

ADVERTISING STANDARDS AUTHORITY INC.

Ground Floor, 79 Boulcott Street, Wellington

PO Box 10-675 Wellington

Telephone (04) 472-7852

Facsimile (04) 471-1785

Email asa@asa.co.nz

Website www.asa.co.nz

Submission of the Advertising Standards Authority Inc on the Issues Paper “Australian and New Zealand Competition and Consumer Protection Regimes”

Background

1. The Advertising Standards Authority Inc (ASA) is a self- regulatory body with the objective of maintaining proper advertising standards in New Zealand.

Its members are:

- Association of New Zealand Advertisers (Inc)
- Communication Agencies Association of New Zealand (Inc)
- Chinese Media Bureau
- Letterbox Media Association
- Magazine Publishers’ Association (Inc)
- Newspaper Publishers Association (Inc)
- New Zealand Television Broadcasters Council
- New Zealand Community Newspapers Group
- New Zealand Cinema Advertising Council
- New Zealand Direct Marketing Association (Inc)
- New Zealand Post
- Online Publishers Group

- Outdoor Advertising Group
- Pay Television Group
- Radio Broadcasters Association (Inc).

2. The ASA funds and resources a separate Advertising Standards Complaints Board (ASCB) and Advertising Standards Complaints Appeals Board (ASCAB) which hear complaints about advertisement from members of the public. When a complaint is upheld the advertiser, advertising agency and media are requested to withdraw the advertisement in accordance with self-regulatory principles. We have experienced 100% compliance with our requests.

3. The ASA has Advertising Codes of Practice with a general Code of Ethics plus 12 specialised Codes.

4. This submission is confined to that of regulation of advertising only and focuses on consumer protection issues.

The Consumer, the Marketer and Advertising

5. The main interface between the consumer and marketer is the transaction. Consumer law primarily deals with the transaction and the negotiations surrounding it but the law also deals with post and pre transaction issues. The principal pre-transaction issues relate to advertising.

6. Advertising is a large industry in both Australia and New Zealand. New Zealand revenues were \$1.8 billion in 2003.

7. In order for the consumer to be properly protected and regulated it is important that the consumer is not misled, offended or subject to socially irresponsible advertising. If the advertising is misleading, offensive or socially irresponsible this will disadvantage the consumer and produce an adverse reaction. Dissatisfied customers are not in the best interests of advertisers, advertising agencies or media and will inevitably lead to a loss of revenue in the longer term. It is therefore in the best interests of the advertisers, agencies and media to ensure that advertising is not misleading, not offensive and is socially responsible.

8. Consumer law usually is concerned only with advertising that is misleading. The Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) both deal with the misleading aspects of advertising. There is other legislation in New Zealand such as the Human Rights Act which protects consumers from unfair or offensive portrayal. There is no government legislation in either Australia or New Zealand, which protects consumers against offensive or socially irresponsible advertisements. In both Australia and New Zealand matters of offensiveness and social responsibility are dealt with by self-regulatory codes.

The Market

9. As CER has progressed so has the one-market concept. As a consequence there is a large number of Trans-Tasman enterprises. Their advertising also tends to be Trans-Tasman. Therefore an increasing number of identical advertisements are published or broadcast in both countries.

Additionally, the media is increasingly Trans-Tasman and the same trend emerges with advertising agencies.

New Zealand Self-Regulatory System

10. The regulation of all advertising in all media in New Zealand is primarily carried out by the ASA. The Codes require all advertising to be neither deceptive nor offensive. However, they go further and require advertisements to be socially responsible. Certain codes, such as the Therapeutic, Financial and Children's Codes, require a high standard of social responsibility. The concept of social responsibility is usually not one which is found in consumer law and is not within the brief of either the ACCC or NZCC.

11. The ASA regulatory system is multi-faceted.

(i) Codes

There is an Advertising Code of Ethics plus 12 specialised codes. The principal provision which deals with misleading advertising in Rule 2 of the Advertising Code of Ethics which states:

“Truthful Presentation - Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).”

Most other codes contain similar provisions.

All advertising, regardless of media, is expected to comply with the Codes. Generally the media include such a requirement in their terms of trade.

