the TPA. As with a breach of section 53 discussed above, breach of any of these provisions is a criminal offence under Part VC for which a fine can be imposed. These include:

- False representations and other misleading or offensive conduct in relation to land (section 53A/75AZD)
- Misleading conduct in relation to employment (section 53B/75AZE)
- Not specifying the full cash price in certain circumstances (section 53C/75AZF)
- False offer of gifts and prizes (section 54/75AZG)
- Bait advertising (section 56/75AZJ)
- Referral selling (section 57/75AZK)
- Accepting payment without intending or being able to supply as ordered (section 58/75AZL)
- Misleading representations about home operated business activities (section 59/75AZM)
- Harassment or coercion (section 60/75AZN)
- Pyramid selling (section 65AAD/75AZO)
- Unsolicited credit and debit cards (section 63A/75AZP)
- Assertion of right to payment for unsolicited goods or services (section 64/75AZQ);

Other than pyramid selling, we will not be discussing any of these topics in detail in this paper.

3. Online businesses

3.1 Overview

The ACCC recognises that electronic communications are an integral part of business and consequently, an important part of its enforcement activities involve dealing with the perennial consumer and business problems which have migrated to online networks. The ACCC is keen to
ensure that online traders do not escape trade practices regulation and that web-based misrepresentations are controlled.  

3.2 Internet trading

The ACCC has indicated that it closely monitors complaints relating to e-commerce, particularly during busy trading periods such as Christmas / New Year. The ACCC warns that the Internet can harbour unscrupulous and anonymous traders and businesses need to engage in full disclosure if they are serious about attracting large sales volumes.

Last year, the ACCC acted against several on-line shopping websites. In April 2002, the ACCC accepted enforceable undertakings from Bikes Direct, an Internet trader based in Australia, for allegedly misleading consumers regarding warranties and refunds as well as for allegedly selling imported bikes which did not comply with the mandatory Australian consumer product safety standard.

In October 2002, the ACCC commenced proceedings against the operator of www.sydneyopera.org, a website that purported to be the official booking site of the Sydney Opera House. The ACCC claimed that several consumers from the United Kingdom and Europe attempted to purchase tickets through the imitation site and were either overcharged or did not receive the tickets for which they had paid.

3.3 Unsolicited invoices

One theme which emerged from the ACCC’s activities last year was its successful prosecution of companies which sent unsolicited invoices to Australian consumers. Interestingly, three of the four companies prosecuted by the ACCC were companies which misrepresented that they were responsible for registering Internet domain names.

The details of these cases are discussed briefly below.

• Internet Registrations Australia

The ACCC commenced proceedings against Internet Registrations Australia Pty Ltd (IRA), alleging that it made false or misleading representations regarding the registration or renewal of Internet domain names. This action was prompted by an influx of consumer complaints and inquiries regarding unsolicited domain name ‘renewal advice’ notices sent by IRA which looked like invoices for payment. IRA distributed the misleading notices to approximately 70,000 recipients, many of whom did not have a pre-existing relationship or prior dealings with IRA.

The ACCC claimed that IRA had misrepresented that it had a pre-existing relationship with recipients of the renewal notices and that it had the authority to register or renew a customer’s domain name. The ACCC accepted enforceable undertakings from IRA to provide refunds to recipients of its misleading ‘renewal notices’, and the Federal Court made orders against IRA for making false or misleading representations regarding the registration and renewal of Internet domain names.

The ACCC warned that it remains vigilant of businesses which operate in new and emerging areas of commerce and will act to stop illegal conduct.

• **Internet Name Protection**

In a similar case, the ACCC commenced Federal Court proceedings against Internet Name Protection (trading as Internet Name Group, or *ING*) as well as two directors of the company and a former employee. The ACCC claimed that ING sent unsolicited invoices to small businesses throughout Australia seeking payment for domain name services including the registration and renewal of domain names.

The Court made the usual orders, which included injunctions restraining ING from engaging in misleading or deceptive conduct in connection with Internet domain names. Interestingly, injunctive relief was also granted in relation to the two directors and the former employee.

• **COM. AU. REGISTER**

Another similar case in which orders were also made against an individual was that involving COM. AU REGISTER (*CAR*) and its proprietor Mr Wayt. The ACCC alleged that CAR had misrepresented that it was responsible for registering Internet domain names and that CAR’s Internet site contained misleading representations, for example, that CAR could provide services to ensure compliance with relevant taxation and statutory authorities which the ACCC alleged was false.

The court enjoined Car from engaging in similar conduct in the future, ordered CAR to send corrective faxes and display corrective notices on its website, and ordered Mr Wayt to implement a trade practices compliance program and contribute towards the ACCC’s legal costs.

• **IT & T AG**

The ACCC instituted proceedings against IT & T AG, a Swiss based company which operates an international fax directory that is published on the Internet and is available on CD-ROM. The ACCC alleged that IT & T AG had mailed unsolicited documents (claimed to have the appearance of invoices) from Switzerland to Australian business consumers in relation to its international fax directory.

The ACCC claimed that, given the general appearance of the documents, including design, layout and text, IT & T AG falsely represented: that it had a prior business relationship with the Australian businesses; that it had an existing right to payment; and that a payment to IT & T AG for listing the business in the directory was due and payable. The ACCC also alleged that the Internet version of the directory incorrectly implies that each Australian business listed in the directory had corresponded with IT & T AG with a view to becoming a listed member and had given their authority for its particulars to be included.

The ACCC is seeking a range of remedies including declaratory and injunctive relief.

### 3.4 Enforcement

The ACCC views breaches of court orders very seriously and last year brought contempt proceedings against at least two online traders. Parties are obliged to obey court orders and when they do not, the ACCC has demonstrated a willingness to vigorously pursue the matter.

### 3.5 Outlook

The ACCC has monitored the conduct of online businesses for a number of years and regularly pursues such traders for breaches of the TPA. Companies which make false representations
regarding registration or renewal of Internet domain names are likely to be a continued and major focus of the ACCC’s enforcement activities, as are those distributing unsolicited invoices.

4. Advertising by health insurance companies

4.1 Overview
Last year, the ACCC was particularly active in prosecuting misleading or deceptive advertising by health insurance companies. This is perhaps indicative of the ACCC’s interest in ensuring that customers are given full and complete information on which to base their choice of health insurer, particularly in light of the potential costs involved. Three of the cases are discussed below.

4.2 The MBF case
On 9 September 2002, a Federal Court ruling was delivered which held that the Medical Benefits Fund of Australia (MBF), had engaged in misleading and deceptive conduct in relation to representations made regarding the provision of health insurance services and that such conduct was in breach of the consumer protection provisions of the Australian Securities and Investment Commission Act 1989 (Cth) (1989 ASIC Act). MBF’s advertising agency was found to be knowingly concerned in the conduct.

