

AUSTRALIA



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1. Regulatory action	
Topic:	Misleading & Deceptive Conduct – Product Composition Claims
Who:	The Australian Competition & Consumer Commission (ACCC)
Where:	Australia
When:	September 2006
What happened:	<p>Truth in advertising came under the ACCC's scrutiny recently in the marketing of fruit roll-ups (Roll-Ups). Uncle Tobys, a well known manufacturer of breakfast cereals and snack products, made a number of representations about its Roll-Ups, including by:</p> <ul style="list-style-type: none">• stating that they were “made with 65% real fruit” (65% Claim); and• showing images in an ad of an apple being flattened into a Roll-Up (Apple Ad) and, by doing so, representing that Roll-Ups were made by converting fruit into strips with minimal processing or without further processing or other ingredients added (Minimal Processing Claim) <p>The ACCC expressed concerns that Uncle Tobys misrepresented the composition of the Roll-Ups. Uncle Tobys did not admit to the misrepresentations and, as Court action was avoided, there were no findings by a Court in respect of Uncle Toby's conduct. However, as a result of the ACCC's inquiries, Uncle Tobys, among other things:</p> <ul style="list-style-type: none">• gave the ACCC Court enforceable undertakings, including to stop making the 65% Claim, running the Apple Ad and making the Minimal Processing Claim; and• agreed to publish an article for the food industry through the Australian Food & Grocery Council on the importance of accurate advertising. <p>The article referred to Uncle Tobys' “key learning from this experience” that “we have to carefully consider how consumers might view both representations on packaging and the overall impression created by all aspects of the product marketing...”.</p>
Comment:	Product composition claims, like all other claims about a product, must be substantiated. Claims about the percentage of a particular component in a product must be 100% correct. Also, both words and images must be carefully chosen for advertising. Images convey information and those which are capable of misleading consumers may attract intervention from the ACCC.

2. Case report	
Topic:	Misleading & Deceptive Conduct – Celebrity Endorsements
Who:	Federal Court of Australia
Where:	Australia
When:	August 2006
What happened:	<p>The Australian Competition & Consumer Commission (ACCC) won an action for misleading and deceptive conduct against a company, and its advertising agent, promoting an impotence treatment. The ACCC enlisted the assistance of a celebrity involved in the promotion to win its case.</p> <p>Advanced Medical Institute Pty Ltd (AMI) promoted a nasal product for the treatment of male impotence (AMI's Product) under the heading "TV Star's amazing CONFESSIO!". AMI's newspaper ad represented that the entertainer Ian Turpie had confessed to an interviewer, in the presence of his wife, that he had suffered from impotence and that AMI's Product had cured him.</p> <p>However, Mr. Turpie did not suffer from impotence, he had not used AMI's Product to treat impotence and the interview in the presence of his wife did not take place. After being contacted by Mr. Turpie's son, the ACCC took action against Mr. Turpie for being knowingly concerned in misleading and deceptive conduct. However, they gave him a partial indemnity in return for giving evidence against AMI and its advertising agent Philip Somerset.</p> <p>The Court found that the representations in the ad were misleading and deceptive. It also found that AMI had breached section 52 of the <i>Trade Practices Act, 1974</i>, which prohibits misleading and deceptive conduct, and Mr. Somerset, who prepared and organised publication of the ad, was accessorially liable. The fact that Mr. Turpie had written "ok" on, and signed, draft copies of the ad did not assist AMI or Mr. Somerset. The Federal Court found that this authorised publication, but it did not represent that the contents of the ad were true.</p>
Comment:	The case is yet another reminder of the cardinal rule that all advertising claims must be capable of substantiation. Also, celebrity and other testimonials must be supported with current signed releases from ad participants. The releases must grant permission for publication of the testimonials and confirm their accuracy or truth

3. Regulatory action	
Topic:	Misleading and Deceptive Conduct - Trade Marks
Who:	ACCC v Just Squeezed Fruit Juices Pty Limited
Where:	Australia
When:	27 March 2006
What happened:	<p>The ACCC alleged that Just Squeezed Fruit Juices Pty Limited (Just Squeezed) had contravened the Trade Practices Act 1974 (Cth) through its use of its trade mark "Just Squeezed". By way of background, Just Squeezed manufactured and distributed fruit drinks throughout the majority of States and Territories in Australia under the brand name "Just Squeezed" which appeared prominently in large letters alongside images of the particular fruit relevant to that drink.</p> <p>Upon investigation by the ACCC, Just Squeezed advised the ACCC that the fruit drinks contained between 25% and 75% fresh juice, depending upon seasonal availability and the remainder of the drink was essentially made from "reconstituted juice".</p> <p>The ACCC took the view that the brand name "Just Squeezed" when placed alongside the words "fresh juices" and images of the particular fruit, falsely represented to consumers that the drink was produced directly from the fruit</p>

