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Session 6:
Tread Carefully With Comparative Advertising

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Background

Comparative advertising – where features of the advertiser's product are expressly compared with those of competitors' products – is a legal risk area and significant source of disputes between competitors.

Comparative advertising is, in one sense, highly pro-competitive and even desirable from a competition policy perspective. In a competitive market, it is desirable that consumers are informed about the differences between products, and the advantages of one product over another, so providing assistance to consumers in making rational purchase decisions.

However, direct comparisons, particularly with respect to price, are a compelling and powerful advertising tool, and with power comes responsibility. Product comparisons are a signal to courts and regulators that an advertiser is making serious and testable claims, rather than mere "product puff." There is also a danger that a comparison may be a half-truth or an unqualified literal truth which paints a misleading picture. For those reasons, the courts and regulators tend to look closely at comparative claims.

There is a further risk, which is that comparative advertising involving a named competitor will immediately attract the attention of that competitor. As the *Energizer* case (discussed below) points out,[1] the competitor will be closely familiar with its own product, will have a financial interest in stopping the advertising, and the advertising will therefore be analysed by the competitor "minutely and finely with an eye keenly attuned to the perception of error."

Therefore in harnessing the power of comparative advertising, an advertiser risks serious challenge from regulators and competitors. This paper presents a review of the law surrounding comparative advertising, reviews several of the cases, and provides some guidance to avoid legal exposure.

What laws apply?

Comparative advertising, including with reference to named competitors or competing products, and including with reference to price, is allowed in Australia. There is no specific law or judicial or regulatory pronouncement that suggests that comparative advertising is inherently disreputable[2] or that it will be viewed with suspicion by the courts.[3]

[1] *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223 at [44] per Lindgren J.
[2] *Gillette v Energizer*, above, at [20] per Heerey J.
[3] *Id*.

The principal law relied on in comparative advertising challenges is misleading or deceptive conduct under section 18(1) of the *Australian Consumer Law*.[4] The law is well known, but it is repeated here for convenience.

> *18(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

Note that there is no additional associated concept of "fairness" with s18(1).[5] Provided a product comparison is not misleading or deceptive (including with respect to silence possibly being misleading in some circumstances) the comparison does not also need to be "fair." This point is relevant to whether a "complete picture" must necessarily be given in the course of a product comparison, and is discussed in relation to the *Energizer* case,[6] below.

The "false or misleading representation" provisions of the *Australian Consumer Law*[7] are also relied on in comparison cases. In particular the following provision relating to false or misleading representations about goods or services is applied:

> *29(1) A person must 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) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or*
>
> *(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or […]*
>
> *(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or […]*
>
> *(i) make a false or misleading representation with respect to the price of goods or services;*[8]

The above law does not impose any additional requirements, in respect of comparative advertising, than are imposed in respect of normal advertising or in respect of commercial conduct more generally. Notwithstanding this, there are some specific fact circumstances where the law has been applied in a particular way. Those circumstances are best illustrated by reference to the caselaw, which is done in the following sections.

Ensuring price comparisons are accurate

Price comparisons, including in respect of named competitors and competing products, is allowed in Australia. However, the comparison must not be misleading or deceptive.

In the *OPSM v Specsavers* case,[9] Specsavers was challenged on its price comparison advertising comparing its prices for spectacles with those of OPSM in a slightly unconventional way.

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[4] *Competition and Consumer Act 2010* (Cth), Schedule 2, the *Australian Consumer Law*.
[5] Refer *Gillette* at [21] and following.
[6] Above, note 1.
[7] *Australian Consumer Law*, Part 3-1, Division 1.
[8] *Australian Consumer Law*, Section 29(1).

By way of background, the case relates to the optical services market which was (in 2010, the year the case was decided) a $1.3B per year market, with 10,000 employees, and growing rapidly consistent with the requirements of an aging population. Aggressive marketing was being undertaken to obtain market share in Australia.

OPSM was the major and incumbent supplier, operating 300 stores in Australia in 2010. Specsavers was the more recent entrant, having commenced operations in 2008, and was rapidly building market presence as a challenger and discount brand, operating 200 franchised and company-owned stores. In terms of placement, OPSM's evidence was that it was the David Jones/or Myer to Specsavers' Target or Kmart. That is to say, OPSM considered itself a premium brand competing with a discounter and price competitor which was directed at "more value conscious customers."[10]

Specsavers ran price comparison advertising on national free-to-air television and online. The advertising sought to compare Specsavers' pricing with OPSM's as follows:

There was a voiceover which announced the words: "*On average OPSM customers paid over $480 for their prescription glasses. We believe that's too much. That's why at Specsavers our customers paid on average over $114 <u>less</u> for their prescription glasses than OPSM customers.*" The word "less" was emphasised in the voiceover. The voiceover did not announce the smaller-print disclaimer, which reads: "Based on 1313 consumers aged 18 and over who bought prescription glasses (Jul 2009-Jan 2010). Roy Morgan Research 2010. Excludes health fund rebates."