The Facts
In the months prior to the Federal Government’s July 2000 ‘Lifetime Health Cover’ initiative, MBF, utilising the services of John Bevins Pty Ltd (the ad agency), launched a large advertising campaign to boost membership. Part of the campaign involved a series of television advertisements that followed the story of a couple and the birth of their baby.

In the third advertisement, the couple were shown celebrating the birth and expressing thanks for MBF’s help. The voiceover stated: ‘Join MBF hospital cover before 30 June and they’ll waive the two and six month waiting periods.’ The final few seconds of the ad contained large text telling viewers to ‘visit a Member Centre.’ Below this, text of approximately half the size stated: ‘12 month waiting periods such as pre-existing conditions and obstetrics still apply.’

The fourth advertisement in the series contained images of the parents and their baby. Text in large font stated: ‘Join Now. Claim Tomorrow.’ Below this in small font appeared the same statement as in the third advertisement regarding the waiting period for obstetrics.

MBF also advertised in newspapers and on railway billboards in relation to transferring health funds. In each advertisement, the following text (or very similar text) was superimposed over or placed adjacent to a photograph of a pregnant woman:

In the largest font:

Are you sure your health cover is going to deliver?

5 Cassidy v Medical Benefits Fund Australia (No. 2) [2002] FCA 1097
6 The Australian Securities and Investment Commission Act 1989 (Cth) has now been superseded by the Australian Securities and Investment Commission Act 2001 (Cth). For the purposes of this decision, Justice Hill held that there is no relevant difference. However, the provision of health insurance services is now regulated under the Trade Practices Act 1974 (Cth).

In medium font:

Does your hospital insurance cover you for things like pregnancy, a knee replacement, or major heart surgery? If not, it could be a big price to pay for paying less up front. And a good reason why switching to MBF Pays - once you've served your waiting periods *. Contact MBF today ...

In small font:

*Conditions apply. There is a 12 month waiting period for some services including pregnancy and cover for in-patient hospital services only...

Proceedings were brought by ASIC and the Chief Executive Officer of the ACCC against MBF as principal and an employee of the ad agency as an accessory for misleading and deceptive conduct in breach of section 12DA of the 1989 ASIC Act. Section 12DA of the 1989 ASIC Act deals with misleading or deceptive conduct in relation to financial services and is a mirror provision to section 52 of the TPA.

The Findings

(a) Television Advertisements

Justice Hill held that the third and fourth television advertisements in the series were misleading and deceptive. The test he applied was whether:

a reasonable person (concerned with their health cover) who saw the advertisements and who was not particularly intelligent or well informed, but of somewhat less than average intelligence and background, although not unusually stupid, was (or was likely to be) misled by the advertisements.

Hill J held that the first and dominant impression was that waiting periods for obstetrics would be waived. The effect of this first impression was not ameliorated by:

• the accuracy of the qualifying message later in the advertisements;

• the statements regarding waiting periods in brochures (particularly since prospective customers would not necessarily read the brochure carefully); or

• the statements regarding waiting periods in 'sign-up' forms (particularly given the use of the 'QuickJoin' and Internet forms which did not explain the waiting periods in detail).

Other factors Hill J took into consideration included:

• evidence from two couples who had recently had a child that they were misled into believing that the waiting period on obstetrics had been waived; and

• the fact that the rush to meet the Government's 'Lifetime Health Cover' deadline meant that consumers had difficulty speaking to customer service people about the terms of the health insurance and were being forced into making quick decisions without effective consideration of those terms.

(b) Print Media

In relation to the newspaper advertisement, Hill J held that there was no misleading or deceptive conduct. The statement to which the asterisk applied was not false or misleading. Further, the reader would have had time to study all elements of the advertisement, including the qualification regarding waiting periods.

(c) Billboards
Although the billboards contained very similar text to the newspaper advertisement, his Honour found the billboard advertising to be misleading and deceptive. Hill J held that the main message of the billboards was that MBF covers members for pregnancy. His Honour emphasised that many people would only see the advertisement briefly from passing trains and therefore the qualification in small type regarding waiting periods was ineffective.

(d) **Was the employee of the ad agency 'knowingly concerned'?**

The employee of the ad agency was held to be knowingly concerned in the breach under section 12GD(e) of the 1989 ASIC Act. He was found to have had knowledge of the: ‘essential elements of the conduct that constituted the breach.’ He knew the content of the advertisements and knew that waiting periods did still apply for pregnancy. It was no defence that he would not benefit from misleading the public and did not intend to mislead the public.

**The Orders**

Hill J ordered MBF undertake corrective advertising to remind the public about the misleading statements and of the importance of questioning advertisements. However, his Honour held that injunctive orders preventing the respondents from infringing the TPA in the future and requiring them to implement compliance programs were unnecessary. This was because the respondents’ breaches were not deliberate, they had already implemented compliance programs and further, the problem did not arise because of a lack of a compliance program, but rather due to a lack of appreciation that the advertisements could mislead.

A proposed order requiring the employee of the ad agency to circulate a notice of the decision to the members of the Advertising Federation of Australia was not supported by Hill J. His Honour stated that other advertising agencies would learn of the decision regardless and that such an order would be excessively punitive, especially since Professor Fels referred to the respondents in media reports earlier this year.

Appeals have been lodged by both MBF and John Bevins Pty Ltd. The orders against MBF have been stayed pending the outcome of the appeal.

**4.3 The NRMA case**

On 6 November 2001, the ACCC instituted proceedings against NRMA Health Pty Ltd, (also trading as SGIC Insurance Limited and SGIO Limited), NRMA Insurance Ltd and Saatchi & Saatchi Australia Pty Ltd based upon allegations of misleading and deceptive advertisements of their health insurance products. Specifically, it was alleged that the relevant advertisements attempted to persuade consumers to transfer or join the health funds by promising ‘free delivery’ of babies. The advertisements contained fine print disclaimers stating that members only received full insurance coverage for obstetric services following the payment of any excess or co-payment or after the 12 month waiting period for obstetric related benefits had been served. It was alleged that the disclaimers were inadequate and failed to detract from the overall impression conveyed by the advertisement of ‘free delivery’.

On 10 July 2002, the Federal Court made consent orders against NRMA Health and NRMA Limited including:

- declarations that they contravened the relevant provisions of the ASIC Act 2001 by publishing advertisements that were misleading;
• a requirement that NRMA Health write to consumers who took out the relevant health insurance during the relevant period informing them that the advertisements were misleading;

• a requirement that the 12 month waiting period for pregnancy related services be waived for people who are misled and excesses or co-payments refunded; and

• an order that they not make representations in the future about health insurance benefits without clearly and prominently displaying the existence of excesses, co-payment and waiting periods.