	<p>depicted on the label, was produced by squeezing the fruit depicted on the label and that the ingredients in the drinks were made recently (i.e. within days prior to purchase),. The ACCC was also of the view that the disclosure on the drink's ingredients label of the true ingredients (containing reconstituted juice) was not sufficiently prominent to counteract the misrepresentation.</p> <p>In response to the ACCC's concerns, Just Squeezed has agreed to implement an ongoing Trade Practices Compliance program, publish corrective advertising in respect of the matter and has provided court enforceable undertakings to, among other things, cease use of the "Just Squeezed" trade mark and branding in respect of their products. The Just Squeezed products are now marketed under new branding of "Just Delicious".</p>
Comment:	<p>This matter reinforces the requirement that advertisers must take care and consider the meaning that their trade marks will have for consumers and ensure that their branding and trade marks do not create an overall impression that is untrue or is misleading. The outcome for this trader was the abandonment of their entire trade mark and the necessary creation of a new one.</p>

4. Legislation	
Topic:	Tobacco Advertising Prohibition Act 1992
Where:	Australia
When:	1 October 2006
What happened:	<p>The Tobacco Advertising Prohibition Act 1992 (Cth) essentially bans all tobacco advertising in Australia. However, until October 2006, the Federal Health Minister was able to grant exemptions for some sporting events in this regard.</p> <p>In 2000, the Tobacco Advertising Prohibition Act 1992 was amended to phase out tobacco advertising at sporting events in Australia. The amendment gave a deadline of October 2006 for previously exempted events to arrange alternative sponsorship in order to comply.</p> <p>There were 5 such events that had been exempted, being the Ladies Masters Golf, the Indy 300, Rally Australia, the Motorcycle Grand Prix and the Formula One Grand Prix.</p> <p>From October 2006 tobacco advertising (as it is defined in the legislation), unless it is "incidental to" another matter or "accidental", is prohibited outright.</p>
Comment:	<p>As set out above, the exemption for some sporting events was only designed to be a temporary exemption to allow such sports to gain alternative sponsorship by October 2006.</p>

5. Case Report	
Topic:	Misleading and Deceptive Conduct – Use of Asterisks and Disclaimers
Who:	Astrazeneca Pty Limited v Glaxosmithkline Australia Pty Limited [2006] FCAFC 22
Where:	Australia – in Australian Doctor magazine
When:	8 March 2006
What happened:	<p>In November 2004, Glaxosmithkline Australia Pty Limited published print advertisements for its prescription only medicine for the control of asthma, Seretide, in Australian Doctor magazine which is a magazine distributed to general medical practitioners.</p> <p>The advertisements referred to the medication either as "Seretide" or "Seretide Total Control". Wherever the words "Seretide Total Control" were used they were linked via asterisk to a footnote which read as follows: "The GOAL study examined whether guideline defined asthma control could be achieved in 3,416 patients with uncontrolled asthma. 41% of patients achieved total control and</p>

	<p>71% achieved well controlled asthma with Seretide for periods of 7 out of 8 weeks over the 12 month study”.</p> <p>Astrazeneca alleged that the advertisements were misleading because the overall impression was that by use of the words “Total Control” they implied that, among other things, all or virtually all asthma sufferers will achieve 100% control or total control of all asthma symptoms by using Seretide.</p> <p>Astrazeneca did concede that the footnote correctly summarised the findings of the study. The Federal Court found that, having regard to the intended audience of the advertisements (general medical practitioners) along with the footnotes which were connected by asterisk to the main headline and in an “easy to read type”, the advertisements were not misleading and deceptive.</p> <p>There had also been a second arm to the claim by Astrazeneca which was that the footnote did not address the fact that the study did not include persons who had significant concomitant diseases, smokers or asthma sufferers under the age of 12 and therefore that the advertisement was misleading on the basis that it implied that the study (and therefore Seretide) would achieve the same results as set out in the footnote.</p> <p>The Federal Court disagreed and found that simply not referring to such exclusions from the study did not make the advertisement misleading or deceptive as the advertisement stated only that the study was based upon observations of “3,416 patients with uncontrolled asthma”.</p>
Comment:	<p>This case highlights the fact that footnotes (referred to in the judgment as “elucidators” and previously known as “disclaimers”) <i>can</i> be effective when used appropriately, when prominently linked to the original statement and when given sufficient prominence in the advertisement. Of importance in this case is the fact that the product itself, being a prescription medicine is not the sort of product that is purchased without due consideration and the intended audience of the advertisement was general medical practitioners who were considered to be sufficiently sophisticated and knowledgeable, in light of the “elucidator”, to not be misled by the branding of the medicine. The outcome of this case is interesting when compared with the “Just Squeezed” case set out earlier.</p>

