COMPARATIVE ADVERTISING AND THE FAIR TRADING ACT 1986:

Consumer Protection or Marketing Gamesmanship?

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Introduction

In a recent issue of the Air New Zealand magazine, **Pacific Way**, the luxury of a Mercedes car was compared with that of a Mazda. The advertisement unflatteringly referred to a "Teutonic status symbol", (See Appendix I) listing the comparative qualities of the "vehicle of integrity for the quiet achiever", the Mazda 929, and used the following quote from the Australian car magazine **Wheels**: [1]

> "At the risk of a trip to Litigation City, the Mazda's springy tautness and general demeanour make one think of a similarly-sized Mercedes. With good seats."
>
> WHEELS (Aust) June 1988[1]

This type of comparative advertising technique does indeed create a risk of a trip to "Litigation City", but only a few comparative advertisers have taken that road during the five years in which this advertising technique has been acceptable in New Zealand media. However the use of comparative advertising is increasing and is still the subject of controversy. The line between what is and isn't acceptable, both legally and in terms of meeting publisher imposed advertising codes, is difficult to draw, and overseas experience shows the technique has given rise to claims and counterclaims from competitors. Comparative advertising has been used for over twenty years in the United States, and was the technique used in the well known advertising wars between Coca Cola and Pepsi, and Avis and Hertz rental cars. [2]

The claims made in comparative advertisements, both express and inferred, open the advertiser up to unpleasant retaliation in a targetted competitor's marketing campaign, as well as a number of different forms of legal action. An aggrieved competitor may attempt to bring the following causes of action against a comparative advertiser:

i) **tort** actions, including injurious falsehood and possibly passing off, based on protection of reputation and actual damage caused by the comparative advertising;

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1 Mazda advertisement **Pacific Way**, June 1989 , 42

2 W Wilkie and P Farris "Comparative Advertising: Problems and Potential" (1975) 39 **Journal of Marketing**, 12

ii) infringement of **trade mark** actions under the Trade Marks Act 1953[3];

iii) contravention of the provisions of the **Fair Trading Act** 1986, particularly under section 9 relating to misleading and deceptive conduct in trade.

The latter cause of action is the focus of this paper, as the writer submits that it will replace or overshadow other causes of action, in seeking injunctions to stop misleading or deceptive representations made in comparative, and other forms of advertising. Its attraction lies in the relative simplicity for a plaintiff in bringing a strict liability action free from the inhibiting common law requirements of, for instance, proving damage in injurious falsehood, or an intentional misrepresentation calculated to injure, in passing off.

In **Part One** this paper will examine what comparative advertising is, when it is used, and the media rules governing it. In **Part Two** liability for deceptive or misleading conduct under section 9 of the Fair Trading Act 1986, and its applicability to comparative advertising will be considered. The paper will focus on the policy issues raised by the use of this Act, which is primarily aimed at consumer protection, by traders seeking injunctions to stop rivals' advertising campaigns and protect their own market shares.

Part Three will examine the first New Zealand case in which an interim injunction has been granted to a targetted trade rival of a comparative advertising campaign under the Fair Trading Act: E.R. Squibb & Sons (New Zealand) Limited v ICI New Zealand Limited[4]. This case both provides the first New Zealand guidelines on the degree of deception and other factors in this form of advertising that will breach the Act, and a general overview of the grounds on which an interim injunction will be granted for a cause of action based on section 9. The comparative advertising campaign at issue was aimed at the number two top selling prescription drug on New Zealand's tariff of drugs wholly or partly paid for by the government.

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3 cf Villa Maria Wines Ltd v Montana Wines Ltd [1984] 2 NZLR 422 For a comprehensive discussion of this comparative advertising case based on trade mark infringement, and the applicability of tort actions to comparative advertising see: M Bucknill "Comparative Advertising - the Legal Implications" (1985) 11 NZULR 233

4 Unreported, 27 December 1988, McGechan J, High Court Wellington Registry, cp 823/88

Part One

A What is comparative advertising?

Comparative advertising may take a number of different forms. The two most common forms are: [5]

i) **Brand versus brand** - comparing two or more specifically named or identifiable brands of the same generic product or service class (e.g. Roly's Dry Pet Food versus Chef Jellimeat)[6]; and

ii) **Generic** - comparing the advertiser's product with all of the same generic product or service class, usually in terms of one or more specific product or service attributes (e.g. Roly's Dry pet Food versus all canned pet foods).

The characteristics of both of these forms may be present in the one advertisement. For instance, the Mazda 929 print advertisement already referred to both names "Mercedes" and compares the Mazda 929 with other European cars at the top end of the market (see Appendix I). A good example of the "generic" form is the current series of Postbank television commercials, showing the conversion of ordinary customers to its banking services, after finding that other trading banks were only interested in business or big customers. Another example is the Hyundai print advertisement (see Appendix II) claiming that the Sonata has "more space than any other car in its class".

Comparisons are usually made about an attribute or measure that is common to both products, in the case of brand versus brand advertising, or all objects in the class, in the case of generic advertising. Advertising that simply claims a product is 'the best' in its class, without stating a basis for the claim, is not regarded as comparative.[7] Such an unqualified general claim, not mentioning a specific rival product, is likely to be regarded as mere puffery, or self evident exaggeration, as it doesn't invite any conclusion of being a statement of objective fact.

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5 M Bucknill "Comparative Advertising - The Legal Implications" (1985) 11 NZULR 233

6 Radio New Zealand Rules, Policies and Statutes Affecting Advertising on Radio New Zealand Stations, 1.7.2
The rival product need not be mentioned directly. It is enough that it is recognisably presented - for instance in the United States in the 1960's an Avis campaign was directed against Hertz, recognisable only as "Number 1" Above n2, 7

7 Above n2, 7

B Why is the Technique Used?

i) Persuasiveness

When the technique was first allowed by publishers under New Zealand advertising codes five years ago, the less controversial generic form was favoured. However, in an increasingly competitive environment, copy has become more explicit and directly comparative of brand against brand. While this mirrors advertising patterns in other countries, this trend in New Zealand is of particular interest in light of the new legal development of stricter liability potentially imposed by the provisions against misleading and deceptive conduct of the Fair Trading Act 1986, which may have been expected to deter comparative advertisers from copy which even hints at disparagement of another product.

The main reason for using the comparative technique is that it is one of the most **persuasive** forms of advertising. Because these advertisements both laud the virtues of the advertiser's product and often assert or imply some form of superiority over those of its rivals, the technique is especially used by:

i) advertisers entering a market for the **first time** which is dominated by well established products[8]; and

ii) advertisers wanting to **elevate** the market positioning of a product by associating it with a brand or product already at the top of the market.

The barrage of legal suits that went with the increasing prevalence of the technique overseas, led to differences of opinion on its desirability for this country. Some advertising agencies and clients were keen to use the technique, and others very much against it.[9] However, it is now generally accepted by the industry, according to Executive Director of the Association of Accredited Advertising Agencies, Chris Inneson[10]. The small number of court cases belies the extent of disputes over certain campaigns, which the Association advises its members to settle between themselves, to avoid the time and expense involved in litigation. However, while more advertisers are using the technique, its **effect** on consumer behaviour is still the subject of debate.