The ACCC’s proceedings against Saatchi & Saatchi, the advertising agency responsible for preparing the campaign, were set down for hearing before the Federal Court on 18 September 2002. The judgment in this case is discussed later in the paper in relation to accessorial liability.

4.4 Westfund Health Insurance

In October 2002, the Federal Court, Sydney declared that Western District Health Fund Limited, trading as Westfund, had engaged in misleading and deceptive conduct in advertising its health insurance products to consumers.

In January 2002 the ACCC, under delegation from ASIC, instituted proceedings against Westfund for advertising that appeared on television between February and September 2001 and for misleading or deceptive representations made on its website.

In both the television advertisement and on the website, Westfund stated that the fund would pay all hospital and medical expenses associated with all operations and that members would not be required to pay any excess or co-payment. In fact, Westfund would not pay all medical expenses for all operations and there were circumstances in which a member may have to pay an excess or a co-payment.

These representations also included two fine print disclaimers which the court held failed to detract from the overall impression conveyed by the advertisement that a Westfund member would not be required by the fund to make any payment to cover hospital or medical expenses associated with any operations.

As well as declaring that Westfund’s conduct was misleading and deceptive, the Federal Court orders, all made with Westfund’s consent, included an order that Westfund write to consumers who bought health insurance from the fund between 15 February 2001 and 22 September 2001, informing them that they may have been misled by the advertisements and/or the website and that Westfund, for those members, offer to refund, to the extent possible:

• hospital expenses not paid by Westfund;

• certain medical expenses;

• any excess or co-payment paid by the member; and

• the cost of membership for those members who, as a result of having been misled, chose to leave Westfund.

The court also granted:

• an order that Westfund publish a corrective statement on its website;
• an injunction preventing Westfund from making representations in the future about health insurance benefits without clearly and prominently displaying the extent to which an insured person is required to make any payment in respect of hospital and/or medical expenses associated with operations; and

• an order requiring Westfund to establish, maintain and have audited, a trade practices compliance program.

4.5 Outlook

Health insurance companies have been a major focus of the ACCC’s investigations into misleading and deceptive conduct, particularly since the introduction of Lifetime HealthCover. Insurers need to be very careful with the use of images and disclaimers, so that consumers are not misled into thinking they have instant cover for certain conditions when waiting periods in fact apply. The courts will have regard to the overall impression of such advertising.

5. Fine print, disclaimers and hidden charges

5.1 Overview
The ACCC has recently cracked down on businesses that employ advertising techniques which:

• do not disclose all charges or the full price of its goods or services; and

• use fine print or disclaimers to qualify statements about the goods or services which it is advertising.

In September 2001, the ACCC released the second edition of its ‘Advertising and Selling’ Guide for businesses and consumers. The Guide, which outlines the basic obligations on all businesses under Part V of the TPA, identified disclaimers and fine print as marketing techniques that require particular care. The courts have quickly followed the ACCC’s lead in subjecting advertisements containing disclaimers and fine print to even greater scrutiny.

Whilst there has not been any ground breaking case law in this area, the ACCC continues to scrutinise advertisements which use fine print and disclaimers to qualify messages or statements. The ACCC has also recently focused on price disclosure and is concerned to ensure that companies do not ‘hide’ charges when disclosing the price of goods or services.

5.2 Disclaimers
The use of disclaimers in advertising is common and can be an effective way of making a punchy or concise statement without having to disclose all the detail or elements of a particular offering. However, there are inherent risks in using disclaimers as they can often be used in an attempt to modify an otherwise unlawful statement about a good or service. A successful disclaimer will achieve this objective. However, we find that on occasions businesses either do not adequately draw the consumer’s attention to the qualifying statement or the disclaimer itself is ineffective in remedying the misleading statement.

The effectiveness of a disclaimer must be assessed in the context of the overall effect of the advertisement. In assessing whether a disclaimer will be effective and will therefore satisfy the ACCC or a court’s concerns, one should consider the following factors:
• **The prominence of the disclaimer**

A disclaimer should be sufficiently prominent. This is often more difficult in radio and television mediums than in print advertising.

• **The wording of the disclaimer**

Obviously the wording of a disclaimer cannot be such that it completely overrides the main statement. For example, it would not be appropriate to advertise that certain whitegoods have a ‘Guarantee’ if that statement is then qualified by an asterisk leading to a disclaimer which says ‘Not a Guarantee’. Whilst this may seem to be a rather obvious example, there are companies who do attempt to engage in behaviour not dissimilar to this.

• **Timing**

The timing of a disclaimer must also be considered. Ideally, a disclaimer should be made at the same time as the main statement. For example, a disclaimer which is made at point of sale is unlikely to be effective if the misleading or deceptive conduct has enticed entry into the premises.  

5.3 **Use of disclaimers - the Target Case**

In June 2001, the Federal Court ordered Target to broadcast corrective advertisements on television for breach of the misleading and deceptive conduct provisions of the TPA. The Federal Court found that Target had misled the public by advertising substantial price reductions for certain categories of goods, but failed adequately to point out that certain goods were excluded from the offer. The court ordered Target to broadcast corrective advertisements on over 88 television stations during prime time and to publish those advertisements in over 30 newspapers across the country.

Between May and August 2000, Target broadcast television advertisements and published newspaper advertisements in all states and territories in Australia, offering substantial price reductions for clothing and home goods. The offers were limited and small print was used to exclude several items from the discount. The voiceover in the television advertisement for the clothing discounts stated:

We are dropping the price of all mens’, ladies’ and kids’ clothing by a massive 25% and that’s right, 25% off every stitch of clothing.

A disclaimer was shown in writing for approximately 1.5 seconds at the end of the advertisement, stating that the offer did not extend to ‘accessories’ which includes ties, scarves, gloves, hats, underwear, socks or hosiery.

The ACCC first contacted Target in July 2000, alleging that the advertisements might constitute misleading and deceptive conduct and suggesting that Target offer enforceable undertakings. Target refused and the advertising campaign continued. A letter of demand was sent to Target in August 2000, with no result. The ACCC commenced proceedings in the Federal Court in Perth on September 2000, alleging breach of sections 52 and 53(e) of the TPA.

In June 2001, Justice Lee declared that Target had engaged in false, misleading and deceptive conduct, in breach of sections 52 and 53(e) of the TPA. Justice Lee also ordered:

---

7 *Britt Allcroft (Thomas) LLC v Miller* [2000] FCA 699
• an injunction restraining Target from offering to supply clothing or home goods that are advertised at a discounted price when no discount applies for a period of 4 years;
• an injunction restraining Target from making representations as to the price of clothing or housewares without clearly and prominently disclosing all relevant conditions that may apply to price, for a period of 4 years;
• that Target publish, at its own expense, corrective advertisements in over 30 newspapers across Australia and on 88 television stations during prime time;
• that Target use its best endeavours to ensure that its trade practices compliance program is consistent with the Australian Standard; and that Target pay the ACCC’s costs in the agreed amount of $65,000.

