Avoiding the pitfalls: Advertising in a competitive market

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AVOIDING THE PITFALLS: ADVERTISING IN A COMPETITIVE MARKET

‘Advertising says to people, 'Here's what we've got. Here's what it will do for you. Here's how to get it.'

Leo Burnett
Introduction

- Consumer credit is a competitive industry – facing challenging times.
- Advertising is an essential ingredient in generating business - awareness of advertising parameters is important – personal liability for misleading advertising.

Discussion includes:

1. Advertising legislation and current developments
2. Advertising interest rates and requirements for comparison rates
3. False or misleading advertising
4. ASIC Guidelines
5. Examples of breaches
6. An advertising checklist
Focus of this presentation

- Advertising provisions in the *National Consumer Credit Protection Act 2009* (NCCPA) *National Credit Code* (the Code) and *Regulations*

- Provisions relating to misleading and deceptive conduct in *The Consumer Law* [Schedule 2 of the *Competition and Consumer Act (Cth) 2010* and Part 3 of *The Fair Trading Act 1989* (Qld)]

- Proposed legislation: *Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* (the Draft Bill) - introduced into the House of Representatives on 21 September 2011

- *ASIC Consultation Paper 167* - issued on 30 August 2011: ‘Advertising financial products and advice services: Good practice guidance’
Current Legislation

**The National Credit Code and Regulations**

- Advertising: Ss 150-156
- Comparison Rates: Ss 160-168 & Regs 97-100

**The Consumer Law**

- Misleading or Deceptive Conduct: S18
- Unconscionable Conduct: Ss 21 & 22

The provisions apply to all types of advertising:

- Online/Websites
- Radio and television
- Written advertising
National Credit Code: Advertising

Who is liable for false advertising?

Under the Code:

- **s. 151-**
  
  Unless the contrary is proven, a person is taken to have published an advertisement (or caused it to be published) if he/she provides credit or has an interest in the goods or services provided advertised, or if his contact details (or his agent’s) appear in the advertisement.

- **ss.200 & 201-**
  
  Company officers, agents or employees of credit provider are liable for offences against the Code.
National Credit Code: Advertising

- **General principle:**
  Ss 150(1)-(2) provide that advertisements for credit must comply with this section and the Regulations and with Part 10 if a comparison rate is included.
  - A criminal penalty attaches to non-compliance: 100 penalty units (i.e. $11,000.00).

- **Advertising of annual interest rate:**
  S 150(3) provides that:
  - The advertisement need not contain an annual percentage rate, but must do so if it states the amount of any repayment.
  - Further, if the advertisement contains an annual percentage rate, and credit fees and charges are payable, the advertisement must at least state that fees and charges are payable.
What interest rate can be disclosed?

- **Section 153** provides that:
  - Only the *annual interest rate* (expressed as a nominal percentage) and the *prescribed comparison rate* (with the necessary warnings set out in the Regs) can be disclosed.
  - It is an offence of strict liability to breach this provision (i.e. no intention is necessary) - a criminal penalty of 100 penalty units is attached.

When do you need to provide a comparison rate?

If an interest rate is advertised, the comparison rate must be included, except in the case of continuing credit contracts [s157(2)].
National Credit Code: Comparison rates

What is a comparison rate?

- A comparison rate is an indicative rate to help consumers establish the ‘true cost’ of a loan.
- It includes interest, ascertainable fees and charges paid in connection with the credit contract.
- It excludes Govt. fees and charges (such as stamp duty and mortgage registration fees) and fees which may or may not be charged (eg. redraw fees).
- The comparison rate must be calculated according to the formula in Reg. 100.

Example: A credit provider’s advertised interest rate may be 24% and its comparison rate 30%.
National Credit Code: Comparison rates

Comparison rates: Advertising requirements

- The prescribed amounts and terms used to calculate the comparison rate must most closely resemble the typical loan deal (credit and term) provided by the credit provider for the product being advertised [s161(2)].

- The prescribed amounts and terms are contained in Regs 97 & 98.

- Where different products are advertised in one advertisement, different comparison rates can be used.
Comparison rates: Information required

1. The advertisement must state:
   - name of consumer credit product
   - amount of credit
   - term of credit [S162(1)]

2. If the comparison amount is for $10,000 or $30,000, it must be stated whether the comparison rate is for a secured or unsecured loan (Reg. 98).

