



**SUBMISSION FROM THE FEDERATION OF
AUSTRALIAN COMMERCIAL TELEVISION STATION TO
THE NSW FAIR TRADING ADVISORY COUNCIL
INFOMERCIAL INQUIRY**

2 NOVEMBER 2001

1. INTRODUCTION

The Federation of Australian Commercial Television Stations (FACTS) is the representative association of Australia's 46 commercial free-to-air television stations, and makes this submission on behalf of its members.

FACTS welcomes this opportunity to submit its views in response to the NSW Fair Trading Advisory Council Infomercial Inquiry, and commends the Council for this initiative.

Television infomercials are an accepted and established format on commercial television. They provide a valued source of information to viewers about new products and services, with greater scope for demonstration and the provision of more detailed information than is possible in a television commercial. They are recognised by and regulated under the Commercial Television Industry Code of Practice, which has been registered by the Australian Broadcasting Authority.

The majority of infomercial advertising is conducted by responsible advertisers. This is evidenced by the low number of complaints received when the total number of infomercials which are broadcast is taken into account.

However, FACTS acknowledges that there is a level of community concern in relation to the business conduct of a very small number of traders who have used television infomercials to promote their products. FACTS is not aware that there is significant community concern in relation to viewers being unable to distinguish television infomercials from other program matter. While FACTS' members sometimes receive complaints from viewers about the slow delivery of advertised products or other matters concerning the products or conduct by traders, it is extremely rare to receive complaints that viewers could not distinguish an infomercial from other programming.

The conduct of promoters making misleading claims in infomercials is appropriately regulated by State and Territory Fair Trading legislation and under the Commonwealth *Trade Practices Act 1974*. As broadcasting is a national activity, action by one State or Territory Department of Fair Trading will have implications nationally.

FACTS notes that the NSW Department of Fair Trading has taken a leading role amongst its equivalent State and Territory Departments in taking enforcement action against television advertisers who have engaged in misleading and deceptive conduct through infomercials. FACTS strongly supports the action that has been taken by the Department in relation to these advertisers, which is discussed in the Inquiry's Background Paper.

The conduct of broadcasters is appropriately regulated by the *Broadcasting Services Act 1992* and registered codes of practice, with oversight by the Australian Broadcasting Authority. The Commercial Television Industry Code of Practice is regularly reviewed with the next review due in 2002, a process which will involve extensive public consultation. This review is the appropriate forum for considering any proposals that would involve amendments to Code provisions in respect of infomercials.

This Inquiry provides an opportunity for FACTS to outline the responsible measures its members apply, to the extent possible, to safeguard viewers against false and misleading claims in infomercials, and to distinguish infomercials from other program matter. It also provides an opportunity to demonstrate the commitment of the commercial television industry to working co-operatively with State and Federal fair trading regulators to advance consumer protection.

In addition to responding to the Inquiry's Terms of Reference, this submission discusses the actions taken by commercial television stations in relation to infomercials with particular reference to the examples highlighted in the Background Paper, and suggests a number of proposals that may result in improved consumer protection.

2. SCOPE OF INQUIRY

This Inquiry is confined to television infomercials. Infomercials are segments either within a program or which may comprise an entire program for which a broadcaster receives payment and which promote products or services. Examples of the former are the infomercial segments that appear in *Good Morning Australia* on Network Ten, and which appeared on *Denise* on the Seven Network until that program recently ended. Examples of the latter are tele-shopping programs such as *Victor Paul Shopping* and *Danoz Direct* which usually appear in overnight timeslots on the three commercial networks and regional stations.

FACTS notes that infomercials also appear on pay TV, notably on TVSN. Surprisingly, the Background Paper does not refer to pay TV, the ASTRA Subscription Television Broadcasting Code of Practice or regulation of the pay TV industry by the *Broadcasting Services Act 1992*. To be comprehensive the Inquiry needs to examine infomercials on all television services, not just those on commercial free-to-air television.

FACTS also notes that metropolitan and local newspapers and national magazines regularly carry advertorials, or articles that are placed by advertisers and presented in the form of an article (though acknowledged as an 'Advertisement'). The internet, radio, direct marketing techniques by email or traditional mail may also employ direct selling techniques similar to those employed in television infomercials.

