

Viral Marketing: Misleading or Deceptive?

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THIS article is concerned with the practice of ‘viral marketing’, a marketing technique whereby people are encouraged to pass on product information and recommendations to others. Our aim is to suggest that some forms of viral marketing are inherently misleading or deceptive and thus contrary to section 52 of the Trade Practices Act 1974 (Cth) and the equivalent State fair trading provisions. We begin by defining viral marketing and outlining some of the different forms that it may take, before examining the application of the misleading or deceptive conduct provisions to the practice.

I. THE PRACTICE OF VIRAL MARKETING

Viral marketing has been defined as ‘a technique whereby users [of products or people who imply that they are users] are encouraged to pass on messages, especially slogans or product recommendations, to friends and relatives’.¹ Viral marketing relies for its success on the knowledge and trust individuals place in one another. By exploiting informal networks of people, the marketing message is more likely to be accepted than when more traditional media, such as television or print, are used.²

Viral marketing may take a number of different forms. Arguably, the best-known instance of viral marketing is that of Hotmail, the free web-based mail system. Each message sent from a Hotmail account has the ‘Hotmail’ tag automatically attached, which, in turn, encourages the recipient to set up his or her own free Hotmail account. In this case, what is intended primarily as informal social interaction also becomes a vehicle, often unwittingly, for commercial advertising. This form of viral marketing might cause some annoyance to recipients, but it is relatively unremarkable from a legal point of view because the fact and source of the advertising are clear.

Other forms of viral marketing are more questionable. For instance, broadcasters can also qualify as viral marketers. The endorsements in the ‘Cash for Comment’

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1. Tasmanian Electronic Commerce Centre Pty Ltd ‘eMarketing’ at <<http://www.tecc.com.au/tecc/e-Series/default.asp?id=212>>.

2. Ibid.

scandal in New South Wales are an example. Readers will recall that radio announcers John Laws and Alan Jones recommended various products and services on their programs leading listeners to believe that they personally, because of their own positive experience, actually preferred them. It transpired, however, that the advertisers were paying the radio announcers concerned. This fact was not disclosed to the listeners.³

A third form of viral marketing was featured on a recent episode of the ABC's *Mondo Thingo*.⁴ That program focused on the practice of certain service providers, such as hairdressers and masseurs, endorsing other goods and services for reward during the course of their own service provision. A representative of a public relations firm claimed that:

Hairdressers and massage therapists are great because they have that one-on-one contact with someone – you know, sometimes up to an hour and a half. So it's a way of trying to get your message in when, you know, someone is relaxed and perhaps not thinking about that.⁵

It is this last form of viral marketing that raised our interest in the application of misleading or deceptive conduct provisions. There is no doubt that viral marketing can generate consumer backlash, particularly when consumers realise that what they think is social interaction has, in fact, been sponsored. More significant, however, is the potential for this form of viral marketing to contravene the Trade Practices Act 1974 (Cth), section 52,⁶ and its mirror provisions in the State fair trading legislation.⁷

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3. Although this led to an inquiry by the Australian Broadcasting Authority (ABA) no action was taken by the Australian Competition and Consumer Commission (ACCC): see ABA *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into Radio 2UE Sydney Pty Ltd* (Sydney, Feb 2000). This is despite comments made by Professor A Fels, former Chairman of ACCC, acknowledging that such 'infotainment' has the same potential to constitute misleading or deceptive conduct as do other forms of false advertising: see Multi Media News 'Our Viewing Displeasure' (6 Jan 2002) at <<http://www.auspaytv.com/news/jan02/0602.htm>>.
 4. *Mondo Thingo* is a magazine-style program which focuses on the entertainment industry and pop culture. It is marketed as appealing to 'anyone who's interested in celebrities, movies, music, books, collecting or obsessing. It is for people who are interested in pop culture but aren't interested in being sold anything': see ABC 'Program Summary' at <<http://www.abc.net.au/tv/guide/netw/200407/highlights/231431.htm>>.
 5. M Haylen, Love Public Relations in ABC 'Thingo of the Week' at <<http://www.abc.net.au/thingo/txt/s1097599.htm>>.
 6. It may also be possible to catch such behaviour under the Trade Practices Act 1974 s 53(a) and (aa) (and/or their equivalents under the State Fair Trading Acts, below n 7). Unlike s 52, the consequences for contravention are penalties.
 7. See Fair Trading Act 1992 (ACT) s 12; Fair Trading Act 1987 (NSW) s 42; Consumer Affairs and Fair Trading Act 1990 (NT) s 42; Fair Trading Act 1989 (Qld) s 38; Fair Trading Act 1987 (SA) s 56; Fair Trading Act 1990 (Tas) s 14; Fair Trading Act 1999 (Vic) s 9; Fair Trading Act 1987 (WA) s 10.