This was the first time that a court ordered a business to broadcast corrective advertisements on television for breach of the misleading and deceptive conduct provisions of the TPA. At the time, Professor Fels said:

Where there are misleading advertisements on prime time television, there should be corrective advertisements on prime time television.

The Target decision reinforces the ACCC’s focus on disclaimers and the use of fine print in advertising and its intention to subject fine print ads to greater scrutiny in the future. It remains clear that the overall impression of the advertisement is critical and there will be certain situations in which companies will be unable to qualify statements by the use of fine print or disclaimers.

5.4 Danger words

The ACCC has identified in its Guide to Advertising and Selling a range of words and phrases which it believes should be handled with care. Words such as free, cost price, new, cheapest, sale and discount are dangerous and powerful and often create an impression you cannot cure with fine print or disclaimers. The ACCC warns that as these words are likely to grab the interest of, and favourable responses from, consumers care must be taken when using these words such that any limitations or qualifications to the representations are made apparent to the consumer.

The ACCC is always wary of advertisements which claim that a particular product is free and has pursued several cases of misleading and deceptive conduct against businesses which have unlawfully made such claims. A recent example is the proceedings commenced against Free2aiR in June 2002. The ACCC alleged that Free2aiR engaged in misleading and deceptive conduct by representing to consumers that their Internet access was free after a one-off payment. There was no mention of any ongoing fees and charges (apart from an excess download charge) however, the Free2aiR service allegedly had a number of terms and conditions that applied to subscribers including a quarterly administration fee. These terms and conditions were not made apparent to potential customers prior to their subscribing to Free2aiR’s services.

The Court declared that Free2aiR had: engaged in misleading and deceptive conduct and made false or misleading representations in breach of the TPA; engaged in unconscionable conduct in breach in dealings with customers; and had used undue harassment and coercion by threatening to disconnect customers who failed to pay administration fees. The court declared that the sole Director of Free2aiR, Mr Young, was ‘knowingly concerned’ in each of the alleged breaches or aided, abetted and procured each of them.
This case demonstrates that businesses cannot advertise ‘free’ products, and then attempt to impose charges or limits through fine print, disclaimers, terms and conditions or user policies. Businesses should be careful only to describe an offer as free if it is absolutely free, in that the cost of the offer is not recouped in the price of another product or service.

5.5 Hidden charges and price disclosure

The ACCC has also recently focused its attention on price disclosure. In addition to section 52 which prohibits misleading and deceptive advertisements, section 53(e) prohibits misleading representations with respect to the price of goods or services.

Cases – use of “WAS - NOW” price claims

Allans Music Group Pty Ltd, a major musical instrument retail group, was fined a total of $80,000 in the Federal Court, Adelaide, in December 2002 for misleading and deceptive advertising. Allans pleaded guilty to nine counts of making false or misleading representations concerning price. Nine other counts were withdrawn. The claims essentially related to false “WAS – NOW” price claims in its Christmas 2000 catalogue – in practice, the specified items in the catalogue had not been sold in the pre-Christmas period at the 'WAS' price but rather at prices substantially below the claimed ‘WAS’ price.

Justice Tamberlin said: "In particular, I do not accept that a customer would understand the pricing policies of the suppliers in the market as referring to reductions from a prior recommended price as opposed to a prior actual price".

As mitigation, Allans offered to contact the consumers who purchased the specified items and offer them a $50 gift voucher or, if they could not be contacted, to donate $50 to charity. Justice Tamberlin noted this offer but also noted that "the extent to which Allans departed from the true position as to earlier pricing is significantly in excess of $50 and in some cases amounts to a difference in respect of $1000 in respect of an individual item".

Interestingly, this is the first time a retailer has been convicted by the Federal Court for the use of false 'WAS – NOW' advertising. The ACCC regarded the conduct as particularly blatant and reckless in this case and pursued it as a criminal prosecution.

Cases - used car dealers

In April 2002, the Federal Court held that used car dealer Alex Salter Pty Limited engaged in misleading and deceptive conduct by adding undisclosed fees and charges to advertised prices. The ACCC alleged that during a ‘Massive Mark-Down Madness’ sale in 2001, Salters advertised a used car for $6,787 when in fact the car was not available for less than $8,400. The ACCC also claimed that the advertisement failed to state that the vehicle was unregistered and falsely represented that the vehicle was in condition for immediate delivery. The Federal Court ordered, by consent, that Salters implement a trade practices compliance program, made a declaration that the conduct amounted to a breach of the TPA and permanently enjoined the trader against similar conduct.

Cases – mortgage lenders

The ACCC alleged an advertisement for Wizard's products broadcast in Victoria and Queensland during June and July 2001 was false and misleading in breach of sections 52 and 53 of the TPA.
The allegations included that Wizard’s RateBreaker loan, advertised on commercial television, had certain features that were not in fact available, but were only available with loans at higher interest rates. Wizard voluntarily withdrew the ad on 13 July 2001.

The ACCC issued an information request relating to the potential breaches to Wizard on 2 August 2001 but did not commence court action until 5 February 2002. By the time the hearing commenced, Wizard admitted contravening both sections. Wizard agreed with the declaratory relief sought by the ACCC ought to be granted but objected to the ACCC’s request for additional orders.

Merkel J held that the contravening advertisement was a result of Wizard’s systemic failure to set in place procedures to ensure all advertising received legal approval. He also held that Wizard’s response to its contravening conduct was inadequate. Merkel J therefore considered it appropriate to grant an injunction restraining Wizard from engaging in the misleading conduct for 18 months. Although the ACCC had sought a 3 year injunction, Merkel J stated that the shorter time frame would be sufficient for Wizard to ‘establish and maintain appropriate and adequate procedures to ensure that there is not a repetition of contravening conduct’.

In Merkel J’s view, the injunction was sufficient to prevent repetition of the contravening conduct. He declined to order that Wizard undertake corrective advertising as sought by the ACCC. Merkel J noted that, since the contravening conduct ceased in July 2001, it was too late for corrective advertising to dispel the incorrect impressions created by the misleading ad. Merkel J rejected the ACCC’s submission that corrective advertising was necessary as an aid to the enforcement of the injunction.

Merkel J did not order Wizard to implement a trade practices compliance program on the basis that the injunction would be sufficient to induce Wizard to establish an appropriate compliance program developed in accordance with external legal advice.

**Cases – advertisements of mobile phone and call plans**

The ACCC has stated that consumers are entitled to know the full cost and consequences of entering into mobile phone contracts and that offers of no, or low, cost phones and/or references to seemingly low plan payments may persuade customers to enter into transactions they might otherwise avoid, only to find out later that they are either committed to a long period of monthly payments or else face substantial early termination payments.