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8 P Clarke "Liability under the Trade Practices Act for Comparative Advertising" (1988) 16 ABLR 98

9 **National Business Review**, Wellington, New Zealand, 29 July 1985, 51

10 Interviewed by the writer on 12 July 1989

ii) Effectiveness

a) The attention of the advertiser's **direct target audience** - users or would be users of the competing brand or product class mentioned - is engaged. This enables '**positioning**' of the product more easily in the desired market segment than with standard advertising techniques. [11]

b) Comparative advertising can provide the consumer with a useful source of **evaluative information**. In the modern market actual comparison of products by consumers at the point of sale may be both difficult and time consuming.

c) Some advertising experts think that comparative claims are more likely to be accepted as '**correct**' and **factual** than those in standard advertisements. One reason for this is that consumers may tend to believe that 'permission' must have been gained for an advertiser to compare their brand with another. [12]

d) However, there is little **research** to show whether comparative techniques actually work. It is difficult to gauge whether increased sales and improved customer perception, for instance, is the result of advertising per se, or the comparative technique used.

e) American marketers have found that while the **impact** of comparative advertisements is different from that of standard advertisements, the results can be either beneficial or harmful to the advertiser. [13] While the technique may be more effective in drawing **initial attention** to the advertisement, this does not necessarily lead to increased brand awareness, and may even lead to **confusion** of products.

f) Some advertising experts think that comparative advertising may lead to increased opportunities for **misleading or deceptive** advertising. One advertising agency director has warned that its undisciplined use could turn the advertising industry into a "carnival brand name shooting gallery - noisy, unproductive, unprofessional" [14], leading to legal claims, information overload, consumer confusion, and 'tune-out'.

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11 Above n2, 11

12 Above n2, 14

13 Above n2, 11

14 Above n2, 9

C Media Rules

Fearing reprisals, legal action and public battles between competitors, New Zealand television, radio and newspapers all refused to publish comparative advertisements until about 1984.[15] The advertising industry pushed for comparative advertising rights to ensure that practices were compatible with Australian procedures, from where many New Zealand commercials are now sourced.[16] This pressure and the recognition that the technique can benefit consumers by providing valuable information and leading to increased competition between suppliers, led to the introduction of rules by broadcasting and newspaper publishers in 1984 and 1985.[17] The Magazine Publishers' Association does not have rules, but tends to rely on those of the Newspaper Publishers' Association.

In practice, the necessity to comply with these publishers' rules has largely prevented advertisers coming up against the legal rules on misleading advertising, and avoided litigation. The publisher guidelines lay down similar requirements. Major differences between them would be pointless because many campaigns are multi-media, spanning television, radio and print media. Some common requirements are:

a) comparative advertising should be factual and informative, offering positive merits, and **not disparaging** of competition;

b) comparative claims should be **clear and unambiguous**, with no likelihood of consumers being misled;

c) the **same** unit of measurement or feature should be compared;

d) the identification should be for honest comparative purposes and not simply to **upgrade by association**; and

e) if the results of a competitive test are mentioned, the testing source should be **independent** and objective.

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15 Above n5, 234

16 Above n9

17 Television New Zealand **Television Advertising Rules and Guidelines**; Newspaper Publishers' Association **Regulations for Accredited Advertising Agents in New Zealand**; Radio New Zealand **Rules, Policies, and Statutes Affecting Advertising on RNZ Stations**. In August 1989, the Committee of Advertising Practice, was about to release a uniform national code on comparative advertising, for use by members of the Association of Accredited Advertising Agencies

D Approvals, Agency and Media Liability

All comparative advertisements are stringently checked by publishers against both their own codes and for breaches of the law. Terms of acceptance often require the advertiser to indemnify the publisher against any legal claims and costs incurred.[18] The client or advertiser usually owns the advertisement but there are contractual alternatives for allocating liability between the advertiser and the advertising agency:

i) **agency** agrees to take all responsibility for the advertisement;

ii) agency requires the **client** (advertiser) to assume all responsibility; and

iii) agency and client agree to **share** responsibility.

The last alternative is the most common, but protection from liability of the advertising agency or media has yet to be tested in court.

However, an application for **judicial review** has been used to challenge a **publisher** of a comparative advertisement who was a statutory body - the Broadcasting Corporation of New Zealand - and had attempted to contract out of liability for screening the advertisement.[19] A "Dynamo" advertisement claimed that washing powder cleaned a whole wash for less cost than the leading powder. Unilever, the manufacturer of that leading powder, "Drive", alleged that the advertisement had breached the BCNZ's own rules on comparative advertising. The Court held that it was arguable that the advertisement inferred Dynamo was more cost effective, and there was a factual issue as to whether this inference was true. Mr Justice Heron issued an interim order restraining broadcasting of the advertisement, and suggesting that the BCNZ should consider developing its own mechanism for disposing of arguments about the objectivity of comparative advertisements[20].

The importance of fairness and objectivity in this form of advertising, with its inherent criticism of rivals' products, was to take on even greater significance with the passage of the Fair Trading Act 1986.

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18 TVNZ also reserves the right to request an advertiser's legal representatives confirm the transmission does not contravene the provisions of the Fair Trading Act c.f. **Television Advertising Rules and Guidelines**, 14 Rule 9.4 advises that an alternative advertisement should be available, as the contracted placement will be charged in full should an injunction be served on TVNZ.

19 Unilever New Zealand Ltd v BCNZ & Colgate Palmolive Unreported, 3 October 1986, Heron J, High Court, Wellington, cp 408/86

20 Ibid, 9-10

PART TWO - THE FAIR TRADING ACT 1986

A Scope and Objects

The legal position of advertisers was to radically change with the introduction of the Fair Trading Act 1986. The full scope and impact of this Act on commercial behaviour is yet to be felt. Its companion, the Commerce Act 1986, regulates market conduct and aims to promote competition. The Fair Trading Act aims to ensure fair play in competition and introduces the concept of liability for misleading or deceptive conduct. Any person may apply for an injunction to restrain offending conduct[21], the applicant does not have to have suffered personal economic loss.

Both Acts are modelled on the Australian Trade Practices Act 1974. Section 9, the widest provision of Part I of the Act dealing with deceptive or misleading conduct in trade, is virtually identical to section 52 of the Trade Practices Act.

> s9. **Misleading and deceptive conduct generally** - No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Unlike most other sections of the Act, section 9 doesn't give rise to the criminal remedy of a fine under section 40[22], which can be up to $100,000 in the case of a corporation. However, it may lead to an injunction (section 41); damages (section 43(2)(d); an order for corrective advertising, if the applicant is the Commerce Commission (section 42); and a wide variety of other orders (section 43).

Parts I to IV of the Act enact the machinery provisions for making regulations on consumer information, product and service safety standards. The Act attempted to reform and bring within its orbit pre-existing piecemeal legislation, that had been both without teeth and rarely used.[23]

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21 Section 41

22 The more specific provisions of Part I on misleading and deceptive conduct, false representations and unfair practices which can give rise to criminal liability include: conduct in relation to goods (s 10); services (s 11); employment (s 12); various false representations including price of goods or services (s 13); forging trade marks (s 16); and pyramid selling (s 24).

23 J Collinge "The Fair Trading Act 1986" **N. Z Law Society Seminar**, March 1987, 7

The Long Title indicates that the Act has two main aims, consumer protection, and regulating conduct in trade:

> An Act to prohibit certain conduct and practices in trade to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety and also to repeal the Consumer Information Act 1969 and certain other enactments.

In introducing the Act, the Minister of Consumer Affairs, Hon. Margaret Shields, referred to the deficiencies in the existing legislation, particularly the lack of direct remedies in the Consumer Information Act and the Merchandise Marks Act. She emphasised the concern to supply consumers with accurate comparative information: [24]

> The Bill is designed to ensure that consumers as participants in the market place participate in the benefits of competition by countering deceptive conduct and promoting informed choice in the key areas of price, quality and service, and ensuring that consumers have accurate comparative information on which to base their purchasing decisions. In that way the Bill will also enhance the position of ethical traders ...

While the Minister announced that the Act was the first step in a programme of consumer law reform, it is likely to be the primary source of consumer legislation in New Zealand for many years to come. [25]

Comparative advertising purports to provide consumers with evaluative information on which to to base informed purchasing decisions, which is itself an aim of the Fair Trading Act. The application of section 9 of the Act to comparative advertising is therefore likely to reveal the boundaries which New Zealand courts will draw in deciding when freedom of commercial speech oversteps the mark to become conduct that is deceptive or misleading to consumers, or likely to be so. It will also reveal the degree of accuracy in advertising claims that the courts will require under this relatively new cause of action.