II. VIRAL MARKETING AS MISLEADING OR DECEPTIVE CONDUCT

Section 52 has been a much litigated section of the Trade Practices Act. Actions have been brought by consumers, competitors and the Australian Competition and Consumer Commission (ACCC), a body which has wide-ranging powers in relation to enforcement of consumer protection laws. Section 52(1) provides that:

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

In order for a breach of section 52 to be established, it must be shown that a corporation's⁸ conduct occurred in trade or commerce; that the defendant engaged in conduct; and that that conduct was misleading or deceptive or was likely to mislead or deceive.

Under the section, the phrase 'in trade or commerce' means trade or commerce within Australia or between Australia and places outside Australia.⁹ The courts have construed 'trade or commerce' widely,¹⁰ though it is clear that internal matters of business¹¹ and private transactions¹² are not considered to be 'in trade or commerce' for purposes of the provision. In the case of viral marketing, the marketer (eg, hairdresser or masseur) is in effect acting as agent for another business and will in most cases be in receipt of a financial incentive. This is clearly conduct in trade or commerce as it is furthering the commercial interests of the principal.

A corporation may 'engage in conduct' by silence. Ordinarily, the basis for misleading and deceptive conduct involves an express statement or representation by the wrongdoer. However, remaining silent will attract liability where, in the circumstances of the case, the silence creates a misleading or deceptive impression. The representor is then under an obligation to correct this wrong impression.¹³ The relevance for viral marketing is immediately apparent: first, it is arguable that commercial touting which masquerades as social interaction is misleading or deceptive. This is so even if what is imparted is true and no deception about the quality of the product is intended or caused. Secondly, a promoter falsely professing or implying first-hand experience of a particular product or service, even if the characteristics being extolled are not false, may be engaging in misleading or deceptive conduct if the promoter

8. The Trade Practices Act 1974 applies to corporations and to natural persons caught by s 6.

9. *Ibid*, s 4.

10. *Re Ku-ring-gai Corporate Building Society (No 12) Ltd* (1978) 36 FLR 134, 139, where Bowen J said: 'The terms 'trade' and 'commerce' are ordinary terms which describe all mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprised commercial arrangements.'

11. *Concrete Constructions v Nelson* (1990) 169 CLR 594.

12. *O'Brien v Smolonogov* (1983) 53 ALR 107.

13. *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539.

has no personal experience of the product or service: it has been suggested that one way of determining whether or not information should be revealed is to ask whether ordinary members of the relevant target audience would reasonably expect in the circumstances to be so informed.¹⁴ In the case of viral marketing, failure to disclose a lack of personal familiarity, or the fact that payment is being received for the recommendations made, will be misleading in a context where a customer would reasonably expect to be apprised of this fact.¹⁵

Liability for breach of section 52 does not require that there be any *intention* to mislead or deceive on the part of the wrongdoer.¹⁶ Although the phrase 'misleading or deceptive' is not defined in the Trade Practices Act, judicial interpretation has been that the phrase means 'to lead into error',¹⁷ so that conduct will be misleading or deceptive if it causes the person to whom it is directed to believe things that are not true or correct. The courts have applied a four stage approach in order to determine whether a breach of section 52 has taken place:¹⁸

1. The court starts by identifying the relevant section(s) of the public by reference to which the question of whether conduct is or is likely to be misleading or deceptive falls to be tested. Identification of this target audience will depend upon a number of factors, such as the nature of the conduct complained of, to whom it was addressed, and the media by which it was disseminated.¹⁹ The audience may be the public at large, or sections of the public, such as television viewers.²⁰ In this case, the relevant section of the public would be those to whom the conduct was addressed – that is, the clientele of the service provider who are also the apparent beneficiaries of a certain level of social intimacy.
2. Once the relevant section of the public is established, it would appear that the conduct should be tested against ordinary members of the relevant target audience.²¹ Although judicial opinion is not entirely consistent as to the test to be adopted,²² we suggest that, in the factual scenario highlighted in *Mondo*

14. *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) 11 ATPR 53,193, French J 53,195; *Demagogue Pty Ltd v Ramensky* *ibid*, Black CJ & Gummow J 32, 34.

15. This approach has been endorsed in subsequent cases: see eg *Warners v Elders Rural Finance Ltd* (1993) 41 FCR 399; *Franich v Swannell* (1993) 10 WAR 459; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452.

16. *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216.

17. See *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ 198.

18. The four stage test is taken from the judgment of Deane and Fitzgerald JJ in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202.

19. *Con Agra Inc v McCains Foods (Aust) Pty Ltd* (1992) 14 ATPR 53,363; *Brown v The Jam Factory Pty Ltd* (1981) 53 FLR 340.

20. *R & C Products Pty Ltd v SC Johnson & Son Pty Ltd* (1994) 16 ATPR 42,726.

21. *Parkdale Custom Built Furniture v Puxu* above n 17.

22. Gibbs CJ was of the opinion that s 52 should be assessed as 'contemplating the effect of the

Thingo, it does not appear that there would be cause for any reasonable person to believe that an endorsement of an unrelated product or service from a service provider is likely to be other than a genuine expression of opinion.