OPSM commenced proceedings claiming the advertisements were misleading or deceptive in contravention of the provision corresponding to the current s18(1) of the *Australian Consumer Law*. OPSM sought injunctions, corrective advertising to remove misleading perception, and damages.

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[9] *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd* [2010] FCA 423.
[10] *Id* at [1] per Perram J.

OPSM had three concerns with the advertising and the comparison:

- that the exclusion of health-fund rebates from the figures used is misleading, because the amount shown is not the amount that most customers actually pay (net of health fund rebates, which are usually credited in-store). The disclaimer is not sufficiently prominent to dispel the misleading impression.

  In relation to this issue, the court took a robust approach in saying that customers watching the advertisements casually on television would not be affected by the inclusion or exclusion of health fund rebates in a pricing comparison, even if they did not read the disclaimer. That issue was not misleading.[11]

- the two amounts shown are not directly comparable, as the OPSM amount of $480 is a price, whereas the Specsavers amount of $114 is a saving. The figures are in the same font and the language surrounding them is identical, so that the word "less" is insufficiently prominent to dispel the suggestion that what is being compared are two side-by-side prices, not one price and one saving.

  On this point, the court considered the effect of the voiceover emphasis of "less" as well as the prominence of the language on screen was that it was clear that the advertisement does not compare $480 and $114, that is, that it was not misleading to present a price on one hand, and a saving on the other.[12]

- finally, OPSM claimed that the $480 amount (and the Specsavers amount) were a representation and comparison of the cost of a single pair of glasses, and not, as they in fact were, an average spend at the respective stores. This was compounded by the images in the advertisement of a pair of glasses near each price. In fact, the average cost for glasses at each respective store was $417.59 for OPSM and $204.97 for Specsavers (or, a saving of $212.62 for Specsavers).

  The court agreed with OPSM on this point.[13] The implication from the advertisement in all the circumstances was that the comparison was of a single pair of glasses, and not an average spend. The disclaimer was inadequate to dispel this suggestion. Specsavers was found in contravention of the former equivalent provision to s18(1).

Frustratingly for Specsavers, it knew and could have used the per-pair-of-glasses figures in the campaign, rather than the spend-per-visit figures. Indeed, that might even have been the more compelling approach from a marketing perspective – the proportional difference in pricing between the two companies would have been greater in the per-pair case than in the case of the per-visit figures actually used (that is, $417 vs a $212 saving per-pair, is more compelling than the campaign figures of $480 vs a $114 saving per-visit).

Examined in this sense, the legally misleading aspect of the campaign was actually as damaging to Specsavers as it was to OPSM (because it understated the price difference on a per-pair-of-glasses basis). Nonetheless, OPSM was still entitled to succeed, because the aim of the relevant law is to protect the public, not to level the playing field between competitors. Specsavers was still therefore in contravention, even though it was arguably as injured as OPSM from its own campaign.[14]

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[11] *Id*. at [28]-[32].
[12] *Id*. at [34].
[13] *Id*. at [38]-[40].
[14] *Id*. at [39].

Ultimately, Specsavers was declared to have contravened the "misleading or deceptive conduct" provision and required to pay OPSM's costs of bringing the action. Corrective advertising was sought by OPSM but declined on the basis that the detail of the contravention would have been lost with the passage of time in the eyes of consumers (that is, the correction would have no practical consumer protection effect).[15]

In passing, the court in the Specsavers cases did make some additional comments about the nature of television advertising audiences. The court noted:

> *"They [television advertisements] will be seen by the casual but not overly attentive viewer viewing a free-to-air program with only a marginal interest in the advertisements shown between the segments of the program. In that context it will be the first impressions conveyed to that viewer, rather than an analysis of the cleverly crafted constituent parts of the commercial, which will be determinative."*[16]

Is the comparison valid for the life of the advertisement?

