

8-10-2000

Advertorials and the Trade Practices Act: why the 'Golden Tonsils' saga might prove costly in the long run

Mark Pearson

Bond University, m.pearson@griffith.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/hss_pubs



Part of the [Journalism Studies Commons](#)

Recommended Citation

Mark Pearson. (2000) "Advertorials and the Trade Practices Act: why the 'Golden Tonsils' saga might prove costly in the long run" , , .

http://epublications.bond.edu.au/hss_pubs/72

Advertorials and the Trade Practices Act: why the 'Golden Tonsils' saga might prove costly in the long run

Mark Pearson

Abstract

Not long after the Australian Broadcasting Authority announced its inquiry into radio station 2UE over the 'cash for comment' scandal in 1999, the Australian Competition and Consumer Commission (ACCC) warned it would look at drafting guidelines for the media on the production of 'advertorials', items which appear to be news but are in fact sponsored by advertisers. This article analyses the legal positioning of advertorials, particularly in the light of consumer legislation, and considers a possible framework for the ACCC guidelines.

Introduction

The controversy over Sydney broadcaster John Laws' secret deal to promote the interests of the banking lobby on his talkback program left the rest of the media baying for the blood of the self-proclaimed non-journalist with the "golden tonsils". A favourite heading with the sub-editors of the leading articles in the aftermath labelled the disgraced disc jockey a "Laws unto himself". The *Australian* (July 15, 1999, p. 12) commented:

Banks have a right to advertise and Laws and his programs have a right to accept advertising. But advertising implies an awareness on the part of the target audience that it is receiving a commercial statement. Obscuring facts about the subject and its commercial motivation is dishonest.

The *Sydney Morning Herald* (July 15, 1999, p. 16) called for the adaptation of the Federation of Australian Radio Broadcasters (FARB) code of practice to require the disclosure of paid advertising in all its forms.

Yet while the Laws matter was remarkable for its scale, its audacity and his lack of contrition, as it unfolded it was discovered the practice of undisclosed commercial interest was confined neither to Laws, nor to talkback programs nor to radio. This paper does not aim to retrace the events or outcomes of the Australian Broadcasting Authority's inquiries into the talkback saga. Rather, it reviews the regulatory terrain of prickly ethical issue of advertorials, before discussing a legal remedy under the Trade Practices Act which might well bring blatant breaches before the courts in the future. It focuses mainly on the implications for newspapers, though broader implications can be drawn for other media.

Regulation of 'advertorials'

The lack of disclosure of commercial interests has long been rife in the newspaper industry, in the form of 'advertorials' (advertisements disguised as editorial copy) and in the form of blatant self-promotion of a newspaper company's own products and activities. Both practices have come under scrutiny in a range of forums over the past decade.

Advertorials have been subject to adjudications by the Australian Press Council. That body's *Statement of Principles* requires that publications treat readers fairly by "disclosing any commercial or other interest which might be construed as influencing the publication's presentation of news or opinion" (APC, 1996). While that principle was not formally developed until a revision of the council's principles in 1996, the council used this rationale in upholding a complaint against *The Gazette* in Warrnambool in 1991 (APC, 1991). That newspaper had published an advertorial with the heading "Building Societies are as Safe as Houses" without denoting it as advertising material. The council said it should have done so. However, in 1995 the Press Council dismissed a similar complaint against the *Newcastle Star*, which had run advertorials supporting the forest industry in a regional advertising supplement (APC 1995). The council distinguished that case on the basis that the advertorials appeared as part of an identified supplement on a special topic, and not under the guise of a news report. This was a curious finding, implying that readers

had the nous to assign a different level of credibility to supplements. Interestingly, such an assumption flies in the face of research. For example, a US experiment on reader recall found that such labels were not effective disclaimers for feature ads (Cameron & Curtin 1995). The study involving 42 subjects exposed the readers to copy labelled advertising as well as copy featured as straight editorial. It found that readers retained information from advertorials but did not remember the commercial source of the information.