3. The comparison rate must be accompanied by a warning about the accuracy of the comparison rate as prescribed by Reg. 99.
National Credit Code: Comparison rates

Comparison rates: Warnings (Reg. 99)

- The warning must contain the long or short form statement in the prescribed form [Reg. 99(3) or (4)].

- Both forms of warning essentially state: The comparison rate applies only to the examples given and may not include all fees and charges. Different terms, fees or loan amounts may influence the cost of the loan.

- Warning must be in the same form as the comparison rate – eg. print size (unless the advertisement is on television, the internet or other electronic medium).
National Credit Code: Comparison rates

Comparison rates: Other requirements

- Must be identified as a comparison rate [S164(1)] and be accompanied by the amount and term of credit on which it is based [Reg. 100(7)].

- Must not be less prominent than the annual percentage rate and the repayment amounts stated in the advertisement [S164(2)].

- For television, internet or other electronic media – specific provisions in s164(3) – For example: If the annual percentage rate is in spoken form and not displayed on the screen in text, the comparison rate must also be in spoken form.
National Credit Code: False advertising

False or misleading representations

- **S154** provides - a person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction.

  *(Note: This section carries a criminal penalty – 50 penalty units).*

- It is a defence if a person charged proves that he or she reasonably believed that the representation was not false or misleading.

- Consumers can take **civil action** [s154(3)] or **complain** to ASIC or to the Ombudsman (COSL or FOS).
Australian Consumer Law

Misleading or deceptive conduct

- **S18** states - a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Unconscionable conduct

- **Ss 21 & 22** provide that a person must not, in trade or commerce, in connection with the supply of goods or services to another person, engage in conduct that is unconscionable.

Both provisions can relate to false or misleading advertising by companies.
Proposed Legislation: The Draft Bill

*Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* - amends the NCCPA

Summary:

Section 10: Unfair and dishonest conduct

Section 15: Obligation to assess unsuitability

Section 25:
- Prohibits use of certain words
- Prohibits giving misleading information

Section 28: Redefines ASIC’s powers
Proposed Legislation: The Draft Bill

Section 10

(Creates a new s180A)

- Deals with **Remedies for unfair or dishonest conduct by credit service providers** (including credit assistance providers and intermediaries).

- Subs. 10(4)(e) provides that the Court, in determining if conduct was unfair or dishonest, will take into account conduct that involved a technique that:
  
  (i) should not in good conscience have been used; or
  
  (ii) manipulated the plaintiff.

**Meaning:** Broker advertising techniques under scrutiny – was the consumer manipulated?
Section 15

[Adds a new par.128(aa) after s128(a)]

- Deals with obligation to assess unsuitability

- It states that a credit provider must not represent to a consumer that the licensee considers that the consumer is eligible to enter a credit contract with the licensee unless it has been determined that the loan is not unsuitable.

**Meaning:** The credit provider should not advertise that no one is turned away or imply that everyone is accepted.
Section 25

(Includes new ss160B and 160C)

- It prohibits **credit service providers** from using the words “independent”; “impartial” and “unbiased” in relation to their credit service.

- There are certain exceptions, e.g. if no commission

- It prohibits **credit service providers** from using the phrase “financial counsellor” or “financial counselling” in relation to their credit service.

**Meaning:** Credit service providers should not imply that they are impartial or that they are able to give consumers financial advice.
Proposed Legislation: The Draft Bill

Section 25 (continued)

Important provision: Prohibition on giving misleading information etc.

(Includes a new s160D in the Act)

- A person (the *giver*) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether the information or document is materially false or misleading.

  *(Note: This section carries a criminal penalty off 100 penalty units, or 2 years imprisonment, or both.)*

**Meaning:** This section expands the ambits of section 154 of the Code, specifically prohibits the giving of materially false or misleading information and provides for imprisonment for breach.
Proposed Legislation: The Draft Bill

Section 28
[Repeals s124(2)]

Redefines ASIC’s powers

- ASIC may bring Court applications regarding contravention of the Code on behalf of consumers or on its own behalf.

Meaning: This suggests that ASIC may be more proactive in pursuing offenders in a similar manner to the ACCC

Recent example of ACCC action:

- The ACCC brought an action against Optus for misleading advertising during its ‘THINK BIGGER’ campaign.