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24 NZ Parliamentary Debates Vol 467, 1985: 7884-5

25 Above n23

B The Role of the Commerce Commission

The Commerce Commission is charged with ensuring compliance with the Fair Trading Act, and guiding traders and consumers on their rights and obligations under it in section 6. Complaints from consumers that potentially come within the jursidiction of the Act may be received through the Ministry of Consumer Affairs, who are charged with consumer education, but are then usually directed to the Commerce Commission.

An important provision of the Act impacting on comparative advertising is that the Commission alone is given the power to apply to the Court for corrective advertising under section 42. The aim of this section is clearly to counteract the misleading information and misconceptions caused by the offending conduct.[26]. But the Commission has not yet used this power at all.

In his recent book, Lindsay Trotman has suggested that a major role for the Commission as a consumer guardian could be in seeking injunctions where the offending conduct is within the scope of section 9 as misleading or deceptive conduct, but doesn't constitute a breach of the criminal liability sections.[27]

However, examination of the 26 Fair Trading Act cases successfully prosecuted to June 1989 by the Commission shows that not one was brought solely under section 9. An explanation for this could lie in the Commission's reluctance to give undertakings as to damages, which may be substantial. In a case brought by the Commission in 1987 the High Court held that an interim injunction under section 41 would not be issued unless the Commission gave such an undertaking[28]. It refused. Wherever possible the Commission tries to persuade parties to comply with the Act and stop the contravening practice without resorting to litigation.

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26 G Taperell, R Vermeesch & D Harland **Trade Practices and Consumer Protection** (Butterworths, Sydney, 1983) 636

27 L Trotman **Misrepresentation and the Fair Trading Act** (Dunmore Press, Palmerston North, 1988) 10

28 Commerce Commission v Megavitamin Laboratories Unreported, Holland J, 14 December 1987, High Court Christchurch, M 532/87. While not recommending giving the Commission immunity from undertakings as to damages in the **Review of the Commerce Act 1986**, the Ministry of Commerce proposes the Crown would indemnify the Commission up to $10 million

A spokesperson for the Commission, however, has informed the writer that the Commission is concentrating its efforts on the sections of the Act which give rise to criminal prosecutions, and that section 9 is likely to be used as an adjunct to another cause of action. From 1 April 1987, when the Act first came into force, until 31 March 1989, the Commission registered 3,956 complaints.[29] Thirteen per cent of those complaints were directed at section 9 (See Appendix III). Not surprisingly, nearly thirty per cent of complaints were directed at section 13(g) - false or misleading representations with respect to the price of goods or services.

The Commission noted that initially 90 per cent of complaints under the Act were from consumers. Nine months after the introduction of the Act that rate had dropped to 70 per cent and was still dropping. The Commission commented that "a number of traders see enforcement of fair trading principles as solely a Commission responsibility and appear unwilling to seek private remedies."[30] It states that as anyone may seek civil remedies the Commission is concentrating on consumer complaints.

The Commerce Commission recently declined to bring an action under section 9 against the Tobacco Institute, for an advertising campaign in which the health hazards of secondary smoke inhalation were compared with banal everyday hazards. Criticism was levelled at the Commission's refusal by the anti-smoking group, Ash, for impliedly endorsing the Institute's contention that there was no proven scientific evidence secondary inhalation of smoke damaged the health of non-smokers. The Commission pointed out to Ash that it could bring a private action under the Act, and seemed concerned about the question of conflicting scientific evidence.

The Commission appears reluctant to take a case to court where it is obviously in the interests of others to do so. While this consideration would clearly apply to the area of comparative advertising, the potential for consumer deception from a misleading campaign using this technique is extensive, and as discussed in the next section, even a trader may be unwilling to bring such an action.

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29 Figures supplied by Commerce Commission. See Appendix III

30 Commerce Commission **Competition Review** (1988) Vol 1, 50

C Can Consumer Protection Be Achieved?

This legislation against misleading and deceptive conduct is of particular impact in relation to the increasingly influential advertising of goods and services. **Caveat emptor** is no longer appropriate in a modern market where consumers and producers rarely meet. Importantly, as advertising doesn't usually constitute an offer, the Act gives non-contracting parties remedies in relation to general commercial conduct.

One of the unresolved questions that emerges from the dual aims of the Act - consumer protection, and regulating conduct in trade - is the extent to which the goal of consumer protection is effectively achieved by largely relying on rival traders to bring actions which in reality are aimed at protecting their own individual property rights. It is submitted that one of the difficulties with this issue, is that it leads to questioning the philosophy behind the scheme of the Act, which is based on the neo-classical free market ideal.

The Fair Trading Act and Commerce Act together seek to enable the legal conditions to prevail for the operation of the 'perfect' market. The theory is that freer competition will lead to more efficient allocation of resources and more accountability between producer and consumer, ensuring quality goods and services are available at the best price, with minimum need for State intervention. From this perspective, the Fair Trading Act promotes economic efficiency, and is largely self-policing, giving ethical traders, and in turn consumers, protection against unethical traders.

The former Chairman of the Commerce Commission, John Collinge, has emphasised that the most unique feature of the Act is the private remedies it gives, to consumers, trade purchasers, suppliers and competitors:[31]

> The private remedy, it is hoped will also make enforcement of the Act more cost effective and efficient, and in that way will provide better protection to the consumer than remedies at the suit of the State alone.

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31 Above n23, 8

In a market where competitors act as watchdogs over one another and are willing to ensure fair trading practices, consumers should benefit from more accurate information in advertising on which to base their purchasing decisions. But does this flow-on effect to the consumer work adequately in practice?

Although no relevant statistics are kept, both the Justice Department and the Commerce Commission say that to their knowledge not one consumer has brought an action under section 9. Disputes Tribunals have no jurisdiction under this section.[32] Therefore to take legal action themselves against misleading or deceptive conduct consumers have to go to the District Court, or, if seeking an injunction under section 41, the High Court. They can go to a Tribunal only if they rely on the more specific provisions of the Act relating to goods, services, employment or false representations, provided for by sections 10 to 13.

Comparative advertising is particularly pertinent in light of the consumer protection aim of the Act, as this goal is to be largely fulfilled by ensuring the accuracy of comparative information as a basis for purchasing decisions. When injunctive court action by a rival trader then, is successful, the misleading effect of the advertising on consumers is removed, but it cannot prevent previous consumer deception during the life of the campaign.

The author submits that consumer deception will also go unchecked, firstly, if the trade victim of a brand versus brand campaign is unwilling or unable to bring an action, because of either the financial costs involved, or the fear of possible damage to trade reputation that exposure of the comparative qualities of its product in court could reveal. Secondly, a deceptive or misleading claim in a generic campaign is highly likely to go unchallenged by a rival trader who sells the same class of goods or services, as one trader will not want to bear all the legal costs and consequences. The writer suggests that the Commerce Commission could play a valuable role as guardian of the consumer by stepping in to apply for injunctive action under section 9 in the latter situation, and using its power to apply for corrective advertising under section 42, if required.

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32 s 39 Jurisdiction of Disputes Tribunals

D The Australian Experience

The Fair Trading Bill Explanatory Booklet[33] states that giving ethical traders remedies against competitors to ensure fair conduct in trade is "also conduct consistent with the promotion of the interests of consumers." However, fifteen years of Australian experience with the similar provisions of Part V of the Trade Practices Act has led Warren Pengilly to question its efficacy to protect consumers.

