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THE TEN-10 ADVERTISING LOG CONTROVERSY

by Mark Armstrong

We reproduce below the text of the Broadcasting Tribunal statements about the recent much-publicised attempt of the Tribunal to prevent publication of advertising revenue figures produced by the licensee of TEN-10, a Sydney television station.

The Directions

In a period beginning on 11 February 1982, the Tribunal served directions on the proprietors of the Australian Financial Review, Sydney Morning Herald and Age, on the Australian Broadcasting Commission, on the NSW Parents' & Citizens' Federation and on the Australian Consumers' Association and on the licensee of 2SER-FM (Sydney), among others. The directions read as follows, with appropriate variations in each case:

"To: [Name & address of recipient]

For the purpose of exercising its powers and functions pursuant to ss19(2) and 106A(5) of the **Broadcasting and Television Act** 1942 (the Act), the Australian Broadcasting Tribunal hereby directs you:

1. To deliver to the Tribunal, within 24 hours of the service of this Direction, all copies in your possession of the Advertising Log, or any parts thereof, for the week commencing 8 November 1981, of Commercial Television Station TEN Sydney operated by United Telecasters Sydney Limited and which Log (hereinafter referred to as 'the Channel 10 Advertising Log') was appendix No C1 of the Application for renewal of licence lodged by United Telecasters Sydney Limited with the Tribunal.

2. Not to publish to any person in any way the revenue figures, or any part thereof or information relating thereto, set out in the Channel 10 Advertising Log.

3. To advise the Tribunal, within 24 hours of the service of this Direction, the names of the persons, corporations, groups or associations to whom copies of the Channel 10 Advertising Log,

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or any part thereof, have been supplied or published or to whom any details of, or information regarding, the revenue figures contained therein have been supplied or published.

[Date]

For the Tribunal

B.J. Connolly, Secretary
David Jones, Chairman

Note: s17(8) of the Act requires a person to comply with a Direction upon service of the Direction on that person. s25AB(d) of the Act provides that a person shall not contravene or fail to comply with a Direction given by the Tribunal. Penalty for failure to comply is $1,000 or imprisonment for three months."

The News Release

At the time of issuing the first directions, the Tribunal explained its action in News Release No NR 274 of 11 February 1982, signed by the Secretary, Mr B J Connolly:

"The Australian Broadcasting Tribunal has issued wide directions to various newspapers, groups and persons, to restrain them from publishing certain material contained in the application for the renewal of licence, lodged by Channel Ten Sydney. Confidential financial information, relating to their advertising log, was inadvertently included in the application.

Mr Jones said today: 'The Tribunal places no obligation on stations, in their renewal application, to disclose financial information relating to their advertising logs. However, if such information appeared to be relevant to the inquiry, the Tribunal has adequate power, in order to make a thorough investigation into the operation of the licensee, to request any relevant information'. He added that 'if an examination of material of a sensitive financial nature, was deemed necessary at an inquiry, the Tribunal would give favourable consideration to hearing such evidence in confidence'.

Mr Jones stated that 'The Channel 10 renewal application, not containing those specific financial details, is available for inspection by the public at the Tribunal's offices'."

The Chairman's Statement

At least two radio stations broadcast some of the contents, and some recipients of the direction indicated doubts about its legality. It appears that all of the newspapers which received a direction complied with it, whatever their doubt about its legality. By 16 February it was clear that the contents of the log had been very widely disseminated. On that date, the Tribunal issued a statement by the chairman, Mr Jones, indicating that the directions would be revoked. It was annexed to News Release No NR 275. The full text of the Chairman's statement is as follows:

"Question 6.4 of the Tribunal's Application Form for Renewal of Licence requires a licensee to provide as part of the application one copy of the station's advertising logs for each day in a nominated week. The information that is sought, and provided by stations, is a schedule of the particular advertisements and the times at which they are shown, but no financial information about them. As the Tribunal does not usually consider such a schedule to contain confidential information it has been the Tribunal's practice to make this information public as part of the application.

In response to Question 6.4 Channel 10 lodged a computer print out schedule of advertisements as part of its application for renewal. On its understanding that the document contained no more than the normal schedule of advertisements similar to that lodged by other stations, the Tribunal did not consider the schedule to be confidential and it was therefore made available for inspection with the Application.

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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Some limited inspection of the documents took place and, at their request, a photocopy of the Application and the schedule was provided to Parents and Citizens Association of NSW.

Following an inquiry from a journalist employed by the Australian Financial Review about the schedule, certain figures on it were drawn to my attention. On ascertaining that figures set out on the schedule were revenue figures for the advertisements scheduled, I directed on behalf of the Tribunal, that they be confidential and not made public. This action was taken because the Tribunal regards this type of information as commercially sensitive and the public release of it could be prejudicial to the interests of the licensee. Information of this type is not normally provided to the Tribunal. It is understood that it was inadvertently provided by Channel 10 on this occasion.