- Optus sold broadband packages with a peak and off-peak allowance component. Neglected to inform consumers their service would be limited to 64kbps once peak allowance was exceeded.

- The Federal Court found that Optus was in breach of the Trade Practices Act - fined Optus $5.26million for misleading advertising.
ASIC Guidelines

Current ASIC procedures in case of breach

If ASIC receives complaint or becomes aware of credit advertising infringements:

- ASIC will require you to take action to comply.
- If you fail to comply ASIC can issue an infringement notice for payment of a penalty. Penalty must be paid within 28 days.
- If not paid, ASIC will commence civil penalty proceedings (Max. Penalty $1.1 million).

- Indication that ASIC is cracking down on financial advertisements (Consultation paper, recent news reports)
- ASIC is widening the ambits of its powers (New amendments, proposed draft Regulatory Guide)

ASIC issued first credit infringement notice for Consumer Credit on 1 July 2010: $27,500 penalty issued to a Sydney mortgage broker (advertised that it provided credit services – no license).
New ASIC Guidelines

ASIC Consultation Paper 167 –
Issued on 30 August 2011 (Submissions by 25 October 2011)
‘Advertising financial products and advice services:
Good Practice Guidance’

- Reg. Guide to be released in January 2012
- Guidance to apply to promoters of financial products and financial advice services and publishers of promotions about financial products and financial advice services.
- To apply to all types of financial products, including credit facilities and general and personal financial product advice.
- ASIC proposes to issue specific additional guidance for consumer credit providers and credit service provider at a later date.
New ASIC Guidelines

Where do these guidelines apply?
To advertising communicated through any medium, including:

- magazines and newspapers
- radio and television
- outdoor advertising, including billboards, signs at public venues, transit advertising
- internet, including webpages, banner advertisements, video streaming (e.g. YouTube) and social networking and microblogging (e.g. Twitter)
- social media and internet discussion sites
- product brochures and promotional fact sheets
- direct mail (e.g. by post, facsimile or email)
- telemarketing activities and audio messages for telephone callers on hold
- presentations to groups of people
New ASIC Guidelines

How does CP 167 affect you?

It outlines the key points ASIC is emphasizing in advertising credit products and services on issues such as:

- warnings, disclaimers and fine print
- fees and costs
- comparisons
- use of certain terms and phrases
- the advertisement’s target audience
- consistency with disclosure documents.
New ASIC Guidelines

ASIC proposals on internet advertising

[Web pages, banner advertisements, video streaming (e.g. YouTube), social networking and microblogging (e.g. Twitter) and internet discussion sites].

1. Should be **self-contained** - Consumers should not need to click through from an online advertisement to additional information on another website.

2. New media channels such as **twitter not suitable** for advertising - if there is insufficient space to provide balanced information.

3. Consumers should be able to **keep a record** of an advertisement - (e.g. by printing it), including any disclaimers, conditions or warnings.

4. When **video streaming** - information about conditions or comparison rates should be easy to understand by an average viewer on the first viewing and not have distracting sounds or images.

5. **Photographs and images** - should be relevant and not contradict, detract from the prominence of any warnings, disclaimers or conditions.
New ASIC Guidelines

Wording of advertisements

- Avoid industry jargon – make sure the audience can clearly understand what you’re saying.
- Consider the characteristics of your actual target audience.
- Words must have their ordinary meaning commonly recognized by consumers (e.g. ‘free’, ‘no fees’ and ‘guarantee’).
- Advertisements must be consistent with information in disclosure documents such as Credit Guide.
New ASIC Guidelines

**Endorsements**

1. Advertising should **not falsely represent** that a product or product issuer has an endorsement or approval that it does not actually have.

2. ASIC is particularly concerned where advertisements claim endorsement or **approval by ASIC**.
   - On 17 August 2011 ASIC issued a **warning against use of its name or logo** by licence holders - or even stating that they are licensed by ASIC.
   - **BUT** from 1 April 2012 licensees must display their ACL on advertisements.

   **Example:** "**Australian credit licence 12345**"

   (Abbreviated form such as "ACL 12345“ is not sufficient).

3. **Testimonials** from individuals should be attributed to them and should be authentic.
What is false advertising?

**Advertising: The Basic Rule**

- The basic rule is that advertisements shall not be misleading or deceptive or be likely to mislead or deceive consumers.