In an article published when the New Zealand Fair Trading Act came into force, he predicted that the results of giving remedies to traders in order to protect consumers, would be similar in New Zealand:[34]

> Despite the avowed consumer benefit in giving legal rights to ethical traders, these rights have been invoked by traders in the vast majority of cases to defend private rights - in particular industrial and intellectual property rights - rather than by plaintiffs attempting to vindicate the public interest in the protection of consumers.

The same author states that nearly all litigation on the equivalent of section 9 has not directly involved consumers and protection of public rights at all, but has been used to protect private property. Yet, it was clearly envisaged that the section would directly involve consumer protection in Australia as well.[35] Giving traders remedies against competitors is a cost-saving compromise solution for the State to ensure consumer protection in the marketplace. But this protection is only arrived at, if at all, as a spin-off from an action to defend private rights.

The main reason for introducing legislation based on Australian law, as stated in the Explanatory Booklet,[36] was to facilitate free trade under the Closer Economic Relations Agreement, by ensuring compatible consumer protection measures. There have been few cases yet from which the New Zealand judicial attitude to use of the Act by rival traders can be gauged.

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33 Department of Trade and Industry (1985)

34 W Pengilly "The New Zealand Fair Trading Act: the likely impact of the law and commercial conduct in light of the Australian experience" (1987) 2 NZLR 59, 60

35 W Pengilly "s52 of the Trade Practices Act: A Plaintiff's New Exocet" (1987) 15 ABLR 247, 274

36 Above n33

However, the New Zealand Court of Appeal in one of the first cases before it to deal with the Act, has stated that it will follow a policy of harmonisation, taking a consistent approach in judicial interpretation in adopting Australian case law: [37]

> ...our Courts are thus fortunate in being able to profit from Australian judicial authority and experience in applying the New Zealand Act.

As Pengilly has discussed, the predominant Australian pattern of rival traders invoking section 52 to protect their own private intellectual property rights may not have been intended at all, and may be unrelated to the contemplated legislative purpose. [38] The author submits that New Zealand could be accepting the unforseen consequences of this very wide provision too hastily. While the Act was intended primarily for consumer protection, this goal may be frustrated because of the lack of viable means of enforcement by consumers.

With respect, the author submits that New Zealand courts may too readily take the current Australian pattern of enforcement as a model for this country. Noting that it was expected proceedings under the Act, as in Australia, would largely replace passing off actions at common law, Cooke P considered that: [39]

> Certain points well-settled in Australia may be said with confidence to be equally applicable in New Zealand. For instance, it is clear that although the Act is primarily consumer protection legislation, a rival trader may enforce section 9 and indeed is the usual applicant.

In looking to the purposes of their Act for guidance, the Courts across the Tasman showed a marked reluctance in early cases to uphold the use of the equivalent of section 9 to solely protect business or trade reputation. [40]

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37 Taylors Brothers Limited v Taylors Group Limited [1988] 2 NZLR 33, 39

38 Above n35

39 Above n 37

40 In Australia, for constitutional reasons, only the Federal Court and High Court of Australia have jurisdiction. Above n27, 3

In the leading case of Hornsby Building Information Centre v Sydney Building Information Centre,[41] Barwick CJ, presiding over the High Court of Australia, took a strong line in dissolving an interim injunction. He held that the use of the name at issue was not misleading or deceptive, and said that the suit before him was no more than a proceeding to protect the respondent in its trade or business.[42]

> Section 52 is concerned with conduct which is deceptive of members of the public in their capacity as consumers of goods or services, it is not concerned merely with the protection of goodwill of competitors in trade or commerce.

On the other hand, in the same case, Stephen J, made an often quoted observation on the practical connection between the deception of consumers and the injury of a trade rival:[43]

> The remedy in such a case will not, as in passing off, be founded upon any protection of the trader's goodwill but, being directed to preventing that very deception of the public which is injuring his goodwill, it will nevertheless be an effective remedy for that of which he complains.

In his first instance judgment of Taylor Brothers Limited, McGechan J observed that as the Act was for the protection of the public, not traders' goodwill, passing off principles should not be automatically applied[44]. While there was an overlap on the key factual question of misleading or deceptive practice, New Zealand should take care not to equate the new statutory remedy with the comfortably familiar common law of passing off.

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41 [1978] 140 CLR 216

42 Ibid 220. See also Phelps v Western Mining Corporation [1978] 2 ATPR 40-077, judgment of Bowen CJ, presiding over the full Federal Court, who said that an applicant's standing under this section is derived from the fact that the essential nature of the suit is for the protection of the public interest, and only incidentally may the applicant obtain advantage to his or her own trade or business.

43 Above n41, 226

44 Taylor Brothers Limited v Taylors Textile Services Auckland Limited [1988] 2 NZLR 1, 27

E Potential for Breach of the Commerce Act

A further unresolved complication with rival traders using section 9 of the Fair Trading Act is that if it is in reality being used to protect a dominant position in the market, such an action could breach an anti-competitive provision of the Commerce Act 1986. While the scope of this paper does not allow extended examination of this issue, the use of section 9 of the Fair Trading Act in the area of brand versus brand comparative advertising, by a trader with a dominant market position in a market could breach section 36 of the Commerce Act.

As comparative campaigns are often used by those entering a market for the first time, and target competitors who are at the top of the market, the target may fulfil the criteria for holding a dominant position in the market, defined under section 3(8) of the Commerce Act. The important test under that section is whether the trader is "in a position to exercise a dominant influence over the production, acquisition, supply, opr price of goods or services" in a market. If the target attempts to retaliate by using section 9 of the Fair Trading Act to bring injunction proceedings to try to stop the campaign, it could breach section 36(1)(a) of the Commerce Act, in seeking to use that dominant position to restrict the entry of a competitor into the market, or section 36(1)(b), in preventing or deterring the newcomer from engaging in competitive conduct, by attempting to stop its advertising launch.

It is arguable whether the intellectual property enforcement defence provided by section 36(2) would be available. Seeking to use the superior market position in the above manner is not actionable if the dominant trader "seeks to enforce any right under or existing by virtue of any copyright, patent, protected plant variety, registered design or trade mark."[45] As the basis of an action under the Fair Trading Act is premised on the protection of the public, rather than intellectual property rights, the dominant trader would not have the defence. However, if the campaign contains sufficiently misleading or deceptive claims the Fair Trading Act would in all likelihood prevail.

While this issue has not yet been raised, the first application under section 9 of the Fair Trading Act concerning comparative advertising has provided an opportunity to clarify some of the other unresolved questions concerning trader enforcement in this area.

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45 Section 36(2) Commerce Act 1986

Part III - Section 9 in Action: Squibb v ICI

The first interim injunction granted in relation to comparative advertising under the Fair Trading Act, Squibb v ICI[46] illustrates when comparative claims will breach section 9 and the application of that section to claims purporting to have a scientific foundation. It highlights the tension in enforcing the Act between the apparent standing of a plaintiff based on the public interest in preventing consumer deception, and the practical effect of such an action in also protecting the private property rights of a dominant trader. During examination of aspects of the case, relevant rationale from Australian comparative advertising cases will be mentioned.

A The Facts and Allegations

The plaintiff and defendant are direct competitors in the most lucrative sector of the pharmaceutical drug market, marketing products to control hypertension and cardiovascular problems. Both parties are New Zealand subsidiaries of international pharmaceutical companies. While the facts are technically complex, an outline of salient points is essential.

The plaintiff's product, an ACE Inhibitor[47], with the trade name "Capoten", was the market leader and a major commercial success for Squibb, representing 60 per cent of its entire sales turnover, nearly $1 million per month in August of 1988. At the time of writing, Capoten was the second top selling drug on the New Zealand drug tariff - the approved list of prescription drugs paid for wholly or partly by the government.

