



# Comparative advertising

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# Comparative advertising

- Powerful marketing tool
- In one sense, highly pro-competitive
- Comparatively rare in Australian environment
- Legal risk area (compared with non-comparatives)
- Particular risks with respect to price comparatives
- Significant source of disputes between competitors

# What laws apply

- Comparative advertising is allowed
- Including with respect to price
- Courts do not consider “inherently disreputable”
- *Australian Consumer Law* applies
  - misleading or deceptive conduct s18(1)
  - false or misleading representations s29(1)

# Price comparisons

- Absolutely key concept in marketing
- Very powerful in comparative advertising
- Because it's so powerful, courts, competitors expect strict compliance
- Essential: overt price comparison claims not misleading
- Also: ensure implications not misleading

# Case Study: OPISM v Specsavers

- Optical industry \$1.3B/year (2010)
- Rapid growth
- OPISM the incumbent – “Myer” of optical stores
- Specsavers the newcomer – “Target” type positioning
- Specsavers started \$1M price comparison campaign on national free-to-air TV

OPSM



PAID OVER  
**\$480**

on average

Specsavers



PAID OVER  
**\$114**

LESS on average

Based on 1313 consumers aged 16 and over who bought prescription glasses (Jul 2009 - Jan 2010), Roy Morgan Research 2010. Excludes health fund rebates.

## **Voiceover**

*“On average OPISM 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 less for their prescription glasses than OPISM customers.”*

## **Disclaimer**

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 v Specsavers

- Three problems raised by OPSM
  - exclusion of health fund rebates  
held: no, consumers would not be concerned
  - price (\$480) vs saving (\$114) expressed side-by-side  
held: no, the point of comparison was clear from text and voiceover
  - amounts were per-visit cost not per-pair-of-glasses cost  
held: yes, the expectation supported by the image and not dispelled by the voice or disclaimer: contravenes ACL

# Duration of campaigns

- Comparative advertising alerts a specific competitor
- Competitor may change commercial position quickly (example: change pricing)
- Ad may become misleading if commercial basis changes
- Comparative advertising therefore suited to short, sharp campaigns

# Product comparisons

- May not be an apples-to-apples comparison
- Products unlikely to be “best” in all metrics, including price. Can you compare across only strong point(s)?
- Can you select competitor’s weaker / non-premium product for comparison
- Is this acceptable? What are the rules?

# Case Study: Energizer

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- Energizer/Duracell against Gillette/Eveready
- Familiar “Energizer bunny” campaign for batteries
- Comparative on one technical aspect: capacity (power)



## **Voiceover**

*“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”*

## **Disclaimer (not voiced)**

*Eveready Super Heavy Duty is a cheaper non-alkaline battery. In AA, AAA, C and D sizes only*

# Energizer case

- Gillette/Eveready complaint:
  - comparison is unfair therefore misleading
  - products are not “approximate peers”
  - Eveready has an alkaline battery which would compare
  - to be fair, comparison should also address price
  - consumers will be left with the impression that Energizer is simply “better” product without making technology/price trade-offs clear

# Energizer case – outcome

- Close call (decided on appeal)
- Assists that case very specific (function, product)
- Not a comparison of value, but particular function
- No general notion of “unfairness” in misleading conduct
- Comparisons are OK, as long as they’re not misleading
- Consumer can decide at point-of-sale, when price known



# Comparative advertising online

- Naturally, the same law applies
- Online more like press than TV: less about first impressions and more about the detail
- Ensure geographical scope of online campaign corresponds with correctness of comparison (eg, restrict to relevant city, state)

# Summary of tips and tricks

- Comparative advertising is allowed in Australia
- Must not be misleading
- Ensure what is claimed/testable is true (no misleading half-truths)
- Provisos may be included in disclaimer / voiceover
- Ensure accuracy for life of campaign (short, sharp campaigns)
- Consider medium: TV ephemeral, press more details-oriented
- Avoid “better value as a whole” claims: stick to specifics
- Stay narrow where possible with respect to products, features

# Thank you

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