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I. INTRODUCTION

Advertising and antitrust have been inextricably linked in New Zealand since at least 1986. That year both the Fair Trading Act (which prohibits misleading and deceptive conduct) and the Commerce Act (the antitrust legislation) were enacted. Significantly, both pieces of legislation are enforced by the Commerce Commission (New Zealand's antitrust regulator), fusing the enforcement of advertising and antitrust law. (Both pieces of legislation can also be enforced by third parties, which can be competitors or consumers.) Consistent with international developments, it appears that the Commission has increasingly seen its powers under the Fair Trading Act not to be just an independent responsibility, but as a vital tool to develop more competitive markets.

There is a range of other law relevant to advertising, which is perhaps less immediately obviously linked to antitrust, including the Trade Marks Act, Copyright Act, and the common law prohibition on "passing off." Similarly, there is a raft of other consumer protection law, most notably the Consumer Guarantees Act, which can come into play in this area. For example, the Commission will frequently take enforcement action when consumers have been misled as to their statutory rights under the Consumer Guarantees Act, even though the Commission has no direct power to enforce that Act. (The Commission essentially has class action rights under the Fair Trading Act, which New Zealand does not have more generally.)

And there is one area where advertising law, in the sense of protecting IP rights, may have been sacrificed in order to foster competition. As a small, open economy the ability to allow parallel imports has been seen as enabling more competitive markets. IP rights holders and local distributors naturally do not favor this as it diminishes any market power they gain from those rights.

Any discussion of the regime would be incomplete without discussing the role of self-regulation. The Advertising Standards Authority ("ASA") is the self-regulatory industry body that hears advertising disputes, including competitor complaints. The ASA publishes codes of practice by which it expects all advertisements to comply. Some of these codes directly overlap with the Fair Trading Act. This avenue tends to be preferred for "lower level" issues (including complaints by consumers), as the sanctions are low and action is cheap and quick. Parties are not usually represented by counsel. Advertisements that are deemed to breach the codes are generally asked to be withdrawn; however, the "teeth" tends to be the "naming and shaming" of

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the advertiser in breach, as all decisions are published on the ASA's website and distributed to media.

As the discussion above highlights, given that many of the statutory rights are directly enforceable by competitors (notably the Fair Trading Act), advertising law can be (and is) used as a "sword" as well as a "shield."

In the next two sections of this article we discuss (1) the Commerce Commission's dual responsibility for enforcing advertising and antitrust laws, and (2) the intersection of advertising and antitrust in practice.

II. THE COMMERCE COMMISSION'S DUAL RESPONSIBILITY FOR ENFORCING ADVERTISING AND ANTITRUST LAWS

The Commerce Commission's general functions cover four main practice areas: (i) fair trading (including advertising), (ii) business competition, (iii) regulated industries, and (iv) consumer credit. While separate teams at the Commerce Commission deal with fair trading and antitrust issues, these issues both fall within the ambit of a broader "competition division;" legal and economic staff in particular are a shared resource, and the senior management team are the same. (As with all responsibilities, decisions are ultimately made by the same Commissioners.) Likewise, antitrust practitioners in New Zealand often advise on fair trading and consumer laws as a complementary skillset.

The interrelationship between antitrust and advertising law is also evident through the Commerce Commission's active advocacy program. This includes recent efforts to educate businesses, consumers, and the legal profession by developing publications, new websites, and targeted advertising following substantive reforms to the Fair Trading Act (of which a number of the key amendments came into force in June).

The Commerce Commission has a suite of legislative controls it can use during investigations into any of the areas under its authority, including information disclosure requirements and compulsory interview powers, introduced under the Fair Trading Act. And the Commerce Commission has also issued various guidelines for specific industries which may, by their nature, be susceptible to breaches of the relevant laws, such as in the health sector. These guidelines focus on the relevance of both competition and consumer laws (including the Fair Trading Act) to those industries.

It is clear from these guidelines, and the Commerce Commission's wider advocacy program, that antitrust and advertising issues tend to go hand in hand—this was summed up well in a Commerce Commission media release in relation to earthquake-stricken Christchurch, which noted that "[t]he Commission's role is two-fold: educating Christchurch businesses to help them avoid breaching competition and consumer laws, and looking for illegal activity that might be taking place."

The Commerce Commission is also very actively involved in the international competition network and is outward looking, always seeking to develop best practice and learn from the international community.

III. THE INTERSECTION OF ADVERTISING AND ANTITRUST IN PRACTICE

A. The Telecommunications Sector

While advertising and antitrust laws are not selective in their application, the telecommunications sector has had more than its fair share of exposure to these issues, with a high number of prosecutions and other forms of enforcement actions being handed down to telecommunications companies. It is perhaps telling that the main antitrust cases (particularly around misuse of market power) have also been in the telecommunications sector.