While the Council has chosen to confine its present Inquiry to television infomercials, FACTS submits that television infomercials cannot be considered in isolation from similar advertising practices employed in other media. Any measures adopted that will impact on the conduct of promoters should apply equally across all advertising platforms. Furthermore, the measures that television stations undertake prior to allowing infomercials to be broadcast should be compared with, for example, the measures that a newspaper applies before publishing an advertorial article.

3. COMMUNITY RESPONSE TO INFOMERCIALS

Television infomercials are a popular and valued source of information about the release of new products and services for consumers. A significant number of viewers watch infomercial programs on free-to-air television. Television programs containing

infomercials generally attract ratings that are consistent with ratings for programs that do not contain infomercials at the relevant time of day or night.

Television stations regularly receive telephone queries from viewers wanting more information about products featured during an infomercial segment.

To the extent that infomercials attract complaint, overwhelmingly community concern is with the conduct of the promoters, not with the television station broadcasting the infomercial. .

FACTS strongly disagrees with the statement on p4 of the Background Paper in relation to infomercials that 'It may be unclear whether it is an advertisement or part of normal programming content'.

It is extremely rare for FACTS' members to receive complaints from viewers that they are unable to distinguish infomercials from program matter. It is a Code requirement that paid segments be distinguishable from other program matter (clause 1.13 of the Code, discussed below). If such complaints are received, they are handled in accordance with the comprehensive complaints-handling provisions in the Code.

This process is transparent and fully accountable. It entails a substantive written response to the complainant, including advice that they may take their complaint to the Australian Broadcasting Authority. The complaint must also be logged by each station in a database and reported to FACTS on a quarterly basis, which in turn must provide a quarterly complaints report to the ABA on behalf of its members. The ABA provides a summary of code complaints in its annual report.

In the year from October 1999 – September 2000 (the standard annual Code reporting period), out of a total of 1,041 formal code complaints dealing primarily with matters such as the content of programs (sex, language, violence, racism etc) only 1 complaint were received concerning an alleged failure to distinguish paid material from other program material. This complainant - who alleged that an infomercial broadcast in an overnight timeslot could not be distinguished as paid programming- subsequently referred his complaint to the ABA. After investigation, the ABA found that no breach of the Code had occurred.

Television stations sometimes receive telephone and written complaints concerning the business conduct of a small number of promoters or products that have been featured on infomercials. These complaints commonly relate to the slow delivery or non-delivery of products following payment, or inferior quality of products delivered. Television stations closely monitor complaints received, which are handled by relevant station management and brought to the attention of station lawyers. Television stations follow up complaints received with the promoter, and require the promoter to keep the station updated on progress in resolving those complaints. If the promoter cannot satisfactorily respond to complaints in a timely fashion, television stations will withdraw that promoter's infomercial.

FACTS notes the figure of 2,709 complaints that the NSW Department of Fair Trading has received in the past two years. In FACTS members' experience, if an infomercial attracts complaint, it will usually attract multiple complaints. That is, a number of these complaints relate to the same infomercial.

FACTS would be interested in learning from the Department the number of different infomercials that have attracted complaint. FACTS believes that only a very small proportion of infomercials broadcast do attract complaint. That is, it is the improper conduct of a very small number of traders who use infomercials to promote their products that has caused consumer concern. The vast majority are responsible traders who provide informative marketing and convenient methods of purchasing and delivery arrangements for consumers.

The number of infomercials that attract complaint needs to be assessed against the large number of hours that are devoted to infomercials. For example, an approximate average of six hours of tele-shopping programming each night (across the 3 networks) results in approximately 2,200 hours of tele-shopping programs per year. *Good Morning Australia* features approximately 2,100 infomercial segments each year, broadcast across approximately 140 hours, and *Bright Ideas* features approximately 280 infomercials each year. As a proportion of the total number of infomercials broadcast, the number of infomercials that attract complaints is very low.

4. MEASURES UNDERTAKEN BY TV STATIONS

4.1 Distinguishing infomercials from other program matter

As the Background Paper notes, clause 1.13 of the Commercial Television Code requires that where a commercial television licensee receives payment for material presented in a program, that material must be distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation.

Infomercial segments within a program and tele-shopping programs or shopping guides are specifically recognised as distinct program formats that are not considered to be television commercials in clause 5.5.5 of the Code.