Using feature ads may be selling off hard-earned editorial credibility for short-term gain... Given the demonstrated inefficacy of labelling feature ads, the use of labels alone is a problematic method for distinguishing editorial copy from advertising appeals... More effective methods of notifying readers of the commercial source for a feature ad should be explored in further research. An alternative policy would be to prohibit feature ads altogether (Cameron & Curtin 1995).

Two clauses in the newly revised MEAA journalism Code of Ethics (MEAA, 1999) relate to potential conflicts of interest journalists might face in their work. Clause 5 instructs journalists to: "Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism..." Clause 6 tells journalists: "Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence." Conley (1997: 282-283) chronicles a 1995 industrial dispute in Sydney where suburban newspaper proprietors and their journalists were at odds over whether suburban newspapers should have different standards from metropolitan daily newspapers when they were commercially dependent upon such advertorials. However, no matter how noble its aims, the MEAA's Code of Ethics has long been regarded as lacking in enforcement (Hippocrates 1996; Pearson 1992).

Individual newspapers have also attempted to tackle the issue of commercial influence as part of internal codes of conduct for their journalists. For example, the *Age* in Melbourne devoted an item of its code to the issue, under the heading "conflict of interest":

10. The *Age* will ensure that material generated as a condition of the placement of an advertisement or advertisements should be labelled as 'advertisement' or 'advertising feature'. Staff should not be influenced by commercial considerations in the preparation of material. (*Age*, 1998).

Again, the proof of any such ethical guideline is in its regulation, which is particularly hard to monitor for such in-house codes of conduct. There are inherent problems in media organisations sitting in judgment of themselves and their journalists. International experiments with in-house newspaper ombudsmen appointed to police such ethical codes have had mixed success, with their credibility often called into question (Pearson 2000: 70). Australia's only experiment with such a system, at the *Sydney Morning Herald* in 1989, was less than successful (Pearson 1992: 118-121).

Ownership pressures

The concentration of media ownership raises the issue of the commercial pressures upon journalism brought about by the promotion or defence of a news organisation's corporate interests. This was the subject of debate during the report of the House of Representatives Select Committee on the Print Media (1992). Submissions to that committee from the Australian Centre for Independent Journalism (ACIJ) and University of Queensland journalism lecturers Bruce Grundy and Lawrence Apps alleged instances of editorial intervention by News Limited in defence of its own commercial interests (House of Representatives 1992: 268-270). The ACIJ allegation was that News Limited, a part owner of the airline Ansett, had shown a bias in its coverage of the 1989 airline pilots' dispute. The University of Queensland allegation was that the *Courier-Mail* newspaper failed to declare its commercial interest in the Sunshine Plantation in Queensland while conducting a 'save the pineapple' campaign in its pages. Both allegations were denied vigorously by News Limited. Whether or not they had any foundation, the fact remains that one downside of a concentrated media is the potential for the abuse of power to perpetuate the commercial interests of a proprietor when no competitors exist to offer scrutiny of the media company's commercial activities.

Schultz (1992: 26) found further worrying evidence of such a tendency in her survey of 247 journalists. The journalists identified the major subjective obstacle to investigative reporting in their organisations as 'commercial considerations'. In a more recent work, Schultz (1998: 145) wrote of "a tension, and at worst an impediment, between the commercial and public interest goals of the politically engaged news media". She noted that journalists were torn between the

priorities of maximising profit and “fulfilling their Fourth Estate obligations”. She listed “distortions produced by dependence on advertising” was one of the key barriers to the media being able to fulfil its Fourth Estate function (Schultz 1998: 146).

Trade Practices Act provisions

While the issue of commercially motivated misinformation has been approached on ethical grounds, or in ‘something must be done’ calls for regulatory remedies, one lesson to emanate from the Laws episode is the reminder that there is, in fact, a law to rein in the likes of Laws. That law appears in sections 52 and 53 of the Trade Practices Act and relates to “misleading or deceptive conduct” (s. 52) or downright “false representation” (s. 53) by corporations.

