COMPARISON ADVERTISING

by Michael Blakeney

1. Introduction

Probably the most contentious advertising technique in Australia today is advertising the qualities of a product by reference to those of competitors. Not only is an advertiser at risk where the comparison is false, misleading or deceptive, but comparison advertising is subject to the self-regulatory activities of the Media Council of Australia and the Joint Committee for Disparaging Copy.

Comparison advertisements range from the direct naming of a competitor's product to inferential identification, by reference to competitors in a few brand market. For example, in **Colgate-Palmolive Pty Ltd v Rexona Pty Ltd** (1), the impugned advertising made the claim that the defendant's product was "50-90% more effective than Australia's best known toothpastes in slowing down the growth of plaque between brushing". The plaintiff who enjoyed about 60 per cent of the Australian market was able to establish a prima facie contravention of s52 of the **Trade Practices Act** 1974 because, inter alia, the defendant was not able to demonstrate the superiority of the product over the plaintiff's.

2. Legal Liability

Comparisons which are false, misleading or deceptive may involve advertisers in liability under the **Trade Practices Act** or in tort for injurious falsehood, but truthful comparisons would seem to be legally unobjectionable.

The English Court of Appeal suggested in **Bismag Ltd v Amblins (Chemicals) Ltd** (2) that the use by the defendant of the plaintiff's trade mark in an advertising brochure was an infringing use, but this case can be distinguished as an application of the specific provisions of the UK **Trade Marks Act** 1938. In the earlier House of Lord's decision in **Irving's Yeast Vite v Horsenail** (3), the defendant's vaunting of its product as "a substitute for Yeast Vite" was held not to be an infringement of the plaintiff's "Yeast Vite" mark because it was not a use in relation to goods. This approach was approved in Australia by the High Court in **Mark Foy's Ltd v Davies Coop & Co Ltd** (4).

The Trade Practices Commission approves the information function of comparison advertising:

> "... provided always that comparisons are accurate. Consumers may be misled by 'before and after' advertisements where the comparison is distorted to deprecate the 'before' or enhance the 'after' situations or by comparisons between the advertiser's goods or services and those of a competitor which fail to compare 'like with like'." (5)

On the question of non-disclosure, the Commission requires that a false impression not be created, explaining that "an advertiser is not bound to mention the areas where the competitive product has an advantage, unless, of course, the omission of such a point would lead a consumer to a mistaken belief"! (6)

3. Industry Self-Regulation

The primary obstacle to comparison advertising in Australia are the activities of the self-regulation authorities. Clause 15 of the **Advertising Code of Ethics** of the Media Council of Australia provides

that "advertisements shall not disparage identifiable products, services or advertisers in an unfair or misleading way". In 1980 the Media Council issued guidelines to assist advertisers in the preparation of comparison advertisements. These advise:

> "1. The intent and connotation of the advertisement should be to inform and never to discredit or unfairly attack competitors, competing products or services.
> 2. When a competitive product is named, it should be one that exists in the marketplace as significant competition.
> 3. The competition should be fairly and properly identified but never in a manner or tone of voice that degrades the competitive product or service.
> 4. The advertising should compare related or similar properties or ingredients of the product, dimension to dimension, feature to feature.
> 5. The identification should be for honest comparison purposes and not simply to upgrade by association.
> 6. If a comparative test is conducted it should be done by an objective testing source, preferably an independent one, so that there will be no doubt as to the veracity of the test.
> 7. In all cases the test should be supportive of all claims made in the advertising that are based on the test.
> 8. The advertising should never use partial results or stress insignificant differences to cause the consumer to draw an improper conclusion.
> 9. The property being compared should be significant in terms of value or usefulness of the product to the consumer.
> 10. Comparatives delivered through the use of testimonials should not imply that the testimonial is more than one individual's thought unless that individual represents a sample of the majority viewpoint."