As noted above, comparative advertising identifies and alerts a specific competitor. Aside from legal action (most often seeking an interim injunction order in the first instance), another possible response by the competitor target is to change its own commercial position so that the advertising is no-longer correct. This seems more likely where the competitor has a direct sales or online model, where pricing could literally be changed overnight.

An advertisement or campaign might therefore initially be lawful but might become misleading because the competitor's commercial position has changed. Although it would be possible to explain and disclaim sources of pricing information and applicable periods of time in a longer campaign, it would be difficult to defend a price-comparison campaign, for example, where the competitor's prices were inaccurate on an ongoing basis.

Comparison campaigns, particularly with respect to price, are therefore suited to short, sharp campaigns to mitigate the risk that the named competitor will change its position.

Comparing products that are different

A common complaint by the competitor targets of comparative advertising is that the comparison is not an apples-with-apples comparison. A feature of the advertiser's premium product may be compared with a feature of a competitor's standard-line product, even though the competitor also itself markets a more-directly-comparable premium product.

This was the situation in the *Energizer* case.[17] The litigation involved one of the well-known "Energizer Bunny" advertisements – a concept originated by the Chiat/Day agency in the US, but applied successfully in Australia – comparing Energizer Duracell batteries with Gillette's Eveready batteries.

The campaign itself featured an animated race between toy bunnies, and is described vividly in the case itself:

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[15] *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd (No 2)* [2010] FCA 644 at [9]-[12] per Perram J.
[16] *Id*. at [11] citing *Telstra Corporation Ltd v Optus Communications Pty Ltd* (1996) 36 IPR 515 at 523-524.
[17] *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223.

"The advertisement shows a race conducted over a rugged and arid landscape. Lined up at the start are two bunnies. One bunny has a Duracell battery, with brand name visible, on his back. The other bunny has a black battery with no brand. He glances around with a knowing and slightly sinister look. The race starts and both bunnies set off. The Duracell bunny is always in front. On two occasions the exhausted non-Duracell bunny is replaced by a similarly garbed runner, who emerges from a hiding place along the track. This appears obviously pre-arranged. The Duracell bunny, apparently oblivious to his opponents' tactics, crosses the finishing line, running strongly and well in front of the last of the non-Duracell bunnies to enter the race. A white-coated bunny with clipboard and stopwatch records the finish. A brief view back along the track shows the three non-Duracell bunnies collapsed. At the conclusion the Duracell bunny, looking fresh and modestly triumphant, is standing on a mountain. The narrative is thus a story of the Duracell bunny winning a race against a relay team of three competitors. So the message conveyed is not only the power superiority of the Duracell battery to its competitor, but the quantification of that superiority"[18]

The voiceover associated with the advertisement announces as follows:

"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 3 times more power Duracell always beats Eveready Super Heavy Duty"

Both Energizer/Duracell and Gillette/Eveready market a range of batteries using different technologies at different price points. In particular reference to the advertisement, the Duracell Alkaline battery uses alkaline technology as its name suggests, whereas the comparator Eveready Super Heavy Duty battery uses a carbon zinc technology which has lower performance but is also significantly lower in cost. Further, Gillette

[18] *Id*. at [15] per Heerey J.

also markets more closely comparable Eveready alkaline technology batteries (Eveready Advanced Formula Alkaline) at comparable cost and performance to the Energizer product promoted in the advertising.

The advertisement did display a smaller-print disclaimer as follows: "*Eveready Super Heavy Duty is a cheaper non-alkaline battery. In AA, AAA, C and D sizes only.*" However, that disclaimer was only briefly present and was not voiced.

Gillette's principal concern was therefore that the comparison in question was not an "apples-with-apples" comparison. A fair comparison would have compared Energizer alkaline and Eveready alkaline technology batteries. Consumers viewing the campaign as it was would be left with the impression that Energizer batteries were technically superior to Eveready batteries, and may not at time of purchase appreciate the technology differences, the price-point differences, or the existence of Eveready's more closely comparable products.

The court disagreed. As noted above, there are no more general notions of "unfairness" in the misleading or deceptive conduct regulation. Comparisons are lawful so long as they are not misleading or deceptive, and there is no "gloss" of fairness or good conscience that need also to be complied with.[19] In the language of the Energizer case:

> "*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.*"[20]

> "*A consumer, informed by the advertisement 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.*"[21]

It was relevant to the court that the specific name of the comparator battery, "Eveready Super Heavy Duty," was repeated three times in the advertisement's voiceover. This added confidence to the court's conclusion that consumers would be aware of the specific product comparison (not an exhaustive whole-of-brand or whole-of-range comparison).[22]

Note that the position would be different if the comparison was in respect of *value for money*, rather than a technical comparison of a particular feature. A value-for-money comparison would need to address costs and many other factors making up the purchasing decision. But a strict single-feature comparison (eg, battery capacity) is allowed, provided always that the facts claimed in the comparison are true, even if the comparison is not strictly an apples-to-apples comparison, and without a requirement to provide more comprehensive information about the competing product or range.