Early in the Laws saga, the chairman of the ACCC, Professor Allan Fels, announced an inquiry into whether the commission should take legal action under these provisions of the Trade Practices Act (*Australian*, July 16, 1999). However, in late August Professor Fels issued a statement announcing the ACCC was dropping its own inquiry because the Australian Broadcasting Authority’s inquiry was a more appropriate forum. At the same time, he warned that the commission would consider developing guidelines about the relevance of the Trade Practices Act to media producing so-called ‘advertorials’: “The ACCC is concerned about the expansion of ‘advertorials’ and expects the Authority [the ABA] inquiry to assist in the clarification of what is currently a ‘grey area’ in the media,” Professor Fels (1999) said.

The prospect of an investigation into the advertorial industry will concern media proprietors who thought they were exempt from the Trade Practices Act provisions after amendments to that legislation in the mid-1980s. In 1984, Section 52 caused concern in the media in the case of *Global Sportsman v. Mirror Newspapers* (1984 2 FCR 82) when it was held that the publication of statements, including statements of opinion made in the ordinary course of news, could constitute conduct which is “misleading or deceptive”. Successful lobbying by the media led to the government of the day introducing Section 65A, which exempts “prescribed information providers” from the misleading and

deceptive conduct provisions unless the deception occurs in relation to the publication of advertisements or in articles promoting the information providers' own commercial interests. Under Section 65A(3) such providers were deemed to include "a person who carries on a business of providing information" and included obviously newspapers, holders of broadcasting licences, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS).

The exemption acknowledged the fact that news organisations could not vouch for every claim made by those quoted in their news columns or stories. However, the instant news material is sponsored, or run in return for some compensation in cash or kind, or is used to promote the news organisation's own operations (such as in a promo), it falls within the Act and leaves any content that is misleading open to prosecution of the media proprietor. This renders journalists and their organisations particularly vulnerable in the realm of advertorials, if it can be shown that space has been devoted to the promotion of a company's products or services just because they happen to be advertising or they have reached some arrangement or understanding with some corporation to that effect.

In the case of *Advanced Hair Studio v. TVW Enterprises* (1987 77 ALR 615), Federal Court Judge French quoted the second reading speech of the then Attorney-General explaining that advertorials were a situation where the publisher's commercial interest made them subject to the misleading and deceptive conduct provisions:

In such cases, information providers must take the same responsibility for the accuracy of information as any other person who publishes information in trade or commerce. This can occur, for example, where a newspaper has agreed to publish a 'news' item about a product in exchange for the product supplier taking out paid advertising in that publication (at p. 623).

If such an arrangement has been made, the media organisation must be able to prove the claims about products in such advertorials, especially those which attempt to compare products or services with others in the market: that a particular product is the best, the biggest, the latest, the greatest and so on. Conduct can be unintentionally misleading and deceptive, so journalists need to pay heed to how the information might be received and interpreted by their audiences.

If such claims are proven to be misleading or deceptive, the media outlet is held responsible and can face an injunction or a damages claim. This need not only be from those adversely affected by such a publication. In a recent High Court case, *Truth About Motorways v. Macquarie Infrastructure Investment Management* (2000 HCA 11), the Full Bench unanimously affirmed the right of any person to bring an action under s. 52, whether or not they have a special interest in the subject matter of the dispute. They need not have suffered any loss or damage. In that case, the applicant had complained that claims made in a prospectus inviting the public to purchase units in two-unit trusts were misleading or deceptive. The claims were estimates of traffic volume on the Eastern Distributor motorway in Sydney and the applicant was seeking an order that the respondent publish corrective advertising providing accurate traffic estimates.