The Media Council Code, insofar as it prohibits unfair comparisons, has a broader application than the **Trade Practices Act**, which is confined to comparisons that are false, misleading or deceptive. An even wider prohibition of comparison advertising is enforced by the Joint Committee for Disparaging Copy. This Committee, which consists of representatives from the media and advertising industries, is empowered on the receipt of complaints from persons within those industries, to veto advertisements which contain "a specific and identifiable disparagement of a particular product or service advertised by a rival". Disparagement is not defined in the Committee's Charter but would seem to include using mock-up packs to resemble those of competitors and "name naming" (7).

It would appear from the language of the regulations enforced by the self-regulation authorities and from the way the system operates in practice, that even non-misleading comparisons, which do not offend the advertising laws, may be suppressed by the self-regulation bodies. A recent illustration of this is the fate of advertising considered by Lockhart J in **Stuart Alexander & Co (Interstate) Pty Ltd & Anor v Blenders Pty Ltd** (8). In that case the applicant sought to restrain a series of television advertisements in which the price of different brands of coffee were compared. His Honour accepted that viewers of the commercials would have associated one of the depicted jars with the plaintiff's "Moccona" brand, which was represented as more expensive than the defendant's "Andronicus" brand. Lockhart J advised that:

> "when a person produces a television commercial that not only boosts his own product, but, as in this case, compares it critically with the product of another so that the latter is shown up in an unfavourable light by the comparison, in my view he ought to take particular care to ensure that the statements are correct."(9)

However, he held the comparison not to offend s52 of the Act because

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Can the Tribunal use s17 to reclaim something it has already released, or to compel those who have lawfully obtained the information to divulge the identity of those to whom they in turn have divulged it?

5. Section 19 of the Act lays down the general principle that proceedings and evidence at a Tribunal inquiry must normally be public, subject to exceptions. It does not contain the "prejudicial to the interests of any person" formula of s106A(5). At what point do s19 and s106A meet in relation to a document like the TEN-10 log which is lodged with the Tribunal for a licence renewal which will probably be subject to public inquiry?

6. Will licensing inquiries concern themselves more with economic issues of the kind which necessarily arise from advertising logs? At present, most licensing inquiries concern themselves with assorted peccadilloes of the licensee, relating mainly to alleged failings of particular programs. There was little demand for this kind of "gripe session", nor was it envisaged when the laws now in force were drafted. The current inquiry model was imposed by unspoken bureaucratic and legal assumptions, and by some accidents of history. A more rational inquiry system would ask about the adequacy of the proposed service in relation to the likely revenue and the needs of the service area.

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the plaintiff's coffee was more expensive than that of the defendants. Notwithstanding the non-deceptiveness of the advertising the Joint Committee for Disparaging Copy ordered its suspension.

4. Conclusions

The regulation of comparison advertising in Australia raises important questions as to interrelationship of the regulation of advertising by the law and by the media and advertising industries. It will be recalled last year that FACTS ordered the suspension of the NSW Health Commission's "Healthy Lifestyle" television advertisements and that the Broadcasting Tribunal considered two of the three suspended advertisements unobjectionable (10). However the Tribunal acknowledged that it had no power to compel the removal of the suspension. The anti-competitive implications of such suspensions may be taken into account by the Trade Practices Commission in its forthcoming consideration of the FACTS Commercials Acceptance and Appeals Procedures.

Footnotes

1. (1981) 37 ALR 391
2. [1940] Ch 667
3. (1934) 51 RPC 110
4. (1956) 95 CLR 190
5. Trade Practices Commission, Advertising and Selling (1981), para 2
6. Ibid, para 212
7. See R. Smiles, "Comparative Ads: Avoid the Legal Landmines", (1981) 2(4) Rydges in Marketing 27
8. (1981) 37 ALR 161
9. Ibid, at 163
10. Australian Broadcasting Tribunal, Re: Advertisements Produced for Television on Behalf of the Health Commission of New South Wales (Decision and Reasons 9 October 1981).