In launching a rival ACE Inhibitor in late 1987 with the trade name of "Zestril", ICI's strategy was to issue and distribute different forms of promotional material to doctors and pharmacies, in an attempt to familiarise doctors with the product before it was included in the subsidised drug tariff. As New Zealand was the first country in which Zestril was to be sold on a commercial basis, the success of its launch must have been crucial to ICI.

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46 Above n4

47 ACE stands for Angio-Tension Converting Enzyme. This drug group is the latest form of hypertension treatment and works by blocking the angio-tension 2 enzyme in the kidneys.

The promotional material used in this extensive campaign by ICI contained express and implied references to the leading product, Squibb's Capoten. ICI was using comparative techniques in attempting to persuade their main consumer target audience, prescribing doctors, to switch to a new product. After entering the market for the first time, sales of Zestril represented $119,400, one eighth of Squibb's market share for Capoten, by the month of August 1988.

With the release of further promotional material, including advertisements in **The New Zealand Medical Journal** and the **New Ethics Journal**, Squibb threatened legal action in March 1988, if ICI's advertising and sales practice wasn't modified. Other promotional material was distributed in quick succession, consisting of a wall chart for surgeries, a quick reference guide for doctors and brochures aimed seperately at pharmacists and doctors, comparing the properties of ACE Inhibitors. There were references to a comparative trial in brochures. Most of the material was sourced from the United Kingdom, where ICI's parent company is based.

Squibb alleged that various statements in the material made claims that were misleading and deceptive, contravening section 9 of the Fair Trading Act. Squibb applied for an interim injunction to both restrain ICI from making further such statements and comparisons, and for the withdrawal of material already distributed.

Squibb claimed that ICI's comparative statements in the material inferred the superiority of Zestril, both generally, and in terms of specific matters, including:

> that multiple daily dosing was required with the Squibb product Capoten, to control blood pressure for 24 hours, instead of once daily with Zestril;
>
> the material referred to peak and trough and adverse side effects of Capoten;
>
> it contained the implication that the presence of the sulphydrl group in Capoten was undesirable;

> it stated Zestril was "superior...in treating congestive heart failure; and,
>
> while Zestril was a third generation ACE inhibitor, Capoten was first generation (inferring a greater level of scientific advancement for Zestril).

In reply, ICI pleaded justification and alleged discretionary barriers to relief - delay in bringing the case, acquiesence, "clean hands", and the lack of resort to the dispute procedures of the Pharmaceutical Manufacturers Association, to which both parties belonged.

B Misleading or Deceptive - Section 9 Principles

McGechan J reiterated the legal principles applicable in determining whether conduct is actually or potentially misleading or deceptive in the terms of section 9 of the Fair Trading Act, previously cited in his first instance judgment of Taylor Brothers Limited[48], noted by the Court of Appeal in that case. (See Appendix IV).

The principle particulary relevant in this case was the question of deceptive truth raised in Hornsby Building Information Centre v Sydney Building Information Centre[49]. In that case, Stephen J illustrated the manner in which a statement may be literally true, but deceptive, and carry with it a false representation.[50]

> To announce an opera as one in which a named and famous prima donna will appear and then to produce an unknown young lady bearing by chance that name will clearly be to mislead and deceive. The announcement would be literally true but none the less deceptive, and this because it conveyed to others something more than the literal meaning which the words spelt out.

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48 Above n44

49 [1978] 140 CLR 216

50 Ibid, 227

Guided by authority, McGechan J held that "if the statement concerned conveys no meaning but the truth, it cannot mislead or deceive. If however, it conveys also another meaning, which is untrue, then it may fall within section 9". [51] It is the overall impression that may be misleading. However the consumer must not be misled by obvious deceptions. [52]

The relevant section of the public who must be reasonably likely to be misled or deceived is a question of fact for the Court, and is a similar enquiry to that undertaken in passing off cases. [53] Susceptibility to conduct by different sections of the public may vary. For instance, children will be more susceptible than highly educated professionals. ICI's material was aimed mainly at doctors: [54]

> ...who will vary in expertise from the knowledgeable specialist to the pragmatic general practitioner, and in perception from the acute to the hurried. I bear in mind also that at least a substantial proportion would be likely to take reputable manufacturers' claims at face value.

Mr Justice McGechan considered that the doubts raised by placing reliance on such comparative information could have a profound effect on doctors' prescribing decisions for the ultimate consumers, patients. [55]
He noted that as these drugs were on the drug tariff, the party bearing the ultimate financial burden was the tax payer. Claims comparing the clinical properties of drugs, are likely to be taken more seriously than those made in advertisements aimed at the buyers of general consumer goods, which have a less obvious effect on health.

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51 Above n4, 30

52 Above n23, 12

53 A Brown and A Grant **The Law of Intellectual Property in New Zealand** (Butterworths, Wellington, 1988) 572

54 Above n4, 30

55 Above n4, 17

McGechan J noted that drug treatments for congestive heart failure are likely to be for life, although starting at a late stage. The prescribing decision is therefore of major financial moment to drug companies. Placing reliance on comparative information is likely to have a profound effect on prescribing behaviour:[56]

> Prescribing doctors have a tendency to adhere to known and proven drugs. However, if a doubt is voiced as to the characteristics of a drug, there may be a natural tendency to switch to an alternative. The New Zealand medical profession is small, and doubts can spread rapidly. Once a patient is established on a new drug, doctors may be unlikely to change back to former treatment in the absence of a demonstrated clinical need.

So if a breach of section 9 were to be found, theoretically, doctors, patients and the tax payer would all be protected by the same provision of the same Act, in an action by a rival trader anxious to protect its own reputation and market share. This scenario depends entirely on the wounded rival trader having both the motivation and the funds to bring such a case. In the meantime, consumers could act on misleading information.

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56 Above n4, 17

C Preliminary Findings

The Court held that the required threshold of a serious question to be tried had been met as to whether each of the claims made by ICI was in breach of section 9. In particular, it held that the statement that multiple daily dosing with Capoten was required to control blood pressure for 24 hours was plainly wrong.[57] The statement may have been accurate in other countries, but had not been in New Zealand since the introduction of a new dosing regime before Zestril arrived on the market in 1987. On this question the Court held there was a strong prima facie case for breach of section 9.

There was evidence that both drugs produced peak and trough effects and a that a respectable body of opinion thought that whatever side effects may be associated with Capoten, there was not yet sufficient evidence with Zestril to draw valid comparisons.[58]

On the question of the effect of the sulphydryl group in Capoten, the judge held that it was impossible to resolve such a technical controversy at this preliminary stage. Indeed, a categorical answer might not be possible on the present state of scientific knowledge.[59]

The inference that Zestril as a "third generation" drug was an evolutionary improvement upon "first generation" Capoten, was not backed up by the evidence.[60]

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57 Above n4, 31

58 Above n4, 32

59 Above n4, 34

60 Above n4, 33

D Justification

Mr Justice McGechan held that justification, raised as a defence to all claims, was not a defence to claims of misleading or deceptive conduct under section 9, but merely a discretionary ground for declining an interim injunction.[61] The judge observed that the term carried baggage from the defamation context that may not be appropriate in a Fair Trading setting.[62]

In explaining his approach, McGechan J distinguished in principle between the protection of **public interest** at the heart of the Fair Trading Act, and the protection of **personal reputation** at the root of the tort of defamation. The weight given to the powerful public interest policy objective designed to ensure interim injunctions didn't restrict freedom of the media in the context of defamation actions, shifted to focus on the public interest in "forestalling misleading or deceptive conduct before consumers may be harmed under the Fair Trading Act".[63]

As defamation defences don't apply, press freedom is ensured by exempting media reports (but not advertisements) under section 15 from contravening the provisions relating to deceptive and misleading conduct. In Australia, injunctions have been issued under the Trade Practices Act against the owners of mediums used to publish or broadcast comparative advertisments.[64]

Mr Justice McGechan was clear that in relation to issues of deceptive truth, half truth, or conveying a secondary meaning under the Fair Trading Act, justification will not provide a defence.

