

While whistleblowers are not specifically protected under the terms of the Trade Practices Act, they are by default under s. 162A which creates a criminal offence for intimidation. However, the provision has not yet been tested before the courts.

In the absence of such specific legal proceedings, the Commission has nevertheless created an environment that encourages genuine complaints, preserving confidentiality and offering a leniency or indemnity policy. Within that context, it encourages people who may have contravened the Act to come forward and has, on numerous occasions, granted an indemnity from legal proceedings to people who provide full and frank disclosure.

The Commission currently deals with the issue of leniency and indemnity for individuals or corporations on a case-by-case basis. It has published flexible guidelines on the issue because the policy continues to evolve.

But do the professions themselves support and encourage whistleblowing? Given the importance of self-regulation, **how** do professions or their regulating associations encourage whistleblowing from within the profession and support the whistleblowers themselves?

Governing professional associations have a major role in ensuring the public's confidence by adopting a formal whistleblowing policy. That is, a clear statement of the professions' commitment to comply with applicable laws and to report conduct that might breach those laws. In fact, such a leadership approach is consistent with a profession's core attributes — an emphasis on ethical behaviour and putting the community's welfare ahead of other interests. Views of this kind have been expressed in relation to the conduct of the accounting and legal professions.

But actually implementing such a policy can give rise to some possibly competing tensions such as:

- demand on resources;
- guarantees of confidentiality;
- mechanisms for keeping the whistleblower informed of investigation outcomes;
- incentives to come forward;
- mechanisms for distinguishing genuine from non-genuine whistleblowers;

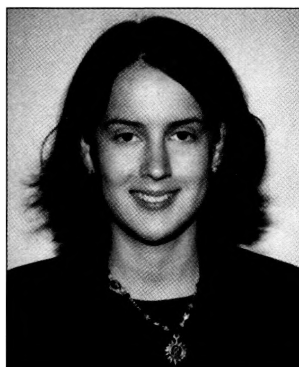
- whether the reporting or disclosure should be internal or external (if external who would the disclosure be to — an appropriate enforcement agency or the media or other person/body); and
- mechanisms for reviewing the policy on a periodic basis.

The challenge for the professions is to take a leadership role, in the public interest, in adopting and publicly committing the profession and its members to support a whistleblowing policy, including protection of whistleblowers.

Leading by example would clearly demonstrate the concern of professionals for high ethical standards and putting the welfare of the community before other interests.

A full copy of the speech is available on <http://www.accc.gov.au>.

## Advertising on the Internet



*The following article by Madonna Parker of the Commission's Brisbane office discusses the risks involved in advertising on the Internet and how the Trade Practices Act is applied.*

The Internet has been wholeheartedly adopted by much of the business community as an essential business tool. Recently, concerns have been raised about how to regulate the conduct of businesses using the Internet to protect consumers from any adverse business activities.

Misleading advertising is generally associated with print, television or radio advertisements, written and oral representations and audiovisual promotions. Although not a new practice, misleading advertising has migrated to a new medium, the Internet.

## How the Trade Practices Act addresses misleading advertising

The Trade Practices Act can apply to advertising in any medium, whether hardcopy publication or electronically via the Internet, provided the elements of a particular provision of the Act exist.

A matter recently considered by the Brisbane office of the Commission involved a large Australian company advertising its products on its web page. The company failed to ensure information on its web page was current or to clearly label material as out of date. Although the matter did not involve issues under the Act, it did highlight the relevance of the Act to businesses using the Internet and the need for them not to unintentionally engage in conduct which may breach the Act.

The most relevant sections of the Act that have an impact on advertising material, are ss 52 and 53.

Section 52 is a very broad provision. It prohibits a corporation, in trade or commerce, engaging in conduct which is misleading or deceptive, or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

While there is a lengthy list of case law and legal discussion about the meaning of 'misleading and deceptive' and the other elements of s. 52, in general it requires sellers to tell the truth or refrain from giving an untruthful impression.

Section 53 specifically prohibits a corporation from making false claims in relation to goods and services. Although s. 53 is directly relevant to advertising material, it is s. 52 that arguably has more impact.

For any business that indulges in misleading advertising, it provides the Commission and individuals who have suffered damage because of it, with the opportunity to commence action for a breach of s. 52. Various remedies and penalties are available for the court to order including injunctions, damages and monetary penalties of up to \$200 000 for companies and \$40 000 for individuals, among others.