Tribunal staff were requested to make contact with persons who may have obtained a copy of the schedule to arrange for its return and replacement with a copy that did not include the revenue figures. On Wednesday 10 February it came to the Tribunal's notice that the schedule had been supplied to the ABC program Nationwide and that the figures contained in it would be discussed in the program that evening. Further, the Tribunal believed that it was likely there could be other publication of this information. In these circumstances the Tribunal considered that it had a duty, and the power, to issue directions, pursuant to the **Broadcasting and Television Act** 1942, to preserve the confidentiality of the material. Therefore oral directions were issued that day, and formal written directions the following day, to various persons (including the ABC) relating to the revenue figures contained in the schedule. They were given by the Tribunal to prevent the publication and further dissemination of material for which the Tribunal had granted confidentiality.

The Tribunal has reviewed the position in the light of the responses to the directions. It is obvious from these responses that the figures and schedule had been widely disseminated, contrary to the Tribunal's belief, at the time of issuing the Directions, that only one or two copies had been obtained. In view of this situation the only course open to the Tribunal was to revoke its previous directions. Formal notice revoking the directions will be served today and will be effective from service. Unfortunate as this incident has been, the Tribunal has felt it necessary to do all in its power to prevent prejudice to a particular licensee. It is important to stress that it was not the intention of the Tribunal to stifle information; and that, subject to relevance, any claim made by a party to the proceedings to have the information dealt with would be considered by the Tribunal at the hearing of the inquiry into the renewal of the licence. Subject to any further orders or directions that might be made by the Tribunal at the hearing, the confidentiality granted to the document on 3 February 1982 remains in force."

Some Issues Raised

In one sense, the controversy was only a storm in a teacup which arose out of an administrative slip. But it may herald some important issues. Among these are the following:

1. Is there a right to advertise on TV or radio at a fair market rate? Apart from any **Trade Practices Act** issue, s100(4) of the **Broadcasting and Television Act** says that "a licensee shall not, without reasonable cause, discriminate against any person applying for the use of his advertising service". The TEN-10 logs, when published, seemed to indicate differences in amounts

charged to different advertisers for comparable times. There may be perfectly proper explanations of the differences in the charges, and there is no suggestion that TEN-10 has fixed its actual charges any differently from other stations. But this first publication of an actual log provides a basis for the argument about legal principle. Does s100(4) only extend to the issue of whether a person may use the "advertising service" at all, or does it extend to the conditions of price on which the service will be available? Is the "person" referred to in s100(4) the advertising agency, or is it the actual client who seeks to advertise? If the section does confer a right to advertise, one might wonder whether it has escaped the notice of advertising industry spokesmen. Is the sleeping giant of commercial radio and TV about to wake?

2. If actual charges for advertising time vary greatly, then what of the standard rate cards published by licensees? Section 100(2) of the **Broadcasting and Television Act** says that "a licensee intending to broadcast or televise advertisements shall publish particulars of his advertising charges". What are "particulars"? Is it sufficient to publish a general starting-point for consideration of what an advertiser might be charged? Or must all the variables which may make up the final decision on price be disclosed? Must the "charges" be only the amounts which the licensee intends possibly to charge in future, or must they be the charges which the licensee is currently obtaining from advertisers? If current actual charges are required, then would the Tribunal ever be able to prevent their publication?

3. How wide is the power of the Tribunal to give directions in *matters relating to broadcasting*? Section 17(1) of the **Broadcasting and Television Act** says that "for the purpose of exercising its powers and functions under this Act, the Tribunal shall have power to make such orders, give such directions and do all such other things as it thinks fit". Until this TEN-10 controversy, the power had been very rarely used. There appears no legal reason why newspaper proprietors should not be subject to this power as much as any other person. There is no doctrine of "newspaper immunity" in the **Broadcasting and Television Act** or the Constitution. It is true that the Commonwealth may not make laws about newspapers as such. But it can make laws about broadcasting which affect newspapers. As newspapers become more involved in electronic communications, technically and economically, they will become even more closely involved with the Commonwealth government and Commonwealth law.

That is not to say that as a matter of policy the Tribunal should normally attempt to prevent the press, print or electronic, from publishing information. But as the following paragraphs show, it will necessarily be involved in some "free press" issues about broadcasting.

4. Section 106A of the Act obliges the Tribunal as a matter of law to assemble information about broadcasting in Australia and to make it available upon request. It appears that broadcasters and reporters have been slow to make use of this section. The obligation of the Tribunal to make information available is limited by s106A(5), which says that information shall not be made available "in such manner, or in such circumstances, as, in the opinion of the Tribunal, would be prejudicial to the interests of any person". That subsection was relied on by the Tribunal in its directions in the TEN-10 controversy. Its extent has not yet been legally tested. Clearly, there must be come real or substantial prejudice before the Tribunal is obliged to restrict information. Virtually *every piece of information* is prejudicial to somebody. Assuming that advertising logs should be withheld under s106A (and the argument seems a fairly strong one if the above point about s100(2) is ruled out) then what of information which has already been released by the Tribunal or some other person?

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.

Contributors

Mark Armstrong, Senior Lecturer in Law, University of NSW, and author of Broadcasting Law and Policy in Australia

Michael Blakeney, Senior Lecturer in Law, University of NSW, and co-author with Shenagh Barnes of a forthcoming book, Advertising Regulations in Australia

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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).

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