6. Regulatory action	
Topic:	Misleading & Deceptive Conduct – Environmentally Friendly Claims
Who:	The Australian Competition & Consumer Commission (ACCC)
Where:	Australia
When:	14 November 2006
What happened:	<p>Hagemeyer Brands Australia made false claims about its Dimplex air conditioning products being “environmentally friendly”. As a result, Hagemeyer Brands Australia has offered a court enforceable undertaking to the ACCC.</p> <p>For a period of 9 months, Hagemeyer appliances advertised certain models of its Dimplex air conditioners on its website and in an advertising brochure claiming that specific models in the Dimplex air conditioner range were “environmentally friendly”.</p> <p>Following complaints to the ACCC, investigations uncovered that the air conditioners held R407C, an alleged potent greenhouse gas, which once released into the atmosphere contributes to global warming. Though R407C may be less harmful than other hydrofluorocarbon refrigerants it is not “environmentally friendly”. The ACCC raised concerns with Hagemeyer Brands Australia that the advertisements on the website and in the brochure amounted to false and misleading representations and breached consumer protection provisions of the Trade Practices Act 1974.</p>

	<p>Hagemeyer agreed to cease making the claim and to implement corrective measures. These were:</p> <ul style="list-style-type: none"> • Write to all customers who received a Come Home to Cool brochure to explain the effect of its conduct • Publish corrective notices in the Appliance Retailer trade magazine; and • Publish a corrective statement on the Hagemeyer and Dimplex websites. <p>The ACCC Chairman, Mr. Graeme Samuel said that “The ACCC considers misleading environmental claims to be a serious issue, particularly as consumers value environmental benefits when making their purchasing choices”.</p>
Comment:	Businesses making claims as to environmental benefits must be able to substantiate those claims, particularly when the popularity of environmentally friendly products is on the rise.

7. Regulatory action	
Topic:	Misleading & Deceptive Conduct – Mobile Phone Ring Tones
Who:	The Australian Competition & Consumer Commission (ACCC)
Where:	Australia
When:	October 2006
What happened:	<p>The ACCC has begun monitoring the marketing practices of ring tone traders in a bid to ensure traders are not deceiving consumers about the nature of the ring tones.</p> <p>The issue came to light when the ACCC became aware of a number of traders marketing ring tones as ‘true’ or ‘real’ tones when in fact the tones were cover versions. In some advertisements for the ring tones, the well-known artists’ name or image was displayed next to the song title without an effective disclaimer. The ACCC was concerned that consumers were being misled into believing that the tones were recordings of their favourite artists singing when in fact they were recordings of un-known or sound-a-like performers.</p> <p>The ACCC wrote to a number of operators locally and internationally and asked that the words ‘real’ and ‘true’ tones be replaced with ‘cover tones’. The ACCC also requested those operators to provide disclaimers in a “prominent, meaningful and contemporaneous manner” in order to avoid any potential for misimpressions. The traders were given a 2 week deadline to respond to the ACCC’s concerns and most have complied with the requests.</p>
Comment:	The ACCC will continue to monitor ring tone traders to ensure that consumers are not being deceived as to the nature of their ring tones

8. Self - regulatory action	
Topic:	AANA Code of Ethics (AANA Code) Federal Chamber of Automotive Industries’ Advertising for Motor Vehicles Voluntary Code of Practice (FCAI Code)
Who:	Advertising Standards Board
Where:	Australia
When:	13 February 2007
What happened:	Hyundai aired a TVC for its Santa Fe model which depicted a male toddler taking his parent’s car keys, getting into and driving the Santa Fe to the tune of a Country & Western style soundtrack. As he drives with the window down and his arm resting on the open window frame, he waves to surprised looking passers by. He then stops to pick up a female toddler hitchhiking and they go to the beach. The female toddler watches as the male toddler surfs. At the end, a voiceover announces “The next generation Hyundai Santa Fe is here” and the scene ends with the male toddler putting his arm around the female toddler,