Two recent cases involve such advertisements. In December 2002, the Federal Court found that Virgin Mobile (Australia) Pty Ltd had made false and misleading representations concerning the price of goods and the existence of any conditions (in breach of sections 53(e) and 53(g) of the TPA) and had failed to state the full cash price of the goods (in breach of section 53C) in relation to national advertisements for its Dial High Club mobile phone packages. The relevant advertisements contained representations such as ‘Nokia 8310 on us, handcuffs off you’, ‘No long-term contracts’ and ‘Leave when you like’, which the ACCC alleged implied to consumers that they were not obliged to pay the specified monthly call charges for any particular period and that they could leave their contract without making any additional payment on

---

8 ACCC v Wizard Mortgage Corporation Limited [2002] FCA 1317
9 Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2) [2002] FCA 1548
termination. In fact, unless consumers continued to pay the monthly call charges for the full period of 24 months, they were required to pay out the full cost of the telephone handset. Further, Virgin Mobile failed to disclose to consumers the cash price of the handset or the minimum cost of joining the Dial High Club package.

The Court made a variety of consent orders including an order requiring that Virgin Mobile write to consumers who signed up to the relevant Dial High Club packages informing them of the Court's findings and explaining all the relevant costs and consequences of their signing up to the packages. Other orders included requirements to publish a public advertisement, implement a trade practices compliance program and create a website for consumers explaining advertisers' obligations under the TPA.

In January 2003, Alliance WA provided the ACCC with enforceable undertakings, admitting that its mobile phone and call plan advertising may have misled consumers, in breach of sections 52 and 53(e) of the TPA. The relevant advertisements contained a representation that the advertised mobile phone(s) and call plan, including all calls, would cost no more than the amount shown in the advertisements as the “Total cost $Y. That’s it!” In fact, the amount shown in the advertisements as the ‘total cost’ was the cost of the mobile phone only and any calls made by consumers were subject to an additional per second charge.

Alliance undertook to contact all customers who had purchased a mobile phone and signed up to the call plan, explaining that they may have been misled by the advertisements, what the actual call charges are and that if they believe they have been misled, they can claim a refund.

5.6 Outlook

These cases illustrate that the timing, prominence and wording of disclaimers are some of the most important factors the ACCC and the courts will consider.

Businesses also need to be careful when advertising the price of goods or services being offered that the total cost is made known. Particular care needs to be taken when advertising “was” and “now” prices.

6. Comparative advertising

6.1 Overview

Unlike some other countries, comparative advertising is legal in Australia. It can be a particularly persuasive advertising tool if used in an accurate way and provided that any claims of price or performance can be justified with technical evidence.

In mid 2002, the full Federal Court handed down its decision in the latest suite of comparative advertising disputes between competitors Energiser (the manufacturers of Everready and Energiser batteries) and Gillette (the manufacturers of Duracell batteries). This case clarified several aspects of comparative advertising law and confirmed the court’s view that comparative advertising, if used in the proper way, can be a useful advertising tool and can be an effective way of informing consumers of the comparative benefits of a company’s product over its competitors.

The inherent risk in engaging in comparative advertising is that a competitor is likely to regard such advertising as potentially seriously damaging and so will do everything it can to stop the
comparative ad from being broadcast. Indeed, the courts have commented that they will carefully consider comparative advertisements given the potential for damage not only to the consumer, should the ad be misleading, but also the potential damage to the competitor whose goods/services or brand is being compared to. The courts also tend to place a heavy burden on the advertiser in such cases to ensure that the information is fair, accurate and not misleading.

6.2 The Gillette case

Gillette Australia Pty Ltd (Gillette) (manufacturer of Duracell batteries) has succeeded in the latest in a series of comparative cases between itself and Energizer Australia Pty Ltd (Energizer) (manufacturer of Energizer & Eveready batteries)\(^\text{10}\) in what has been described as a ‘landmark in the highly contentious area of comparative advertising’: The Age, 27 July 2002.

**The facts**

Carbon zinc and alkaline batteries are the two main types of batteries manufactured for retail sale in Australia. These batteries are interchangeable, although alkaline batteries are more technologically advanced, powerful and expensive to produce than carbon zinc batteries. Gillette manufactures alkaline batteries under the Duracell brand. Energizer manufactures a range of carbon zinc batteries and an alkaline battery under the Eveready brand name as well as alkaline, titanium and lithium batteries under the Energizer brand name. The Eveready Super Heavy Duty battery is the highest selling carbon zinc battery in Australia.

**Decision of first instance**

In late 2001, Gillette televised an advertisement depicting a bunny (powered by Duracell batteries) racing across the desert against a relay team of three bunnies (powered by Eveready Super Heavy Duty batteries) and claiming that Duracell batteries last up to 3 times longer in AA, AAA, C and D battery sizes. Energizer commenced proceedings against Gillette in the Federal Court claiming the advertisement was misleading and deceptive in contravention of sections 52(1) and 53(a) of the TPA.

Energizer’s claim focussed on three central issues:

1. Was the comparison against Eveready Super Heavy Duty batteries or did the comparison extend to the full range of Energizer manufactured batteries?
2. Was it fair to compare zinc carbon with alkaline batteries?
3. Was the claim of “lasts up to 3 times longer in AA, AAA, C and D sizes” misleading and deceptive?

Before the Federal Court, it was agreed and ordered that the first two issues would be considered. It was also agreed and ordered that the third issue, which depended on technical evidence, would be decided at a later hearing. The hearing of the technical issue has not yet taken place. During the course of the hearing of issues 1 and 2, Gillette proposed alternative versions of the advertisement which sought to address Energizer’s concerns.

At first instance, it was held that the bunny advertisement in its original form was misleading and deceptive and the judge permanently enjoined Gillette from broadcasting that advertisement. The

\(^{10}\) Gillette Australia Pty Ltd v Energizer Australia Pty Ltd [2002] FCAFC 223
judge also rejected the modified versions of the advertisement. In particular, he held that the original and modified versions of the advertisement were misleading because they did not adequately identify the comparator battery as the Eveready Super Heavy Duty and did not reveal the substantial price differential between the two products. In addition, the judge found that it was misleading to compare zinc carbon batteries with alkaline batteries.

Issues on appeal

The hearing before the Full Federal Court of Australia (Justices Heerey, Lindgren and Merkel) was confined to the findings in relation to the final modified version of the advertisement which had been considered at first instance. That advertisement stated:

Which lasts longer? Duracell alkaline or Eveready Super Heavy Duty batteries? While Duracell alkaline keeps on running, Eveready Super Heavy Duty just can’t keep up. Uh Oh, no matter what they try it won’t help. With up to three times more power Duracell always beats Eveready Super Heavy Duty.