Section 53 of the Act goes further in the case of claims which go beyond being misleading or deceptive and can be classed as 'false representation'. Under Section 79, individuals face fines of up to \$40,000, and companies can be fined up to \$200,000 for such false representations. Under the lesser s. 52 "misleading and deceptive conduct" provisions media outlets can be sued in private actions by the likes of readers misled by the statements or businesses affected by loss of trade as a result of the statements. Advertising executives might be reminded of these provisions when gleefully selling off their news group's credibility with their latest advertorial deal. Editors and journalists might incorporate this legal reason into their arguments with advertising managers over advertorials. If they must be written, they must be clearly identified as such, and any claims the newspaper makes about the goods and services promoted must be provable as true. Section 53 gives some useful guidance on the sorts of claims that might be deemed to be false representation. They include false representations that:

- "goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use";
- "services are of a particular standard, quality, value or grade";
- "goods are new";
- "a particular person has agreed to acquire goods or services";
- "goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have";
- "the corporation has a sponsorship, approval or affiliation it does not have".

They also include false or misleading representation with respect to the price of goods or services; the availability of facilities for the repair of goods or spare parts for goods; the origin of goods, the need for any goods or services; or the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. In other words, the section covers the gamut of claims likely to be made about goods and services in advertorials in any medium.

Corporate promos

The other items of concern are those promoting media companies' own interests through their columns, such as give-aways, contests, newspaper-in-education initiatives, the promotion of new sections and editions, and the promotion of the company's affiliated interests. False, misleading or deceptive statements in such stories are also on dangerous ground.

In the case of *Horwitz Grahame Books v. Performance Publications* (1987 ATPR 40-764), Judge Wilcox noted the news exemption to section 52 did not apply when the material related to the supply of goods or services by the information provider itself. "Thus a promotional statement in a newspaper or magazine... regarding future issues of that newspaper or magazine... is excluded from the operation of s.65A and, therefore, remains governed by s.52," he wrote.

The provision raises serious questions about media companies' cross-promotion of their related corporate interests, particularly in an age where concentrated conglomerates have substantial shareholdings and sponsorships across industries. It would be an interesting exercise, for example, to put News Corporation's coverage of the Super League saga under the Trade Practices Act microscope. Equally, media companies featuring as major Olympic sponsors might offer fertile ground for such an examination, particularly considering their own corporate reputations and sales are dependent upon the success of the 2000 Olympics.

Conclusion

With both the advertorial and corporate promotion aspects outlined above, it would be fair to ask why these Trade Practices Act provisions have not been used against the media to date. Several explanations might be offered. Perhaps, as one reviewer of this article suggested, it is too costly a form of redress, a "lawyer's goldfield". But this fails to take account of the fact that the ACCC

can initiate its own actions on behalf of consumers. It could be a simple resource issue, with the ACCC having other fish to fry. Perhaps there have been too few complaints about these matters to prompt concern, or that self-regulatory bodies such as the Australian Press Council are handling them adequately. However, the press statements from the ACCC indicate that body will now be turning its attention to the issue and no doubt media executives will be awaiting anxiously the so-called 'guidelines' on advertorials promised by its chairman, Professor Fels.

Such guidelines might make clear that the news exemption to the misleading and deceptive conduct provisions of the Act do not apply to material which is serving a commercial end. This would include media companies' self-promotion and items about advertisers when published or broadcast in the context of advertorials, supplements or 'special reports'. It would not only apply when the item was part of a formal advertising 'contract', but also when it could be reasonably interpreted as being part of an advertising-editorial 'deal'. Any such items would need to be designated as 'advertisements' and treated as such under the legislation. Failure to identify such items as advertisements might itself constitute a breach of the Act if it can be established that readers and audiences have been misled into thinking the items were news. In such cases the s. 65A news exemption would, of course, not apply, and the media outlet would be liable for any misleading and deceptive material.