For infomercial segments within a program, a range of measures are taken to ensure that the infomercial is readily distinguishable from the rest of the program. For example, *Good Morning Australia* is a morning chat-show now in its eleventh year, which contains 32 minutes of infomercial segments in each 2 hour program, interspersed between interviews and musical performances. The program is hosted by media personality Bert Newton, except for the infomercial segments. These segments are presented by someone other than the program host and against the backdrop of a different set (which are usually filmed in a different city). Each infomercial segment contains an on-screen 'super' featuring the 'Buyer's World' logo, followed by another super – 'Brought to you by (name of promoter)'. All of these measures clearly visually signify that the infomercial segments are distinct from the remainder of the program.

Tele-shopping programs such as those broadcast in overnight timeslots are promoted as such, and by the nature of their content, viewers can identify that they are infomercials due to their direct promotion of specific brands of products or services.

As discussed in point 3 above, it is extremely rare for FACTS' members it to receive complaints that viewers cannot distinguish infomercials from other program material.

4.2 Legal precautions taken by commercial television stations

All media organisations that accept advertising from other parties are faced with the difficulty of not being in a position to know that the advertiser may be making false and misleading claims or that the advertiser might be in a financially difficult situation. This is an issue which affects infomercials and regular 'spot' advertising equally. Media organisations are not in a position to independently verify every representation made in an infomercial or advertisement (though promoters are asked to substantiate certain claims) or the financial credentials of advertising clients. Fair trading and corporations legislation appropriately imposes severe criminal penalties on advertisers who mislead consumers by false representations or who continue trading while insolvent, which provides a substantial deterrent against such conduct.

Television stations accepting infomercials apply a range of legal procedures and checks aimed at preventing consumers from being misled. However, if a promoter is prepared to mislead consumers, it can be assumed that they would also be prepared to mislead television stations in making legal undertakings, signing warranties and giving assurances that turn out to be false.

Case Study No 1 referred to on p6 of the Background Paper illustrates the difficulty television stations face.

This Case Study involved an infomercial that appeared during a television program for a brand of sheets. Before being accepted by the television station the following standard steps were undertaken:

- The promoter signed an Advertorial Acceptance Agreement, setting out the terms upon which the infomercial was accepted and specifically recognising that the television station may make changes to the script or withdraw the infomercial at its discretion.
- The promoter also signed an extensive Representation Statement, a legally binding document. The Representation Statement the station required the promoter to sign is aimed at addressing some of the concerns stated on p5 of the Background Paper in relation to infomercials (which also apply to advertisements generally). The representations made by the promoter to the station included the following:
 - Comparisons with other products are fair and substantiated;
 - Any discounts offered are genuine;
 - Value is represented honestly;
 - No false or misleading representations are being made, including in relation to the supply of goods.
- The script prepared by the promoter was reviewed by the television station's legal department, which made changes to the script, and the station ensured that the infomercial produced did not deviate from the legally vetted script. The promoter also represented that a full money-back guarantee would be provided to unsatisfied customers.

Regrettably, the promoter deceived the television station by making false representations, which were repeated to viewers, regarding the availability of supply and the quality of the sheets.

The infomercial ran for some weeks before the station started receiving complaints from consumers who had not received delivery of the sheets they had ordered and paid for. The station's lawyer sent a fax to the promoter reminding him that it is against the law for him to accept payment for goods that cannot be supplied within a stated or reasonable period of time, seeking an immediate explanation for the delay and advising that further infomercials would not be screened unless legal assurances were provided regarding the delivery of goods.

A plausible explanation for the delay was provided, and the promoter gave the requested legal assurances as to supply.

The station continued to receive complaints and, despite ongoing assurances and explanations from the promoter, the station decided to stop broadcasting the infomercial although it had been booked to run for a further five weeks.

The station received a significant number of complaints which it referred to the promoter (and followed up with the promoter) and to the NSW Department of Fair Trading.

Following the obtaining of court orders by the NSW Department of Fair Trading against the promoter as described in the Background Paper, a senior official from the Department rang the station's lawyer on 9 August 2000 to express the Department's thanks for the station's assistance in relation to this matter.