## The peculiar problems of online advertising

### Current and accurate information

As a web page is a continual publication accessible anytime and from any place throughout the world, the impact of misleading material on a web page could be more damaging or far reaching than, for example, a misleading leaflet distributed within a small community or a radio advertisement. The risk is higher for businesses to mislead a consumer and/or breach the Act.

Businesses may launch a web page because it is relatively easy and low cost but often fail to regularly update the material. This may occur because a web design agreement only allows for six monthly updates, or the company lacks the resources to do it themselves. Information on the web page can quickly become incorrect or irrelevant and as such may have the potential, in terms of s. 52, to mislead a consumer who visits the web page, for example, to purchase goods or services from the company, whether online or not.

By not updating information on its web page a company may unintentionally mislead a consumer. The fact that the company did not intend to mislead or was acting honestly or reasonably in the circumstances is not relevant to liability. Liability under the Act will depend on whether, objectively, the information is capable of misleading consumers. Having said this, incorrect information does not automatically imply that a consumer will be misled. It depends essentially on the nature of the target audience of the company's advertising. In *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348, Fox J said:

Section 52 is a comprehensive section with a wide impact ... Intention is not a necessary ingredient ... the tort is more objective, but it is not precisely correct to apply the concept of the hypothetical reasonable man. One looks to the audience, or the relevant part of it, and, eccentricities and absurdities aside, asks whether the conduct complained of was to them misleading or deceptive, but the question is not simply whether they (or he) were (or was) misled. Whether the conduct was misleading or deceptive is a matter for the court ... Doubtless the audience to be considered can be classified as 'consumers'. Conduct will not mislead or deceive a person having a conscious awareness of the true facts or correct information.

Further problems can occur if material is not updated after special offers or discounts advertised on the web page have lapsed. An easily identified offer end date or specified time period for the offer would be a practical solution to the risk of breaching the Act.

Where a company uses out-of-date media releases and/or special offers as a marketing tool, it should ensure the information is clearly dated and no longer applicable. If such information is included under a heading such as archived media releases, then the potential for the information to mislead is arguably reduced.

### Disclaimers

In general, most web pages have a disclaimer or exclusion clause to absolve the business of legal consequences related to incorrect information, out-of-date or ambiguous material.

As the intention of the company is not a determining factor for a breach of s. 52, any disclaimer about the truth, accuracy or currency of the information will not absolve the company from liability for misrepresentations. However, in order for a court to determine whether particular conduct is misleading and deceptive it must take into consideration the conduct as a whole, including the disclaimer together with the surrounding circumstances of the offending material or conduct. Regardless of the presence of any disclaimer, the material presented by a company must adequately disclose all relevant information to a consumer.

As the expectations and practices of the business world change, the concept of misleading and deceptive may further evolve. In the meantime, any business should regularly update its website, present accurate information and use enough disclaimers and other legal warnings to reduce the potential to mislead consumers and to mitigate against its possible liability for misleading advertising. Any disclaimer or important information should be placed to ensure a user's attention is brought to it.

## Managing the potential legal risk of advertising on the Internet

Using the Internet for advertising carries some legal risk. Following are some practical suggestions for a business to manage that risk.

- Fully and clearly disclose all information on the web page and ensure that the information remains current and accurate. If the information is out of date the potential to mislead is increased.
- Be able to substantiate any express or implied claims made on the web page.
- Provide a last revision date on the web page so users can assess the currency of information.
- Ensure that any special offers, discount deals or competitions advertised clearly specify the period and/or offer end date and any relevant conditions to avoid reliance or confusion.
- If out-of-date material is displayed on the web page for advertising purposes, make sure it is clearly labelled as outdated and, where possible, located under a suitable title.
- If price information is displayed, make sure any time limits, conditions or special deals are clearly disclosed. If different stores or dealers associated with one web page use a different pricing system, this must be clearly explained and connected to the displayed price information.
- Provide a legal disclaimer, where necessary, that is clear and easily identifiable to a user. The disclaimer can be made more obvious to a user by making it compulsory viewing. That is, when accessing the site the consumer must firstly view the disclaimer or it could be included in a dialogue box on entry to the website.
- Web design agreements should provide for regular amendments of information. Relying on any restrictions on amendments in such agreements will not, of itself, limit liability.

If your business already advertises on the Internet or is thinking about doing so, remember that many of the rules that apply to other forms of advertising equally apply to electronic marketing, including the Trade Practices Act. Advertising must tell the truth and not mislead consumers. In addition, claims must be substantiated. If all businesses follow these simple suggestions, it may help protect consumers and businesses as well as maintain the credibility of the Internet as an effective and reliable advertising medium.