	<p>sitting on the car bonnet, watching the sun set.</p> <p>The advertisement generated a number of complaints to the Advertising Standards Board (ASB) ranging from those regarding the alleged sexualisation of children, the alleged sexist theme of the boy picking up the girl and the girl watching while the boy surfs through to alleged driving offences such as a toddler being in a moving vehicle without a restraint.</p> <p>The advertiser responded to the complaints by, among other things, pointing out that the storyline was clearly based in fantasy and self-evident exaggeration and that the effect of the toddler driving was created using computer generated animation and post-production.</p> <p>The ASB in its determination noted that the advertisement depicted a small child driving a motor vehicle. The ASB agreed that the advertisement employed fantasy but noted that the explanatory notes to the FCAI Code state that “fantasy is not to be employed to contradict, circumvent or undermine the provisions of the Code. The ASB determined that the legal requirements regarding the minimum legal age of drivers was a matter that cannot be circumvented by employing fantasy.</p> <p>Section 2(c) of the FCAI prohibits advertisers from depicting driving practices that would, if they were to occur on a road or road related area be in breach of any road or driving law. The ASB determined that the advertisement breached section 2(c) of the FCAI by depicting toddlers driving and travelling in a vehicle whilst not in an approved child restraint.</p> <p>The ASB then considered whether or not the advertisement had breached the AANA Code. The AANA Code, among other things, prohibits advertisements from discriminating on the basis of gender, requires advertisers to treat the issue of sex, sexuality and nudity with sensitivity (given the relevant audience and program time) and prohibits an advertiser from depicting material that is contrary to prevailing community standards on health and safety.</p> <p>The ASB determined that the advertisement did not breach the AANA Code in respect of discrimination or vilification on the grounds of gender and did not breach the code in respect of a portrayal of sex, sexuality or nudity. The ASB further found that the advertisement did not contravene the AANA Code’s provisions regarding material contrary to prevailing community standards by depicting hitchhiking. The ASB did determine however that the depiction of a toddler driving a car was contrary to prevailing community standards and in breach of the AANA Code.</p> <p>Subsequent to the determination the advertiser withdrew the advertisement from further broadcast.</p>
Comment:	<p>This determination helps to clarify the limits in respect of the utilisation of fantasy in respect of the FCAI Code. However, it also shows that the outcome of ASB determinations can be difficult to predict given that the depiction of a child hitchhiking was not considered to be contrary to prevailing community standards in respect of health and safety but a child driving a car was considered to be so, even though both depictions occurred in the same context.</p>

9. Case report	
Topic:	Misleading & Deceptive Conduct – Comparative Advertising
Who:	Johnson & Johnson Pacific Pty Limited (Johnson & Johnson) v Unilever Australia Limited (Unilever)
Where:	Federal Court Australia
When:	November 2006
What happened:	In August 2005, Johnson & Johnson launched a new product called “Holiday

	<p>Skin” (Holiday Skin) which was a moisturiser combined with self-tanning lotion and created a new market segment as previously the two were not available in a single product. In March 2006, Unilever released a competing product called “Dove Summer Glow” (Summer Glow) which was also a moisturiser combined with self-tanning lotion in one. Each product was available in two variants depending upon the user’s skin type (i.e. fair or dark). To advertise Summer Glow, Unilever created a series of advertisements which showed a number of women of varying ages and included the claim that “7 out of 10 Johnson’s Holiday Skin users preferred new Dove Summer Glow”. The preference claim was “elucidated” by the statement “In use test of 105 women conducted in Australia by a leading research company in March 2006”. Viewers of the Unilever advertisements were also encouraged to “think again” if they thought that Holiday Skin gave the “best summer tan”.</p> <p>Johnson & Johnson alleged that Unilever’s advertisements breached section 52 of the Trade Practices Act 1974 (Cth) (TPA). Section 52 of the TPA prohibits a corporation from engaging in conduct that is misleading or deceptive or which is likely to mislead or deceive.</p> <p>The Federal Court found that the Unilever advertisements represented that (a) the preference claim in the advertisements related to the tanning properties of the product and not the product in general; (b) that the preference claim applied to both variants of the products; and (c) that 7 out of 10 Holiday Skin users preferred Summer Glow to Holiday Skin.</p> <p>The Federal Court held that because (a) the research conducted did not establish a preference in respect of tanning qualities of the products, only a general product preference and (b) the research was only conducted in respect of the “Normal to Fair” skin variant and not both variants; the advertisement was misleading and deceptive.</p> <p>The Federal Court also held that the research did not include women under the age of 25 years but that the advertisement depicted younger women and therefore that there had been a misrepresentation that women under 25 years of age had been included in the research. Accordingly, the general representation (without age restriction) that Holiday Skin users preferred Summer Glow, was found to be misleading and deceptive.</p>
<p>Comment:</p>	<p>This case highlights the importance of how careful an advertiser needs to be in comparative advertising both when formulating market research and when extrapolating claims from market research to include in product advertising. Advertisers should also take care to ensure that the overall impression of a comparative advertisement reflects the individual comparative claims made.</p>