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61 Above n4, 42

62 Above n4, 35

63 Above n4, 42

64 cf Calsil v TVW Enterprises Limited [1984] ATPR 45, 210; Lelah v Associated Corporation of Australia (1985) 4 FCR 543
Under the New Zealand Act, the defences of reasonable reliance on information supplied by another person in section 44(1)(b) and due diligence under section 44(1)(c), to an action seeking an interim injunction under section 40, are unavailable for an action based on section 9, potentially leaving publishers of comparative advertisements strictly liable.

E Puffery

The Squibb case illustrates that claims of superiority in comparing attributes or qualities of products put forward in a factual manner are unlikely to be deemed to be mere puffery, and therefore immune from action under section 9.[65] The Court said that a claim ICI's product was superior in the treatment of congestive heart failure, followed by purported hard data backup was "put forward in a manner and context which invites the conclusion that it is a justified statement of objective fact, rather than mere puffery."[66] There was opinion that Zestril was too new and unproven, and studies did not establish sufficient differentials, to justify such an unqualified assertion of fact.

Claims purporting to have scientific foundation, especially those related to health products, will receive very close scrutiny. Mr Justice McGechan was guided by the view of Burchett J in the Australian case of Janssen Pharmaceutical Pty Limited v Pfizer Pty Limited[67]

> ...proof that there is no scientific foundation for a statement in the realm of science may be sufficient proof that the statement is misleading. That will be so where in this context the statement must be, or is likely to be, taken as implying there is an adequate foundation in scientific knowledge to enable it to be met (cf Colgate Palmolive Pty Ltd v Rexona Pty Ltd [1981] 37 ALR 391.

Because comparative claims are perceived to be more factual than standard advertising claims, the language used is less likely to be regarded as mere exaggeration. The Australian courts also appear to be moving towards treating the defence of puffery narrowly.[68] For instance, it has recently been held that the term "best value" health insurance,[69] used as a major advertising theme, inviting customers to compare their existing health insurance cover with that offered by the advertiser, was a claim consumers would reasonably believe was being made seriously, rather than mere sales puff.

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65 The rationale for such immunity is that no reasonable member of the target audience would be misled by self-evident exaggeration or mere sales talk. Above n8, 109

66 Above n4, 34-35

67 [1986] ATPR 47,285, 292

68 Above n8, 107

69 Hospitals Contribution Fund of Australia v Switzerland Australia Health Fund Pty Ltd [1987] ATPR 40-830

The attitude of the Australian courts seems to be that in choosing to criticise a rival product, an advertiser should be allowed little leeway when it comes to interpreting whether claims are misleading or deceptive, or likely to be so[70]. This judicial policy stance was articulated by Fox J in Union Carbide Australia v Duracell Australia Pty Ltd[71]:

> It has been said that section 52 of the Trade Practices Act applies with special strictness to representations made in comparative advertising. The Act does not lay down a principle in such terms, but it may be that the public, although used to exaggeration in describing the virtues of a product, expect comparisons between specific competing products to be reasonably fair and accurate.

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67 Above n8, 111

68 (1986) 7 IPR 481, 486

F Remedies: Jurisdiction to Grant Interim Mandatory Relief

The terms of the interim injunction sought were both prohibitory and mandatory:

a) Prohibitory - restraining the defendant from making any deceptive or misleading statements relating to Capoten or drawing any adverse comparisons between Capoten and Zestril.

b) Mandatory - "...by permitting any promotional material or literature distributed by the defendant from remaining in the possession of any person, company or organisation to whom it had been distributed by the defendant."[72]

The Court held that "beneath the verbiage", the latter involved a positive, and was mandatory.[73] However, it doubted whether section 41 conferred the power to make a mandatory order, as the section speaks only of "restraining" from engaging in conduct, never of command.

Two opposing arguments gave the Court some difficulty on this issue. Firstly, to "engage in conduct" in section 9 could include refusal or omission to act under the definition provided in section 2(2)(a). A power to restrain from engaging in conduct may include a power to restrain refusal or omission to act.[74] But, secondly, in the negative, section 41 may be interpreted as part of a legislative scheme, in which it constitutes an entirely prohibitive arm. The mandatory arm is made up of Section 42, conferring the power to apply for orders for corrective advertising on the Commerce Commission alone, and section 43, conferring power to make orders for return and repair of property, and supply of services.

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72 Above n4, 2

73 Above n4, 44

74 Above n4, 45

Originally, the Australian legislation couched the equivalent of section 41 in the same terms as the New Zealand Act. Doubts existed in that jurisdiction about the power to make mandatory orders under the section. Consequently, it was amended in 1983 to give a wide power to grant interim injunctions in such terms as the Court thinks fit[75]. McGechan J commented that this history must have been known when the New Zealand Act was passed: "If the intention then was to include mandatory powers in s41, clear words might have been expected. There are none."[76]

But even if there was jurisdiction to grant a mandatory interim injunction, the Court held that attempting to recall promotional material from recipients could seriously prejudice the defendant. Recall could create an impression that there was something suspect about Zestril itself.[77]

The terms of the interim order were for prohibition only - restraint of further material **expressly** naming Capoten. However the order did not restrain inferences, or instruct that distributed material be recalled. In weighing up the interests of overall justice the Court found that, while freedom of speech was important, there was a countervailing public interest in promoting accuracy in medical information.[78]

> ...the public interest and the interests of justice require some temporary restraint upon comparative advertising where the properties of cardiac related medication and matters of public health may be in issue.

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75 Above n4, 46

76 Above n4, 47

77 Above n4, 51

78 Above n4, 55

G Differences From Common Law

In cases such as the one before the Court, the judge suggested pleading additional traditional causes of action in passing off or slander of goods, if seeking a mandatory interim injunction that was within the equitable jurisdiction, such as withdrawal of material already distributed.[79]

In comparison with the tort of **slander of goods**, or **injurious falsehood**, liability under section 9 can arise without proof of malice, or loss by the plaintiff, as a result of the actions of the defendant. Nor does the plaintiff need to prove that the advertisement contained false statements calculated to produce damage. The section imposes strict liability, and knowledge of the effect of statements is irrelevant.

Passing off, representing for trading purposes that goods are those of the plaintiff, also requires a misrepresentation, in the sense of untruth, rather than half truth, deceptive truth, or conveying a secondary meaning, which is sufficient under section 9 of the Fair Trading Act. However, liability under section 9 rests on misleading or being likely to mislead the public, not on the protection of proprietary reputation that is at the root of the tort of passing off[80]. There have been no reported cases of a cause of action in passing off based on a comparative advertisement, nor any reported cases at all of injurious falsehood in New Zealand.

Section 9 provides a rival trader with a powerful retaliatory weapon, free of onerous difficulties in proof.[81] Liability may also arise even though a statement is literally true, but nevertheless misleading, and neither competitor nor product is named and disparaged directly. If the competitor or product can be identified by the target audience, conveying a misleading **impression** is sufficient.

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79 Above n4, 47

80 Above n4, 21

81 Above n8, 100

Loss may however, be relevant in deciding whether an interim injunction is appropriate. Under the balance of convenience test, McGechan J considered that neither side would be compensated adequately by damages. Nor did he consider that the "extent of uncompensatible disadvantage" could be determined realistically. [82]

Although the plaintiff estimated a loss of $370,000 per annum arising directly from the defendant's conduct, the Court had difficulty accepting that any reliable estimate could be made. "Damage to reputation is an imponderable. Damage to goodwill, as in a sense the habit of doctors prescribing can be called, is notoriously hard to quantify." [83] The plaintiff had claimed that while sales of Capoten had grown considerably, they had actually been declining in terms of overall market growth, and the defendant had gained a considerably greater market share. Causation was an added difficulty, and the judge noted that such problems were familiar in passing off cases, and carried over, in the calculation of damages, into Fair Trading Act proceedings.