Another indication that the ACCC is paying closer attention to media claims featured in advertorials is the commission's willingness to pursue companies using newspaper advertorial columns to make misleading and deceptive statements about their products, even if the commission is not targeting the newspaper itself. This was the situation in July 1999 when a newspaper advertorial featured certain claims about the need for Y2K compliance of new computers when promoting a product called "Bugbuster" distributed by Melbourne company PC Resq. (ACCC, 1999). The commission pursued the company rather than the newspaper which published the advertorial and required it to enter into a court-enforceable undertaking to stop making the representations to consumers, to print corrective advertising, to offer refunds and to implement a compliance program. While the ACCC's focus was on the company making the claims, the arguments above indicate it might just as easily

turn its attention to the newspaper publishing the misleading content in an advertorial.

The 1974 Trade Practices legislation pre-dated the 'cash for comment' episode by a quarter of a century. However, this high profile incident might well prove to be a catalyst for prosecutions and private actions against the media over the truthfulness of claims they make in advertorials and corporate promotions.

References

- Advanced Hair Studio v. TVW Enterprises* (1987) 77 ALR 615.
- Australian Competition and Consumer Commission (1999). *PC Resq to Offer Refunds to Consumers Misled On Y2K Compliance*. (Press release 131.99, issued 23 July 1999). Available: www.accc.gov.au/media/mediar.htm [2000, July 1].
- The Age* (1998). *The Age Code of Conduct*. Melbourne: The Age.
- Australian Press Council (APC) (1996). *Statement of Principles*. Sydney: Australian Press Council.
- Australian Press Council (APC) (1995). *Adjudication No. 772*. Sydney: Australian Press Council.
- Australian Press Council (APC) (1991). *Adjudication No. 493*. Sydney: Australian Press Council.
- Cameron, G. & Curtin, P. (1995). Tracing sources of information pollution: a survey and experimental test of print media's labelling policy for feature advertising. *Journalism and Mass Communication Quarterly*, 72 (1): 178-189.
- Conley, D. (1997). *The Daily Miracle. An Introduction to Journalism*. Melbourne: Oxford University Press.
- Fels, A. (1999). *ACCC concerned about 'advertorial' practices*. (Press release MR 156/99 issued 24 August 1999.) Available: www.accc.gov.au/media/mediar.htm [2000, July 1].
- Global Sportsman v. Mirror Newspapers* (1984) 2 FCR 82.
- Hippocrates, C. (1996). The problems with monitoring journalism ethics in Australia: A review of the judiciary procedures of the Media Entertainment and Arts Alliance. *Australian Journalism Review*, 18 (1): 67-86.

- Horwitz Grahame Books v. Performance Publications* (1987) ATPR 40-764.
- House of Representatives Select Committee on the Print Media (1992). *News and Fair Facts: The Australian Print Media Industry*. Canberra: Australian Government Publishing Service.
- Media, Entertainment and Arts Alliance (MEAA) (1999). *Revised MEAA Code of Ethics*. [Online] Available: www.alliance.org.au/hot/ethicscode.htm [2000, July 1].
- Pearson, M. (1992). Press self-regulation in Australia. *Tolley's Journal of Media Law and Practice*, 12 (4): 115-122.
- Pearson, M. (2000). Ombudsman 'fad' to return? *PANPA Bulletin*, 189, April: 70.
- Schultz, J. (1992), Investigative reporting tests journalistic independence. *Australian Journalism Review*, 14 (2), 18-30.
- Schultz, J. (1998). *Reviving the Fourth Estate. Democracy, accountability and the media*. Cambridge: Cambridge University Press.
- Truth About Motorways Pty Ltd v. Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11 (9 March 2000). Available: www.austlii.edu.au/au/cases/cth/high_ct/ [2000, July 14].

Author

Dr Mark Pearson is Associate Professor and Head of Journalism at Bond University. He gratefully acknowledges the feedback of the referees who reviewed the draft of this paper. He also thanks Mr Jack Herman of the Australian Press Council, Ms Lin Enright of the Australian Competition and Consumer Commission and Associate Professor Bernard McCabe of Bond University for their assistance.