The superscript read ‘Eveready Super Heavy Duty is a cheaper non-alkaline battery’, ‘In AA, AAA, C and D sizes only’ and ‘Duracell lasts up to 3 times longer than Eveready Super Heavy Duty in AA, AAA, C & D sizes only’.

Gillette argued that the comparison made in the modified advertisement, namely Duracell versus Eveready Super Heavy Duty, was both clear and a fair basis for comparison.

The decision

The Full Court unanimously allowed the appeal and lifted the injunction in relation to the modified advertisement.

The Full Court stated that comparative advertising, of itself, does not have legal significance. In particular, Justice Heerey held that:

There is no basis in the TPA for regarding comparative advertising as an inherently disreputable form of commercial conduct, to be viewed with suspicion by the courts. On the contrary, to the extent that comparative advertising provides consumers with accurate hard facts about competing products, it assists in the making of better informed consumer choices and thereby results in more effective competition.

What was being compared?

The Full Court held that the modified advertisement clearly involved a comparison between the Duracell alkaline and Eveready Super Heavy Duty batteries as named. ‘Eveready Super Heavy Duty’ occurred three times in the voice over and twice in the superscript. The Court did not accept that the advertisement compared Duracell alkaline batteries and other Energizer or Eveready batteries. Justice Lindgren held that:

All in all, however, I think that even a casual viewer would understand that the Modified Advertisement is making a fairly pointed comparison between a ‘Duracell’ battery which is based on a superior “alkaline” technology, and an “Eveready Super Heavy Duty” battery of the same size based on a cheaper and inferior “non-alkaline” technology.

Was the comparison fair?

The Full Court held that it was lawful to make a comparison between the Duracell alkaline and the Eveready Super Heavy Duty carbon zinc batteries because the products competed against each other and were interchangeable. Gillette did not have to refer to other batteries in the Energizer
range, nor did it need to refer to price. Even though the word ‘cheaper’ was inserted in text on screen in the modified advertisement, Heerey J commented that this was not critical. He held that:

The word “cheaper” was added at the final stage of the modifications proffered by Duracell. But I do not see its presence or absence as being critical. The thrust of the advertisement was to compare the power of the two batteries, not their value for money...The purchase decision for batteries of this kind is, from the consumer’s point of view, a simple one. The only variables are power and price. A consumer, informed by the advertisement (correctly, it must be assumed for present purposes) that the Duracell battery lasts three times longer than the Eveready Super Heavy Duty battery, can make his or her decision at the point of sale whether the extra power of the Duracell is worth the higher price. I do not see how it could be said that such a consumer has been misled or deceived.

Justice Heerey also held that:

[to use general notions of unfairness, which bring to mind the concept of unconscionable conduct appearing elsewhere in the TPA, is to put an unwarranted gloss on the plain words of provisions of Part V such as ss 52(1) and 53(a). Provided the factual assertions are not untrue, or misleading half-truths, an advertiser can lawfully compare a particular aspect of its product or service favourably with the same aspect of a competitor’s product or service.

The Full Court also considered whether the advertisement was misleading or deceptive because it failed to disclose that Energizer has a comparable alkaline battery to Duracell. The Full Court held that Gillette was entitled to point out truthfully to consumers a feature of its product which is superior to that of a rival product. Justice Heerey held (at para 28):

If viewers think that Energizer has no other batteries which are more powerful than Eveready Super Heavy Duty, then that belief would spring from their own mistaken assumptions and not from anything Duracell has told them in the advertisement. The appropriate remedy is for Eveready to correct such mistaken assumptions, if they exist, by its own advertising. There is no legal or ethical obligation on a trader to publicise the full range of a competitor's products, and reasonable viewers would not think otherwise.

Gillette also succeeded on a natural justice issue.

6.3 Outlook

Comparative advertising, when used correctly, can be a very effective marketing tool. The Gillette case shows that it is possible to advertise products which are not strictly the same, as long as it is clear to the consumer what is being compared.

7. Country of origin

7.1 Overview

The ACCC has recently focussed its attention on country of origin claims. In November 2002, the ACCC released guidelines in relation to ‘Country of origin claims and the Trade Practices Act’. The guide was designed to assist industry and consumers in becoming more familiar with the country of origin provisions in the TPA. On launch of the ACCC’s guidelines, the ACCC’s Commissioner, Ms Jennifer McNeill said:

Consumers are increasingly aware of buying Australian products and have the right to be confident that claims made on food and beverage labels are accurate.
7.2 Legislation

Section 52 of the TPA prohibits conduct that misleads or deceives or is likely to mislead or deceive. More specifically, section 53(e-b) prohibits businesses from making false or misleading representations concerning the place of origin of goods. Sections 65AA to 65AN of the TPA set out the type of features that goods must possess to ensure that a claim about their country of origin does not breach the TPA.

These rules have been in effect since 13 August 1998 and attempt to regulate the way in which businesses label and package products and make statements about where goods have come from.

To make such a claim as:

• Made in Australia;
• Australian made; or
• Manufactured in Australia

there are two requirements that must be met:

• the goods must have been substantially transformed in Australia; and
• 50% or more of the costs of production must have been carried out in Australia.

In order to make a claim such as:

• Product of Australia;
• Produce of Australia; or
• Produced in Australia

there are two strict requirements that must be met:

• each significant component or ingredient of the good must originate from Australia; and
• all, or virtually all, of the production processes must take place in Australia.

7.3 Recent trends

The ACCC has taken action recently against companies in relation to country of origin claims including:

• Federal Court action against Architectural and Structural Adhesives Pty Ltd (a mostly French-owned building company) which claimed to be ‘wholly Australian owned’ or ‘Australian owned’. The ACCC commented that consumers are strongly influenced by claims of Australian ownership and as such it is important to be accurate when making representations to that effect. The Federal Court held that when a business makes a claim that it is ‘wholly Australian owned’ that it is reasonable to expect that all its shares are owned by Australians or Australian companies. Similarly, ‘Australian owned’ means that at least a majority of shares are in Australian hands.

• Federal Court action against the South Australian Olive Corporation and Inglewood Olive Processors Limited (the producers and marketers of Viva brand olive oils) for country of origin representations on product labels and in television and magazine advertisements. The ACCC alleged that the South Australian Olive Corporation and Inglewood Olive
Processors Limited engaged in misleading and deceptive conduct by making various representations about Viva olive oils being Australian when in fact each bottle of Viva brand olive oil contains approximately 20% imported olive oil. In addition, the ACCC is taking action against a director of the South Australian Olive Corporation and the General Manager of the South Australian Olive Corporation for aiding or abetting or being knowingly concerned in the breaches.