3. Conduct is to be regarded as 'misleading' if it has a *tendency* to lead into error. Thus, evidence that an individual has actually formed an erroneous conclusion is persuasive, but not essential.²³ The court must determine the question of whether conduct is misleading or deceptive or likely to mislead or deceive for itself, using an objective test.
4. Finally, the court should inquire why the proven misconception has arisen. Were those who were led into error confused because of the misleading or deceptive conduct on the part of the respondent? In the form of viral marketing discussed in this article, it would appear that the causation element would be easily satisfied and that, given the context, a court would have little difficulty in finding misleading or deceptive conduct.

The equivalents to section 52 in the State fair trading legislation²⁴ make *persons* liable for misleading or deceptive conduct.²⁵ These provisions would catch the individuals directly engaged in the relevant behaviour, as well as the businesses (hairdressers, etc) controlled by them or employing them. In addition, where these businesses are corporations and thus potentially liable under section 52, the persons engaged in the misleading or deceptive conduct might also attract liability as 'person(s) involved in a contravention of' the section.²⁶ Because the persons (and businesses) engaged in the misleading or deceptive conduct are in effect acting as the (undisclosed) agents for the suppliers of the products or services which they are recommending, these suppliers will be deemed to have engaged in that conduct.²⁷

conduct on reasonable members of the class': *Parkdale Custom Built Furniture v Puxu* above n 17, 199. Mason J claimed the test referred to the 'ordinary purchaser' who would take some care in assessing their prospective purchase: *ibid*, 209, while Murphy J considered that the test should apply to the 'imprudent as well as the prudent': *ibid*, 214. Other cases have suggested that the test should be that of the reasonable person: see eg *Campomar Sociedad Limitada v Nike International Limited* (2000) 202 CLR 45.

23. See also *Parkdale Custom Built Furniture v Puxu* above n 17; *McWilliams Wines Pty Ltd v McDonald's System of Australia Pty Ltd* (1980) 33 ALR 394.

24. See above n 7.

25. Thus, these provisions apply to anyone who engages in misleading or deceptive conduct, whether or not that person is incorporated, provided that the conduct occurs 'in trade and commerce'.

26. Trade Practices Act 1974 s 75B provides that liability may attach to a person 'involved' in a contravention of Part V. An individual will be 'involved' if he or she has aided, abetted, counselled or procured the contravention; has induced the contravention; has been, directly or indirectly, knowingly concerned in or a party to the contravention; or has conspired with others to effect the contravention. See further *Yorke v Lucas* (1983) 49 ALR 672; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353; *ACCC v Grant* [2000] FCA 1564.

27. Trade Practices Act 1974 s 84(2).

III. CONCLUSIONS

We suggest that the form of viral marketing highlighted in *Mondo Thingy*²⁸ would be inherently misleading and deceptive for a number of reasons. Usually, advertising material is presented to consumers in a way that makes its nature obvious. In this case, advertising is disguised as simply part of casual social interaction. Ordinarily, too, agents promoting the products or services of their principals can be clearly recognised as agents by consumers and their message assessed accordingly. The message of an undisclosed agent, indeed one who is masquerading as someone interested in passing on useful advice, would obviously not be subject to the same amount of scrutiny. By selecting hairdressers, masseurs, avuncular broadcasters, etc, as its marketers, the seller is ambushing consumers when their guard is down. Clearly, consumers would be likely to think that the goods or services were being honestly recommended and would have no reason to believe otherwise.

As competition for markets becomes more intense, the notion of viral marketing, whether undertaken by a radio announcer, hairdresser or masseur, is likely to increase. The ACCC should take some action now to set boundaries between the social and the commercial, between private opinion and paid endorsement. Blurring the lines between these forms of interaction by failing to disclose the truth appears to us to be inherently misleading and deceptive and likely to increase general levels of distrust in the community.

However, we do not believe that it would be likely or even practicable that individuals would litigate, should they discover they had been the victims of viral marketing under section 52. We do believe that it should be widely publicised that such activity exists and is unlawful. It would be appropriate for the ACCC, at the very least, to issue a public statement that such marketing is a clear contravention of section 52, and in appropriate cases to levy a penalty under Part VC.²⁹ Section 52 was never meant to be merely a vehicle for a private cause of action but was intended to lay down a norm of conduct in furtherance of true competition and consumer protection. Viral marketing infringes that norm and thus is contrary to public policy.

Finally, if the incidence of such activity were to continue to increase, there might be a case for the inclusion of a specific prohibition against viral marketing in Division 1 of Part V of the Trade Practices Act, as exists in the case of, inter alia, bait advertising, referral selling and inertia selling.³⁰ Although these specific practices can be caught under section 52, they are singled out legislatively to highlight their undesirability and unlawfulness.

28. Above n 4.

29. Trade Practices Act 1974 s 53 (a) and (aa).

30. Ibid, ss 56, 57 and 64, 65 respectively.