**What does it mean to mislead someone?** This includes:

- misrepresentation
- leading the person to a wrong conclusion
- creating a false impression
- leaving out or concealing important information
- making false or inaccurate claims.
What is false advertising?

Is intention required?

- A lack of intention is a defence to a criminal charge for misleading or deceptive conduct (s154) (but the onus is on the accused to prove it).

- For civil penalties the relevant question is whether the advertisement is in fact misleading or likely to mislead.

- Not necessary to show that someone has actually been misled.

- Possible to mislead or deceive by omitting important information.

- The surrounding circumstances will determine whether conduct is misleading or deceptive.

- You cannot cure a misleading advertisement by information in a disclosure document.
What is false advertising?

Examples of internet advertising

Company #1

- ‘Your credit history is History.’

Company #2

- ‘We can jump start your credit rating with a second chance loan and can arrange amounts of up to 100% of the purchase price of a new or used motor vehicle, even if you are a recently discharged bankrupt or have paid defaults.

  Our bad credit car loans are suitable for all types of people, including those that are self employed or are already under payment arrangements.’

Will breach the new s128(aa) – unsuitability assessment. Also in breach of responsible lending provisions.
What is false advertising?

**Company #3**
- ‘We'll get up to $600 into your hands within 60 minutes on your first advance.’

**Company #4**
- ‘Is being unemployed holding you back from loan approval? Relax! At Loans For The Unemployed it is possible to get a loan despite your unemployed status in the form of loans for unemployed. We, at Loans For The Unemployed, will help you find loans for the unemployed people in the most hassle free way. You will just need to fill in a simple online application form online to get approval.’

These advertisements create the impression that everyone is approved. Could also breach responsible lending provisions.
What is false advertising?

Consider this: Possibly misleading and deceptive

*Company #5*

- ‘Your first cash advance costs just one cent.’
  
  (If there are any other costs it will be misleading.)

- ‘We're the fastest in Australia.’
  
  (Are they?)

*Company #6*

- ‘Bad Credit No Problem. Bad credit happens to good people so we look at your current situation not your past, if your credit isn’t great we can still help.’

  (Possibly breaches responsible lending provisions. Will also breach the new s128(aa) – unsuitability assessment.)
What is false advertising?

**Company #7**

- ‘Need cash now? Worried about bad credit? Mistakes we’ve all made? Past credit problems, or hard decisions you made like bankruptcy or Part IX agreements? Don’t be. We don’t ask you to ‘fit a criteria’ because we don’t have one!!’

  (Clearly must have some criteria when assessing applications otherwise in breach of responsible lending requirements.)

**Company #8**

- It doesn’t matter what you need it for, we can lend you the money*

  *Normal lending conditions apply. See our terms and conditions page.

  (Will contravene ASIC’s new guideline that advertising must be ‘self-contained’.)
What is false advertising?

**Common issues:**

- The advertiser represents that it is a **credit provider** when it is a **credit assistance provider**.
- **Omitting information** from the advertisement, thereby creating a misleading impression.
- Creating the impression that **no-one is turned away**.
- **Overstating** speed and efficiency.
- There is a **common misconception** amongst advertisers that, because others are doing something, why shouldn’t they do the same?
Advertising Checklist

What impression does the advertisement create in the mind of the reader/listener?

3 Points to consider:

1. What is the message being conveyed?
2. What is the impression left with the reader/listener?
3. Is the impression different from that which you intend to convey?
Advertising Checklist

- If a **printed** advertisement - consider the **wording** – can it be construed as misleading? How will your **target group** interpret it?
- Consider the **size of the print** - is it readable?
- If a **television or radio** advertisement, have the conditions been clearly explained in accordance with the Code and **ASIC Guidelines**?
- If a **comparison rate** is used, has it been properly explained? Have all the requirements been complied with?
- If a **website**, have you treated the landing page as an advertisement and kept these guidelines in mind? Is the advertisement self-contained?
- If a **Google Ad**, is it compliant with these guidelines?
Conclusion

Review your website/advertisements regularly, be proactive instead of reactive in advertising...and look forward -

- *Our basic nature is to act, and not be acted upon.*
  
  Stephen R. Covey

- *The windshield is bigger than the rearview mirror.*
  
  Tom Daschle
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