- Federal Court action against Wesfil (Australia) Pty Limited (an importer and distributor of automotive air filters) in relation to the labelling and packaging of its automotive air filters which were imported from Thailand. The Federal Court found that Wesfil labelled packaging with the claim ‘Made in Australia’ which it intermittently imported from Thailand. The Court made orders, by consent, including declarations that Wesfil had breached sections 52 and 53(eb) of the TPA, injunctions restraining Wesfil from engaging in similar conduct in the future, orders requiring Wesfil to use all reasonable endeavours to identify and relabel any offending air filters with customers and to advise the ACCC of the outcome, orders requiring Wesfil to publish a corrective notice in a major newspaper in each capital city and various magazines, orders requiring Wesfil to pay a refund to customers who had been misled by the claims and purchased the air filters, and orders requiring Wesfil to institute a trade practices compliance program that includes an independent audit and report to the ACCC for 3 years and costs.

- Federal Court action against GIA Pty Limited (in liquidation) and Mr Eric Ian Thomson in relation to country of origin representations in breach of section 53(eb) of the TPA and contravention of section 155(5)(b) of the TPA. The Federal Court found that GIA (operating under the business name Tamar Knitting Mills) manufactured knitted garments which it sold by wholesale and to a limited extent by retail and mail order from its premises in Launceston, Tasmania. The Court found that Tamar Knitting Mills purchased polo shirts that were made in China and GIA’s employees removed the collar labels which contained the words ‘Made in China’ and replaced them with labels containing the GIA’s ‘Tarmar’ name and logo. In addition, the employees attached one or both of 2 swing tags. One bore the words ‘Tasmanian’ and the other was in the shape of Tasmania and contained the words ‘Made in Tasmania’. This activity was brought to the attention of the ACCC and it subsequently issued a notice under section 155(1)(a) of the TPA requiring that GIA provide it with details in relation to this conduct.

Justice Heerey found that GIA had contravened section 53(eb) of the TPA and commented that:

> I regard the conduct constituting this offence as deplorable. There was deliberate and dishonest conduct designed to trick consumers. It was conduct that went on for a substantial time and might have continued indefinitely if not accidentally discovered ... I think the range proposed by the Commission does not sufficiently reflect the seriousness of the offence. Public deterrence of such unpardonable commercial conduct calls for a penalty of $50,000 on the company.

The ACCC submitted that the penalty for GIA should be in the range of $20,000 to $30,000 and $4,000 for Thomson. The Court held that the circumstances (including the dishonest nature of the company’s conduct) warranted a $50,000 fine for GIA and imposed a $4,000
fine on the former managing director for having been knowingly concerned in the company’s anti-competitive activities.

The Federal Court’s decision was welcomed by the ACCC’s acting Chairman, Mr Sitesh Bhojani who said:

This case is a further reminder that the ACCC and courts will not tolerate the making of false or misleading statements concerning the origin of products. Many consumers make a deliberate decision to buy what they believe are Australia-made products in preference to buying similar imported products. It is also important to protect honest Australian companies who abide by the place of origin provisions in the Trade Practices Act and can be unfairly commercially disadvantaged by less honest competitors falsely claiming Australian origin.

7.4 Outlook
These recent cases illustrate the ACCC’s increasing focus on country of origin claims. In particular, the ACCC is interested to ensure that consumers are not disadvantaged by companies who are not accurate in their representations or, more importantly, are deliberately deceived by a company trying to trick consumers into purchasing their products on the basis that they are Australian-made or a product of Australia or manufactured by a company that is Australian-owned.

8. Amendments to the pyramid selling provisions of the TPA

8.1 Overview
Amendments have been made to the pyramid selling provisions of the TPA following the enactment of the Trade Practices Amendment Act (No. 1) 2002, which came into force on 11 December 2002. According to the explanatory memorandum, the purpose of the amendments was to clarify the prohibition of pyramid selling scheme since section 61 was difficult to understand.

Section 61 of the TPA has been repealed and replaced by new Division 1AAA of Part V of the TPA. A corporation is prohibited from participating in a pyramid selling scheme and must not induce or attempt to induce a person to participate in a pyramid selling scheme. It is a criminal offence for a corporation to breach the prohibitions relating to pyramid selling (amended section 75AZO).

A pyramid selling scheme is now defined as follows:

65AAD (1) In this Act:

pyramid selling scheme means a scheme with both the following characteristics:

(a) to take part in the scheme, some or all new participants must make a payment (a participation payment) to another participant or participants in the scheme;

(b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (a recruitment payment) in relation to the introduction to the scheme of further new participants.

The fact that a scheme involves the marketing of goods does not prevent it from being a pyramid selling scheme. However, the amendments to the TPA set out when a court is likely to find that a marketing scheme amounts to pyramid selling:

65AAE Marketing schemes - are they pyramid selling schemes?
To decide whether a scheme that involves the marketing of goods or services (or both) is a pyramid selling scheme, a court may have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments:

(a) the extent to which the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere);

(b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods and services by comparison with the emphasis given to their entitlement to recruitment payments.

8.2 Pyramid selling cases in 2002

Guardian Finance and Insurance Consultants

In June 2002, the ACCC obtained final orders in the Federal Court restraining Guardian Finance and Insurance Consultants Pty Ltd and its sole director, Mr Peter Martin James from promoting Guardian’s Reducible Home Loans Introducers program and Rate Reward program to consumers. The ACCC alleged the Guardian programs constituted an illegal referral and pyramid selling scheme and their promotion by Guardian and its director contravened the TPA. The allegations included that promotion of the scheme induced or attempted to induce consumers to enter into home loans through Guardian and participate in the programs by representations that participating consumers would receive financial benefits such as a 0.1% reduction in their interest rate for each customer they successfully referred to Guardian.

In June 2002, Guardian and its director consented to orders in which the Federal Court:

- declared that Guardian had breached sections 61 and 57 of the TPA in promoting its Guardian Reducible Home Loan Introducers program and Rate Reward program;
- declared that Mr Peter Martin James was knowingly concerned in the contravening conduct;
- granted injunctions preventing Guardian and Mr Peter Martin James engaging in future contraventions;
- ordered Guardian and Mr Peter Martin James to implement a trade practices compliance program;
- ordered Guardian and Mr Peter Martin James to refund application fees paid by participants in the illegal scheme; and
- ordered Guardian and Mr Peter Martin James to contribute to the ACCC’s legal costs.

Skybiz.Com Inc

In September 2002, the Federal Court declared Skybiz.Com Inc, a United States web-based company, breached the pyramid selling and other consumer protection provisions of the TPA.

When the ACCC instituted proceedings against SkyBiz.Com Inc, it alleged that between September 1999 and August 2000 SkyBiz operated and promoted the "Skybiz 2000 Home Based Business Scheme" using a pyramid selling scheme. The allegations included that:
• participants paid SkyBiz US$100 for a website in order to take part in the scheme;
• SkyBiz claimed participants could then earn monetary payments by introducing new consumers into the scheme, and
• Skybiz claimed the Skybiz scheme could be operated as an e-commerce business.