The intersection between advertising and antitrust is clearly evident in conduct between telecommunications competitors. Telecommunications companies often engage in direct dialogue regarding each other's advertisements, and a number of these issues have inevitably escalated to complaints to the ASA or the competition division of the Commerce Commission.

B. Tasman Insulation v. Knauf Insulation

Another example of this intersection, outside the umbrella of the Commerce Commission, is the High Court action taken by PINK® BATTS® maker Tasman Insulation (a business unit of vertically integrated Fletcher Building) against Knauf Insulation (Australia). Knauf entered the New Zealand market in late 2010 with its competing glass insulation product, EARTHWOOL®. Tasman, which was the only New Zealand manufacturer of insulation products made from recycled glass, had sold its insulation under the PINK® BATTS® brand since at least 1973. The company challenged Knauf's use of the word "batts" to describe its product ("BATTS" is a registered trade mark of Tasman in New Zealand; however, outside of New Zealand it is a generic term for pieces of insulation material).

In addition to the IP challenges, Tasman claimed the EARTHWOOL® name and brand gave the misleading impression to consumers, in breach of the Fair Trading Act, that Knauf's products were substantially made of natural wool, when they were in fact made from recycled glass. Justice Brown agreed, finding that Knauf's use of the EARTHWOOL® name was misleading and deceptive, and prohibited the defendants from using that name or brand "except where the word is used in the manner of an adjective in association with a word or words identifying that composition of the product as glass or glasswool." Knauf also successfully counterclaimed that Tasman's comparative "compressibility" tests breached the Fair Trading Act. Both parties have appealed parts of the Court's decision.

C. IP Conflicts and the Fair Trading Act

The ability of an IP owner to exploit IP-related rights has been balanced, to a degree, with a desire for increased competition and consumer awareness. A specific example of provisions encouraging this competition and consumer awareness is the carve out in section 94 of the Trade Marks Act 2002, which provides that a registered trade mark is not infringed by the user of that mark for the purposes of comparative advertising (in accordance with honest practices in industrial or commercial matters). This gives a permissible basis for smaller or more aggressive competitors to pit their products against actual well-known and established products, rather than having to allude to "a competitor's nameless product," although those comparative advertisements are still subject to the Fair Trading Act. The Commerce Act also provides a

limited carve out whereby a person does not misuse their market power by reason only that they seek to enforce a statutory IP right.

As evidenced by the above example, the Fair Trading Act can be used as a sword as well as a shield. The form of the sword may vary, but it is not uncommon for a complaint (or the threat of a complaint) to be made as a means of delaying or tainting the introduction of a competitor's new product. In some instances, this could be seen to amount to anticompetitive "bullying" tactics, especially when there is a disparity in the size and maturity of the competitors (for example, where an incumbent targets a lesser-resourced competitor which may not have in-house legal counsel.)

The relatively weak monopolization provision in New Zealand's antitrust law cannot be used to address such alleged bullying. Section 36 of the Commerce Act prohibits a party with substantial market power, from "taking advantage" (using) that market power, for prohibited anticompetitive purposes (essentially restricting, preventing or deterring a competitor). But all three aspects of this section must be met for the section to apply (namely there must be market power, a use of that market power, and the prohibited purpose). Under the counterfactual, or comparative, test applied in New Zealand, the causal nexus with market power would not be met if this was conduct that could be engaged in by a party without market power but was otherwise in the same circumstances. Clearly non-dominant entities often use legislation to challenge competitors (although perhaps less so than those with substantial market power, "deep pockets," or both).

IV. CONCLUSION

To sum up, the enforcement fusion of (some) advertising and antitrust law, coupled with other advertising law, provide a powerful toolkit for New Zealand's regulator and competitors alike; additionally, in some areas, IP rights (which may limit advertising) are tempered to encourage competition.

As a small, outward-looking nation, New Zealand will try to follow international best practice on the intersection of advertising and antitrust law. That does not mean that it will not take account of local circumstances, as the encouragement of parallel imports shows. More broadly, in the fine balancing between IP rights and antitrust law, New Zealand also shows that IP rights will not be allowed to be used anticompetitively, as shown by the encouragement of comparative advertising.

Given recent reforms to the Fair Trading Act we can expect even greater use of the Fair Trading Act (which among other things, prohibits misleading advertising) to facilitate more competitive markets. Given that perfect competition assumes perfect information, this can only be encouraged.