Brand advertising: an overview and update on recent changes

01/09/2011 by Sue Irwin Ironside, and Rosemary Wallis

Advertising is an integral part of building brand goodwill; it informs consumers, distinguishes products and services, and ultimately increases sales.

Advertising in New Zealand has to comply with the Advertising Standards Authority (ASA) Codes and relevant laws, such as the Fair Trading Act 1986 (FTA), the Medicines Act 1981 (MA) and the Medicines Amendment Regulations 2011. The Medicines New Zealand (MNZ) Code of Practice is also applicable.

The primary function of the ASA is to self-regulate advertising in New Zealand and introduce, monitor and amend the Advertising Codes of Practice.

There are 15 codes covering a variety of areas, including advertising directed at children, advertising food, gaming, liquor, and therapeutic and weight management products and services. They contain the basic principles by which advertisements are judged.

Complaints about advertisements can be made by members of the public and are heard by the Advertising Standards Complaints Board (ASCB). They can be about any aspect of an advert so long as a prima

facie case for a complaint exists. If the complaint is accepted, the ASA will write to the advertiser, the advertising agency and the media with a copy of the complaint, requesting a response within 14 days. The Board will then make the decision whether to uphold the complaint. Advertisers have a right of appeal to the Advertising Standards Complaints Appeal Board (ASCAB).

Advertisers are not obliged to comply with the codes by law but have volunarily agreed to abide by them. If a complainant applies to the Advertising Standards Complaints Board, the complainant cannot also issue a court proceeding in relation to the same complaint. A complainant can therefore find this to be a cost effective method of resolving an advertising dispute.

If an advertisement is deemed to breach a code, the media organisation will remove it. Therefore, while avoiding court action, the advertiser may have to write-off the costs of an advertisement.

The advertiser may also be exposed to negative publicity, as all ASCB and ASCAB decisions are released to the media and available on the ASA website. In addition, there are legal expenses associated with defending an advert before the ASA.

There has been a rising number of complaints in recent years, reaching a peak in 2006 when 1557 complaints were received (compared to 679 the year before). It has remained steadily high since then, with 1164 complaints made last year. The top 3 products complained about in 2010 were consumer products, liquor and therapeutic and health and beauty products, with 141, 114 and 105 complaints respectively.

Liquor advertising witnessed the sharpest increase in complaints compared to 2009, which was likely to have been, at least to an extent, due to the introduction of the Code for the Naming, Labelling,

Packaging and Promotion of Liquor. It came into force on 1 October 2009 and aimed to address the regulatory gap left by the Code for Advertising Liquor.

The Code for Advertising Liquor, which came into force on 1 September 2003, addressed advertising in all media but did not cover non-advertising forms of promotions, such as merchandising, packaging, product names, promotions and sponsorship.

Part of the ASA self-regulatory practice is the provision of copy advice: pre-vetting systems are in place for liquor (the Liquor Advertising Pre-Vetting System and the Liquor Promotions Pre-Vetting System) and therapeutic (the Therapeutic Advertising Pre-Vetting System) advertising.

Companies wishing to place adverts in the media are advised to seek copy advice, as it minimises the risk of withdrawal sanctions being taken by the ASA following a complaint. The high number of complaints relating to liquor and therapeutic advertising, however, indicates that companies are yet to make full use of these procedures.

In addition to the codes concerning advertising therapeutic goods and services, companies should also be aware of advertising provisions of the recent Medicines Amendment Regulations 2011.

The regulations, pursuant to the MA, came into force on 1 August 2011 and contain amendments to the Medicines Regulations 1984 and the Medicines (Standing Order) Regulations 2002.

Regulation 8 covers advertisements directed at consumers and, compared to the regulation it replaces, is more specific to different categories of medicines. It stipulates what must be included in every advertisement for medicines in four categories:

1. Prescription medicines;
2. Restriction medicines (can be sold or supplied only by a pharmacist);
3. Pharmacy-only or general sale medicines;
4. Medicines supplied by mail order, direct marketing or via the internet.

One of the requirements under subclause 1(e) is that an advertisement for a prescription medicine must contain a statement that the medicine has risks and benefits.

In relation to this, it should be noted that the MNZ Code of Practice – the latest edition (http://www.medicinesnz.co.nz/assets/2010-09-28-RMI-COP-Edition-15-Final.pdf) was published in October 2010 and became effective in January 2011 – also applies. It states that the information on the risks and benefits of the product contained in advertisements needs to be "balanced".

A statement must be clearly printed or clearly spoken, or both.

The mandatory requirements do not apply to advertisements that do not refer to a therapeutic purpose, advertisements located at the point of sale and positioned immediately above, below or next to the medicine, labels, and price lists.

Regulation 11 contains provisions relating to what every advertisement for medicines and medical devices for health care professionals must and must not include. Its provisions relating to medicines distinguish between two broad types of adverts: those that enable the practitioner to reach a prescribed decision, and those that do not and are limited to certain messages.

Adverts for medicines falling into the first category must satisfy a long list of requirements – for instance, include the name and quantity of

each active ingredient and a statement of appropriate precautions, any distribution restriction and contraindications, and must not include, among other things, “an unsubstantiated comparison with other medicines”.

Advertisers should also remember that the MNZ code prohibits direct product comparisons in advertising of prescription medicines.

Adverts for medicines falling into the second category must only satisfy some of these requirements, namely, contain the classification of the medicine, the name of each active ingredient, a statement of authorised uses of the medicine and appropriate precautions.

Section 59 of the MA still applies, and, in addition to the above requirements, any medical advertisement must contain the name and address of the person or business on whose behalf the advertisement is published; in the case of a body corporate, the address can be provided as the name of the place where the company has its registered office.

The newly inserted Regulation 58A relates to substances that are not medicines or related products for the purposes of the Act. Such substances include anti-dandruff hair products, anti-acne skin care products and barrier cream products. Thus, prior to taking any action, businesses should check whether their products are covered by Regulation 58A.

Medsafe is expected to publish guidelines which will include all the current requirements in one document in due course.

Brand owners should also keep in mind that advertising must comply with the Fair Trading Act. The Act prohibits conduct that is misleading or deceptive. Traders must not make misleading representations about

the quality, origin, quantity, type or condition of goods or services. Omissions – failing to disclose information, which would create a false representation – are also covered.

Finally, on 20 June it was announced that the New Zealand and Australian Governments have agreed to proceed with a joint scheme for the regulation of therapeutic goods.

The joint scheme will be administered by a single regulatory agency, the Australia New Zealand Therapeutic Product Agency (ANZTPA), which will absorb the current national regulators – New Zealand's Medsafe and Australia's Therapeutic Goods Administration.

A three-stage approach over a five year period has been adopted to achieve the establishment of the ANZTPA. The first stage, which envisions the two regulators engaging in the process of sharing information and data, has already begun. The rules governing advertising of therapeutic medicine are therefore likely to change once the ANZTPA is in place.