In settlement, SkyBiz.Com Inc consented to orders which declared:
• the Skybiz scheme was a pyramid selling scheme;
• SkyBiz.Com Inc represented that the Skybiz scheme could be used to engage in e-commerce when, in fact, it could not;
• SkyBiz.Com Inc attempted to induce people to take part in the Skybiz scheme by representing that those who joined would later receive money if they introduced new consumers into the Skybiz scheme, contingent on those new consumers recruiting further consumers, thereby engaging in referral selling which is prohibited under the TPA;
• SkyBiz.Com Inc represented that the Skybiz scheme would be a profitable business for all persons who took part and could be carried on at, or from, their home, when in fact, this was not the case, thereby making false or misleading representations; and
• SkyBiz.Com Inc attempted to induce persons to take part in the Skybiz scheme by representing that those who joined would later receive payments.

The orders restrain SkyBiz from repeating the conduct and require it to disclose to the ACCC the names and contact details of Australian residents who took part in the scheme.

8.3 Outlook

It will be interesting to see whether the amendments to the TPA have any impact on the ACCC’s enforcement activities in this area. Based on recent cases, it is likely that the ACCC will continue to focus on schemes operating over the internet or where consumers are obliged to make significant financial outlay. Co-operation with regulators overseas may well continue to be a common occurrence.

9. Consequences of contravention

9.1 Available remedies under the TPA

Part VI of the TPA sets out the various enforcement provisions and remedies which are available in the event of a contravention of Parts V or VC. The remedy which will apply depends upon the type of provision which was contravened.

Broadly, Part V contains two types of provisions:

• Provisions for which contravention amounts to a criminal offence. These include the provisions prohibiting the making of false or misleading representations and other unfair practices. Civil remedies such as damages, injunctive relief, punitive orders and non-punitive orders also apply to contravention of these provisions.

• Provisions for which only civil remedies are available. This includes section 52, the general prohibition against misleading or deceptive conduct. Although only civil remedies apply to
a contravention of section 52, conduct which is found to be in breach of this provision will often also be in breach of other provisions, such as section 53, contravention of which is a criminal offence.

Contravention of the first type of provisions has always been a criminal offence under Part V. However, a new Part VC has been introduced as a result of the introduction of the Commonwealth Criminal Code which now imposes higher penalties and sets out whether the offence is e.g. one of strict liability.

Part VI of the TPA empowers the Court to:

• impose fines of up to $1.1 million for corporations and $220,000 for individuals for contraventions of Part VC. These fines were recently increased from $200,000 for corporations and $40,000 for individuals in response to community criticism that the level of penalties was insufficient for such breaches of the TPA. The provisions of Part VC apply to corporations only. However, section 79(1) provides that a person who:
  • aids, abets, counsels or procures;
  • induces, or attempts to induce;
  • is any way, directly or indirectly, knowingly concerned in or party to; or
  • conspires with others to effect,

(in summary, was involved in) a contravention of Part VC is taken to have contravened the relevant provision and is punishable accordingly;

• grant an injunction in such terms as the Court determines to be appropriate, where the Court is satisfied that a person has contravened, attempted to contravene, or was involved in a contravention of a provision of Parts V or VC (section 80);

• order damages to assist a person who has suffered loss or damage by conduct in contravention of a provision of Part V to recover the amount of that loss or damage by action against the person who engaged in the contravening conduct or any person involved in the contravention (section 82). Relevantly, damages can only be awarded in relation to a contravention of Part V, and not Part VC. However, this is a fairly insignificant distinction as all of the relevant offences contained in Part VC are also set out in Part V;

• on application by the ACCC, make one or more non-punitive orders in relation to a person who has contravened or has been involved in a contravention of a provision of Parts V or VC (section 86C). The non-punitive orders which may be made are:
  • a community service order;
  • a probation order for less than three years;
  • an order requiring disclosure of specified information; and
  • an order requiring publication of a specified advertisement; and

• on application by the ACCC, make an adverse publicity order in relation to a person who is guilty of an offence under Part VC (section 86D)
9.2 Extension of liability – advertising agencies as principals or accessories?

The MBF case discussed earlier in the paper shows that advertising agencies can be found to be knowingly concerned in misleading or deceptive conduct and held liable as accessories.

We also discussed earlier in the paper that in July 2002 orders were made by consent against NRMA Health Pty Ltd that advertisements in relation to waiting periods for obstetric services were misleading. In that case, the ACCC also brought proceedings against Saatchi & Saatchi Australia Pty Ltd (Saatchi) who prepared the advertising campaign. The ACCC claimed that in relation to the advertisements, Saatchi engaged in misleading and deceptive conduct, contrary to s12DA of the ASIC Act 2001 (equivalent to section 52 of the TPA). The ACCC made no claim against Saatchi that it aided or abetted the contravention by NRMA, nor that Saatchi was knowingly concerned in contraventions by NRMA. The issue was whether Saatchi was liable as a principal for making misleading representations in the advertisements.

Saatchi’s role was that normally taken by an advertising agency, of preparing advertisements under instructions and having the final copy approved by the client advertiser. In this case the name “Saatchi” appeared in very small print in the bottom corner of the advertisement. The court held that this could not possibly be taken to be an acknowledgment by Saatchi that it made the representations.

The Federal Court (Jacobsen J) therefore accepted the arguments of Saatchi that it did not make the misleading representations. There was nothing in the advertisement which could possibly convey to the relevant section of the public that the representation was by Saatchi. Anyone reading the advertisement would read it as NRMA companies’ advertisement. The court found that Saatchi was not the maker of any representation in the advertisements and accordingly had not contravened s12DA:

   It was the NRMA companies who took the step, through their agent, Zenith, of disseminating the advertisement upon the path of communication to the intended representees. Saatchi prepared the “bullet”, but it was the NRMA companies, which took the step of disseminating it. Saatchi did not disseminate the advertisement because it carefully structured its role so that, at each stage, it went back to the client, the NRMA companies, leaving them to make the ultimate decision to go forward with the act of dissemination of the advertisement.

An appeal to the Full Federal Court in this matter was filed on 24 October 2002.

9.3 Outlook

Until the outcome of the Saatchi appeal is known, it is difficult to identify any particular circumstances in which organisations such as an advertising agency might be held liable as principal rather than as an accessory for an advertisement it prepares. In light of the penalties which are available which are similar in both cases, organisations such as advertising agencies need to be wary of the risks associated with the preparation of advertisements qualified by fine print.

---

11 Cassidy v NRMA Health Pty Ltd [2002] FCA 1228