H Consumer Protection or Marketing Gamesmanship?

In commenting on the newness of comparative advertising, McGechan J said he was: [84]

> ...far from persuaded it is a market necessity in this country, particularly over a short time period such as the life of an interim injunction, whatever the plaintiff's market advisors in the United Kingdom or anywhere else may believe.

The potential danger identified by the judge in comparative advertising cases under the Fair Trading Act 1986, was that injunction proceedings may be used as part of an overall commercial strategy to combat a competitor's campaign: [85]

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82 Above n4, 49

83 Above n4, 48

84 Above n4, 50

85 Above n4, 51

> It would not be in the public interest for any notion to spread that all a trader need do to ruin a competitor's product launch is find some arguable item in the competitor's promotional material which might be labelled misleading or deceptive and than apply urgently to the Court for an interim injuction restraining use of those promotional materials. Interim injunctions in this area should not be allowed to become a matter of mere routine, turning the Court into a tool for marketing gamesmanship.

This case warns that the courts will not assist under the Fair Trading Act if the real purpose of an action by a trader is to ruin a competitor's campaign by seeking an order to restrain promotional material on the grounds that it is misleading or deceptive.

Conclusion

The products and market targetted by the parties in the Squibb case required an extremely sophisticated level of information in promotional material, and was a difficult subject for an interim decision. But the Court's approach indicates likely judicial reaction to further comparative advertising cases brought under the Fair Trading Act by trade victims of campaigns.

The case illustrates that New Zealand courts are likely to take the same tough and narrow line as their Australian counterparts in interpreting claims in comparative advertisements under the Act. The factual overall impression that is the essence of the persuasive success of the technique, means that claims will probably be taken more seriously than in other forms of advertising and so puffery or exaggeration will not be a good defence to deceptive or misleading statements.

Half truths, secondary meanings, and overall misleading impressions, short of obvious deceptions, created by this form of advertising will be prime candidates for contravening section 9. Justification will not provide a defence to an application for an interim injunction. Any doubts about the scientific or independant foundation of comparative claims are likely to be taken as proof that a statement is misleading.

Until the issue is considered by the Court of Appeal, or the legislation is amended, the courts can only make prohibitory interim orders if the applicant is anyone other than the Commerce Commission. An applicant should bring concurrent common law causes of action if seeking a mandatory order. The Commission could play a valuable consumer protection role in seeking an order for corrective advertising as part of an application for an interim injuction to combat a misleading or deceptive generic campaign. The Commission may be more willing to seek such injunctions if it is indemnified by the Crown for undertakings as to damages.

Consumers will have already been misled by an ongoing advertising campaign by the time an injunction is applied for. In the Squibb case, for instance, doctors' prescribing behaviour may have altered in the months before the interim injuntion was granted. Even now, the promotional material at issue may still be sitting in surgeries, and used as a comparative reference point, if doctors do indeed place reliance on material issued by the marketers of the drugs they prescribe. While the Court doubted that it had the power to withdraw this distributed material, and didn't consider it desirable to do so in this case, it is submitted that the damage done by potentially misleading information already distributed may be considerable.

However, the granting of the interim injunction in the particular terms of the Squibb case struck a judicious balance between protecting consumers and stopping short of seriously prejudicing or ruining the defendant's product launch. The campaign could have been amended to remove express comparative references.

McGechan J rightly placed great weight on the public policy interest in preventing further misleading or deceptive claims about cardiac related medicines and health products, the bills for which would ultimately be paid by the tax payer in this case. Without this major public policy factor the court may well have shown more reluctance in granting an interim injunction

A relatively hard line on comparative advertising is desirable in view of the persuasive effect of the technique on consumers. If claims are presented as fact they should be accurate and not bear secondary meanings which are likely to deceive. However, the necessary degree of accuracy may prove to be a matter of individual judgment in each case.

An attitude of judicial scepticism towards the practical effect on consumers, and true motivation behind actions brought by rival traders, is warranted in view of the consumer protection aim of the Fair Trading Act. The courts would be justified in displaying reluctance to too readily grant an injunction in the face of an applicant's obvious aim to protect individual property rights and market share, without the probability of serious consumer deception arising from the campaign.

In the Squibb case section 9 was used in retaliation to a competitor's campaign. But section 9 has the potential to become a major offensive weapon in the arsenal of highly competitive marketing tactics, that bears no real relation to consumer protection, but is invoked in its name and fetters freedom of commercial speech in the process. A competitor who found out about the content of a rival campaign before its launch could try to apply urgently for an interim injunction, on the grounds some claims were misleading or deceptive, in an attempt to prevent the whole campaign.

Mr Justice McGechan's warning that the courts will not allow themselves to be used as a tool for marketing gamesmanship in New Zealand displays an attitude that is consistent with the primary consumer protection aim of the Fair Trading Act.

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"At the risk of a trip to Litigation City, the Mazda's springy tautness and general demeanour make one think of a similarly-sized Mercedes. With good seats."
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Is the man from "Wheels" serious?
The new Mazda 929 V6 3-litre Hardtop may look, sound and feel like a big, strong, solid and smooth-riding luxury cruiser; handle hills, rough roads and tight corners with effortless ease.
It may deliver 186 horsepower (DIN), and equally impressive torque, through its lusty 18-valve fuel-injected V6 and state-of-the art 4-speed automatic transmission; and accelerate from standstill to the legal limit in 9.7 seconds.
It can even boast higher levels of comfort, convenience and luxury equipment than cars costing up to three times its price.
But the Mazda 929 is not a Teutonic status symbol. It is a vehicle of integrity for the quiet achiever.
We suggest you appraise the equipment list below, arrange with your nearest participating Mazda Dealer for an extended test drive, with plenty of hills, bumps and deceptive . . . bends — and take it to the limit!
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MAZDA 929 3.0 V6 HARDTOP
STANDARD EQUIPMENT: Cruise control • Air conditioning • Electric automatic aerial • Central locking • Fuel-injection • 4-speed automatic transmission with Power, Economy and Hold modes plus electric selected overdrive • Concealed wipers • Electric windows • Speed-sensing power steering • Tilt and telescopic adjustable steering column • Factory-fitted 4-speaker stereo with graphic equaliser • Electric remote door mirrors • Fog/driving lights • Fan-assisted rear ventilation • Swing-louvre front ventilation • Power assisted 4-wheel disc brakes
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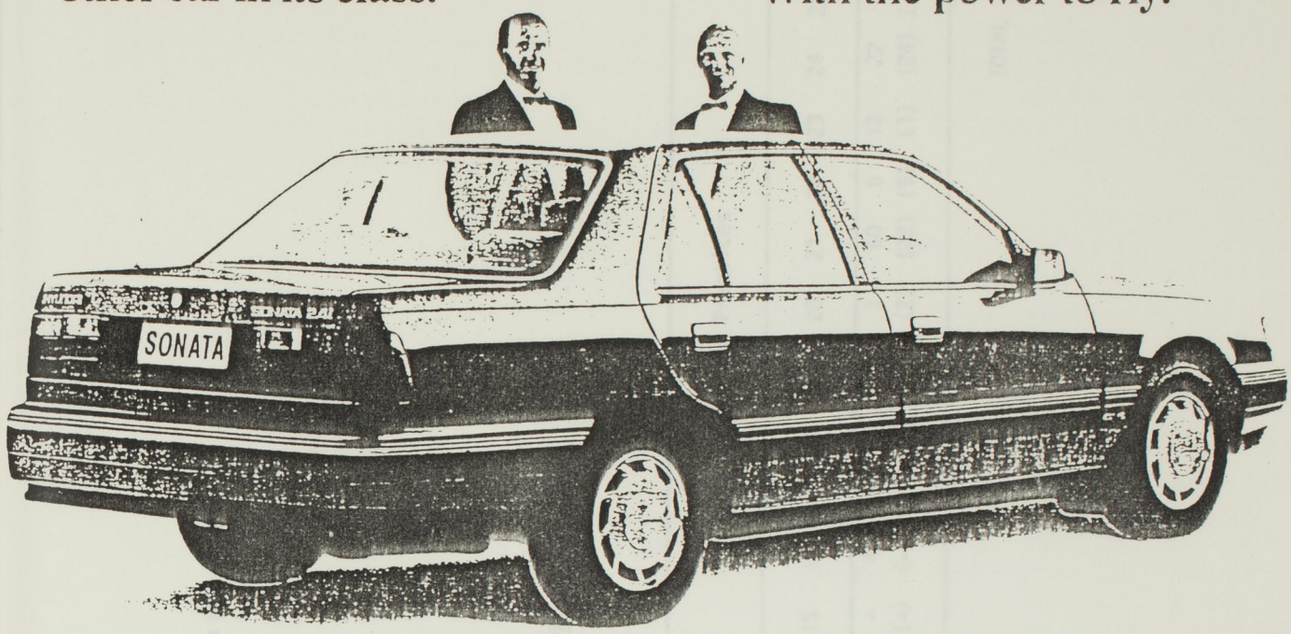