> "*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.*"[23]

The outcome of the Energizer case was that there was no injunction order preventing the Energizer from continuing its campaign, and Gillette/Eveready was ordered to pay Energizer's legal costs.

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[19] *Id*. at [22].
[20] *Id*. at [22].
[21] *Id*. at [23].
[22] *Id*. at [50] per Lindgren J.
[23] *Id*. at [28] per Heerey J.

Specific risks with online comparative advertising:

Naturally, the law around comparative advertising applies online as well as in traditional media.

Online is likely to be treated as more akin to press than television or radio advertising when considering how consumers will interact with it. For example, consumers will have the time to read and consider online material, whereas television and radio is more ephemeral. It is therefore more important to check and correct details (including disclaimers) in online advertising, whereas television and radio campaigns will be analysed more in light of overall impression.

Another aspect of online comparative advertising is ensuring the geographical scope of the campaign is limited to areas where the comparison is valid and meaningful. If price comparisons are only valid for prices offered by a competitor in a particular state, then it will be dangerous if the campaign is available in other states, as it may well be actionably misleading in those other states. It is incumbent on the advertiser to ensure that such controls are effective.

It is clear from Australian defamation law[24] that internet content is effectively published wherever it can be read, so simply placing content on a web site hosted within the relevant jurisdiction will be insufficient, and more dynamic availability controls will be required. The issues might be able to be addressed by way of a disclaimer (eg, expressly confining the advertisement or comparison to a particular geographic area, to be ignored if available in other areas). However, the disclaimer would need to be extremely prominent and clear.

Conclusion: Tips and Tricks with respect to comparative advertising

Comparative advertising is permitted in Australia, provided it is not misleading or deceptive (including by half-truths).

The first step in clearing proposed comparative advertising is to ensure that what is claimed and testable in the advertising is true. Double check price claims and technical claims, and ensure the evidence is available in case of later challenge. If there are material provisos (for example, the Specsaver exclusion of health fund rebates) then consider including them in a disclaimer. If significant, they should be part of a voiceover, since there is a risk the courts will assume consumers do not read less prominent disclaimers.

Comparatives must continue to be accurate for the life of the campaign, so prefer short, sharp campaigns, to avoid the targeted competitor changing its commercial position during the course of the campaign, leading to misleading conduct exposure if the campaign no-longer reflects the commercial reality.

Avoid broad "value-for-money" comparisons or general superiority assertions, as they can be subjective and may call for comparison across many produce features to be provable. Confine comparison claims to specific pricing, or to a specific product characteristic (as with battery capacity in the Energizer case).

Bear in mind that the Energizer case does not mean that advertisers are free to compare aspects of any and all kinds of products. The Energizer case was close (it was won by Energizer on appeal, after the opposite decision being reached at first instance). It was successful because of the narrow (and provable) nature of the comparison, and the clear, repeated identification of the competitor's product.

[24] *Dow Jones and Company Inc v Gutnick* [2002] HCA 56.

Consider how the courts analyse consumer behaviour in relation to watching television advertisements. Consumers are considered by the courts to be robust but not particularly attentive, and television and radio is transient in nature. Consumers will be assumed to take in major concepts of television advertising, but not subtle detail. If the accuracy of a comparative campaign turns on subtle detail or subjective tests, then it will be higher-risk.

Conversely, print and online advertising is considered by the courts to be more detail-oriented than television or radio, because of the ability of consumers to more carefully review advertising content. Disclaimers may be more relevant here, and more finessed points can be made.

Disclaimers can be relevant but have limited usefulness. A disclaimer will be more effective in print than in electronic media. Voiceover is the most compelling approach, if a disclaimer is essential to the correctness of the comparison. A price comparison may require detail of how the price was calculated, over what period, and so on (as was done in the Specsavers campaign).

Be prepared for a contest if a particular, well-resourced competitor is identified as a target of a comparative campaign. There is every incentive for a competitor identified in comparative advertising to very carefully analyse the campaign and challenge it in the courts where those steps are open.

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