The above Case Study serves to demonstrate that television stations act responsibly and undertake a comprehensive range of precautions aimed at protecting consumers.

FACTS strongly supports the action that the NSW Department of Fair Trading took against this promoter which includes a lifetime ban from trading in NSW. This sends a strong message to all promoters, regardless of the medium they use to advertise in, that such unscrupulous behaviour (including deception of the media organisation through false assurances), is completely unacceptable and illegal conduct.

5. LEGISLATIVE AND REGULATORY CONTEXT

The Background Paper sets out the comprehensive range of fair trading provisions that apply to infomercials, and advertising generally.

As indicated above, television stations like all other media organisations, cannot be expected to independently verify every claim an advertiser makes or the financial viability of its advertising clients. If a promoter signs warranties as to the accuracy of the representations and availability of supply and appears to be solvent, on what basis can a broadcaster reasonably refuse to broadcast the infomercial?

It is impossible for a broadcaster to examine the financial viability of infomercial clients. Just as a broadcaster is not in a position to be aware of the financial viability of advertising clients (such as a One.Tel or HIH Insurance) and their capacity to honour

their commitments to customers, the same equally applies to infomercial clients. On occasion an infomercial promoter has gone into liquidation, and upon becoming aware of this stations have immediately withdrawn broadcast of that promoter's infomercial.

The action taken by the NSW Department of Fair Trading demonstrates that existing legal provisions are effective in taking punitive action against promoters who engage in deceptive or misleading conduct. This action provides a strong deterrent to all other promoters and advertisers.

FACTS' members welcome the action taken by the NSW Department of Fair Trading (and State and Federal counterparts) and are committed to working closely with fair trading regulators. The action taken by the Department as set out in Case Study No 2 illustrates this point. Following the undertakings agreed between the promoter and the NSW Department of Fair Trading, all commercial free-to-air television stations withdrew the client's infomercials from broadcast and ensured that no further infomercials from the promoter would be broadcast unless they met all undertakings made by the promoter, including strict compliance with scripts approved by the Department.

As set out in the Background Paper, section 76 of the Fair Trading Act provides for prescribed codes of practice to apply to advertisers, of which there are currently none. FACTS encourages this Inquiry to consider whether there is a need for such prescribed codes of practice to be developed, in consultation with relevant industry associations and direct marketing promoters.

In summary, FACTS strongly supports the enforcement action that the Department of Fair Trading has taken in relation to promoters who have advertised through infomercials. The outcomes of this action demonstrate that existing legal provisions are adequate. The results of this enforcement action provide an effective deterrent for all other promoters. FACTS' members are committed to working in close co-operation with the Department and its State counterparts if the need for further enforcement action arises.

6. RESPONSE TO THE TERMS OF REFERENCE

6.1 Existing legislative framework

FACTS considers that the existing legislative framework which regulates the activities of broadcasters of infomercials is adequate. The provisions of the Commercial Television Industry Code of Practice requiring infomercials to be distinct are applied by commercial television stations, who do not receive complaints from viewers that they are unable to distinguish them from other program matter. The Code is subject to regulatory oversight by the ABA, and subject to regular review.

The legislative framework dealing with the activities of promoters also appears to be adequate. The NSW Department of Fair Trading has had considerable success in the enforcement action, including a lifetime trading ban, taken against a small number of promoters and this provides an effective deterrent for all promoters. FACTS is not aware of cases where the Department has been unable to bring enforcement action against promoters due to inadequate legislative provisions. Nor has there been any case where broadcasters have not fully co-operated with the Department of Fair Trading

in acting to protect consumers. FACTS suggests that one area in which the provisions under the Fair Trading Act could be augmented is through the development of prescribed codes of practice for infomercial providers under s.76 of the Act.

6.2 Should relevant Codes of Practice be amended in any way in respect of infomercials?

As indicated above, FACTS does not believe that the Commercial Television Industry Code of Practice requires amendment in relation to infomercials. The community concern that exists regarding infomercials relates to the business conduct of a small number of traders, not the conduct of broadcasters. There is no evidence that viewers have difficulty in distinguishing infomercials from other program matter. The appropriate forum for considering any changes to the Code is next year's review of the Code that will be undertaken by FACTS in association with the ABA and will involve an extensive public consultation process. FACTS invites the NSW Department of Fair Trading to participate in the review of the Code next year.