Introducing Sonata. Hyundai's all new mid-size car measuring up to 100 cubic feet of passenger comfort. That's more space than any other car in its class. Richly upholstered accommodation for five adult New Zealanders, including their elbows and shins.

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The same can be said of Sonata's motivating force. The most powerful standard engine in its class. An electronically fuel injected multi-valve overhead camshaft engine available in 2.4, 2.0 and 1.8 litres. Coupled to front wheel drive, each engine has the power to make Sonata fly.

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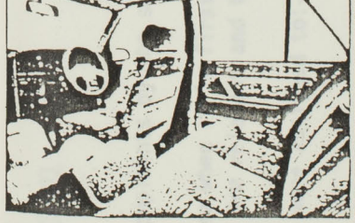
Sonata. Hyundai's powerful new argument for a truly spacious mid-size luxury saloon.

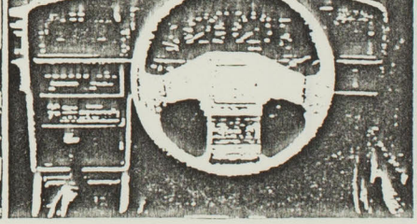
INTERIOR
Classic comfort of the Sonata GLS. Fully velour upholstered seating with 60/40 split fold-down rear seat to further increase the capacity of Sonata's big 13.4 cubic foot boot. Driver's seat offers six-way adjustment including lumber support. All electric sunroof, with rear tilt facility, is controlled from an aircraft type ceiling console (2.4 GLS only).

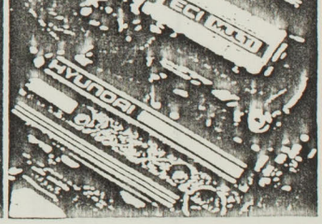
DASHBOARD
Full instrumentation and graphic warning display informs at a glance. The neat gaitered five speed gear shift (four speed automatic with overdrive also available) is positioned in the central console which for the 2.4 GLS houses heater and air-conditioning controls, six-speaker radio/cassette player, tape storage and side mirror controls.

ENGINE
The new Sonata is fitted with a high performance multi-valve overhead camshaft Multi-Point Injection (MPI) engine. Independent suspension, front wheel drive and power rack-and-pinion steering provide maneuverability and confident handling. The cross-linked power braking system operates large ventilated front discs and self-adjusting rear drums.

REAR BADGING
Sonata. Hyundai's all new mid-size car available in two luxurious forms – GL and GLS – with three power options. The 1.8 and 2.0 litre MPI engines are fitted to the GL and GLS respectively as standard, with the 2.4 litre engine available as optional on the GLS. Whatever form or engine, an extensive protection process ensures Sonata of a long, elegant life.







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SONATA

A classic by

TABLE 3 (12 months: 1/4/88 - 31/3/89)

This table gives a breakdown of complaints by the sections of the Act.

The section is assigned to the case when it is first registered. Subsequent investigation may reveal that other or additional sections are relevant and this is not reflected in this table.

The greatest number of complaints were assigned to:-

s.13(g) 592
s.13(a) 304
s.9 191

COMPLAINTS BY SECTIONS OF THE ACT 1/4/88 TO 31/3/89
(1/4/87 to 31/3/88)

	Conduct				False Representations										Unfair Practices												Other
Section	9	10	11	12	13a	b	c	d	e	f	g	h	i	j	14	15	16	17	18	19	20	21	22	23	24	25	26	
Number of complaints	330 (191)	60 (117)	103 (105)	15 (17)	249 (304)	63 (91)	29 (23)	22 (27)	125 (116)	22 (9)	528 (592)	5 (7)	56 (56)	67 (21)	8 (13)	- (-)	4 (-)	30 (29)	4 (9)	97 (118)	1 (2)	60 (22)	6 (9)	13 (1)	22 (24)	- (-)	- (-)	29 (105)

TOTAL 1948 (2008)

In Taylor Bros Ltd v Taylor Textile Services (Auckland) Ltd (unreported) High Court Wellington 1 October 1987 CP 95/87, albeit in the context of a "names" case, I borrowed willingly from the first instance judgment of Wilcox J in Chase Manhattan Overseas Corporation v Chase Corporation [1986] ATPR 47, 328; 47, 336. Wilcox J observed:

> "The legal principles relevant to the determination of the question whether the use by a corporation of a particular name amounts to conduct which is actually or potentially misleading or deceptive may, I think, be summarised as follows:
>
> (a) Conduct cannot, for the purposes of sec 42, be categorized as misleading, or deceptive, or likely to be misleading or deceptive, unless it contains or conveys a misrepresentation : Taco Company of Australia Inc v Taco Bell Pty Limited [1982] ATPR 40-303 at p 43, 751: (19820 42 ALR 177 at p 202.
>
> (b) A statement which is literally true may nevertheless be misleading or deceptive: see Hornsby Building Information Centre Pty Limited v Sydney Building Information Centre Pty Limited [1978] ATPR 40-067 at p 17, 690; (19780 140 CLR 216 at p 227. This will occur, for example, where the statement also conveys a second meaning which is untrue: World Series Cricket Pty Limited v Parish [1977] ATPR 40-040 at p 17, 436 (1977) 16 ALR 181 at p 201.
>
> (c) Conduct is likely to mislead or deceive if this is a 'real or not remote chance or possibility regardless of whether it is less or more than 50 per cent': Global Sportsman Limited v Mirror Newspapers Limited [1984] ATPR 40-463 at p 45, 343; (19840 55 LAR 25 at p 30.
>
> (d) The question whether conduct is, or is likely to be misleading or deceptive is an objective one, to be determined by the Court for itself, in relation to one or more identified sections of the public, the Court considering all who fall within an identified section of the public 'including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations': Taco Company at ATPR p 43, 752, ALR, p 202. Evidence of the formation in fact of an erroneous conclusion is admissible but not conclusive: Global Sportsman at ATPR p 45, 343, ALR p 30.
>
> (e) Ordinarily, mere proof of confusion or uncertainty will not suffice to prove misleading or deceptive conduct : Parkdale Custom Built Furniture Pty Limited v Puxu Pty Limited [1982] ATPR 40-307; (1982) 149 CLR 191. However, where confusion is proved, the Court should investigate the cause; so that it may determine whether this is because of misleading or deceptive conduct on the part of the respondent : Taco at ATPR p 43, 752; ALR p 203."

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Comparative advertising and the Fair Trading Act 1986