6.3 Should there be specific disclosure requirements for marketers, promoters and broadcasters in respect of the promotion of products and services by infomercials?

FACTS does not consider there is a need for specific disclosure requirements as viewers are able to distinguish between infomercials and other program matter. Community concern is directed at the business conduct of promoters, not at the issue of disclosure. The need for infomercials to be distinguishable from other program material is dealt with under clause 1.13 of the Commercial Television Code. As discussed in section 4.1 of this submission, there are a range of measures adopted by broadcasters dealing with disclosure of infomercial arrangements, such as on-screen supers (subtitles), use of different sets or where the context makes clear to viewers that is an infomercial program or segment.

In any event, as broadcasting is a national activity, the question of disclosure requirements should be considered on a national basis, not on a state-by-state basis. The appropriate forum for this is the review of the Commercial Television Code.

6.4 Other matters that should be brought to the attention of the Minister?

FACTS would like it brought to the Minister's attention that its members support the work of the Council and are committed to working co-operatively with the Inquiry as it progresses.

FACTS also makes a number of recommendations in the next section that it would like brought to the Minister's attention.

A further point that has not been discussed in the Background Paper is that infomercials provide an important service for regional viewers who do not have easy access to products or services because of their geographical situation. Infomercials provide opportunities for the demonstration of new products for regional viewers, and the promoters of these products offer convenient delivery arrangements.

Infomercials also provide a significant revenue stream for regional television stations that operate in small advertising markets FACTS notes that the Inquiry intends to conduct a

regional forum. These are important factors to consider when assessing regional impacts.

7. RECOMMENDATIONS/PROPOSALS

7.1 Notification and Vetting mechanisms

FACTS would like to explore ways by which stronger communication links could be developed between the NSW Department of Fair Trading and its member stations.

FACTS would welcome a system by which its members could check the credentials of new infomercial clients with the Department of Fair Trading, which could conduct any checks of its own database and that of its State and Federal counterparts, and advise whether the promoter is or has been under investigation. Departmental checks could also include police and court checks to which the public is not generally allowed access. FACTS' members would support measures whereby the Department could require any written undertakings from a promoter that is or has been under investigation, prior to the broadcast of the infomercial including vetting of the infomercial script by the Department.

FACTS would also welcome a formalisation of procedures to notify broadcasters when a Department of Fair Trading commences an investigation. FACTS' members rarely receive advice from the Department (or its State counterparts) that it is receiving complaints and is undertaking an investigation into a promoter.

The situation could occur where a State Department is receiving complaints but the station is not aware of this and is continuing to run the infomercial. In practice, the relevant station may also receive complaints and will follow up with the promoter and withdraw the infomercial if the promoter's response is unsatisfactory. However, the station is usually not aware of any action being undertaken by State Departments of Fair Trading - FACTS' members are fully prepared to withdraw infomercials on the recommendation of a State Department of Fair Trading if investigations are underway.

As the State Department of Fair Trading that has taken the leading role in relation to enforcement action against promoters who have used infomercials, FACTS would support the NSW Department of Fair Trading in taking on a co-ordinating role as a central point of communication for all fair trading regulators and FACTS.

7.2 Industry Code of Practice

FACTS would encourage promoters who advertise through infomercials to develop and commit to an advertorial code of practice. In our view it would be preferable if this section of the advertising industry developed its own code. However, if the industry does not develop a self-regulatory code of practice, FACTS would support the NSW Department of Fair Trading developing a code pursuant to s.76 of the Fair Trading Act.

FACTS notes that the Background Paper quotes extracts from the ADMA Direct Marketing Code of Practice, which contains detailed consumer protection provisions that have been developed by the Australian Direct Marketing Association. FACTS considers that the ADMA Code could provide a useful model for the development of an advertising industry code relating to television infomercials.

FACTS' members would be prepared to support initiatives to ensure that advertisers were required to commit to the terms of an approved industry code of practice, which had strong consumer safeguards and appropriate adjudication mechanisms, as a prerequisite for acceptance for broadcast. FACTS is prepared to play a facilitating role in the code development process if the industry wished FACTS to do so.

FACTS would be pleased to discuss this submission with the Inquiry.

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