The Codes are developed by the ASA after extensive consultation with Government agencies, consumer groups and relevant industries. The Codes undergo regular reviews.

(ii) Complaints

Any member of the public may complain to the Advertising Standards Complaints Board (ASCB), which is an independent board, funded and resourced by the ASA. There are eight members on the ASCB, of which four are public members with no

background in advertising or the media, and four are from different aspects of industry. The Chair must be a public member and has a casting vote.

There is a right of appeal from the ASCB to the Advertising Standards Complaints Appeal Board (ASCAB) which has three members - two public and one industry. The Chair must also be a public member.

The weighting of the ASCB and ASCAB is in favour of the public.

If a complaint is upheld we request that parties to withdraw the advertisement. There is 100% compliance with this request

(iii) Prevetting and Advice

The Television Commercial Approvals Bureau (TVCAB) pre-vets all television advertisements prior to screening to ensure they comply with the ASA Codes, ASCB decisions and the law.

For newspapers, the Newspaper Publishers Association provides an advisory service, which is used extensively.

The ASA provides advice to advertisers, agencies and media upon request. This is a major activity of the ASA.

The Association of New Zealand Advertisers (ANZA) provides a prevetting system for liquor advertising. An independent adjudicator determines whether the advertisement complies with the ASA Codes and Decisions of the ASCB. The media will not accept liquor advertisements which do not have prior approval.

ANZA also run a similar system for therapeutic advertising.

It should be noted that all of these prevetting and advisory services are complementary and have the full support of all ASA members. The services and systems are part of the ASA self-regulatory system.

(iv) Education

A strong emphasis is placed on education. The ASA runs several seminars each year, which are attended by advertisers, agencies and media.

12. The ASA self-regulatory system is not just codes and complaints, but is also a complex system of checks and balances through pre-vetting and advisory services. The entire industry co-operates to ensure there are consistent standards throughout the industry. It is also important to note that the various systems and services have been developed with the co-operation and support of various Government agencies.

A particular feature of the system is that when consumers make a complaint the process commences and is fully processed until there is an end result. In a regulatory system a complaint is made to the regulator who has an absolute discretion whether to

proceed or not. With the ASA self-regulatory regime 100% of complainants receive a formal decision.

In this way the consumer is fully empowered.

It is a system that works well and provides proper protection to the consumer. It also operates with the minimum of bureaucracy and cost, thus providing a very efficient system. We operate co-operatively with various Government agencies and in particular the NZCC.

It is also a system, which is admired elsewhere in the world.

The ASA supports harmonisation in principle but this support is conditional on the ASA self-regulatory system continuing without bureaucratic intervention and additional cost.

ACCC

13. As a preliminary comment, it should be acknowledged that the ASA self-regulatory regime is not fully understood in Australia and particularly by the ACCC. This is probably due to the complexity of the system and the quite different regulatory cultures that operate in Australia and New Zealand. Consequently there has been a number of problems over the years involving the ACCC which makes us wary of this harmonisation process. For harmonisation to succeed it will require a cultural and philosophic shift by the ACCC.

14. The ASA self-regulatory system is based on the former Australian Advertising Standards Council. However, in the mid-90's the Council was dismantled for a number of reasons. A key reason was the intrusion of the ACCC which introduced greater bureaucracy. Finally, industry walked away and set up a limited standards and complaints system based on taste and decency and excluded misleading advertising. This system is completely out of step with the rest of the world as it only covers half of advertising. In our view the consumer is severely disadvantaged.

The European Advertising Standards Alliance which has 22 European member countries and 4 Non European members (including New Zealand) recently issued an Advertising Self-Regulation Charter which incorporates Standards of Best Practice. The Australian regime does not meet those standards.

15. Mention is made in the paper of the harmonisation of food regulation and therapeutic regulation. We have been extensively involved on the advertising aspects in both processes. With regards to food there is no harmonisation of advertising except for specific prohibitions of advertising the benefits of nutritious food, for instance - healthy food cannot be described as healthy. An attempt was made to harmonise advertising rules but was abandoned because of the difficulty of resolving the cultural and philosophical differences between New Zealand and Australia.

Therapeutic harmonisation has been much more successful. The process commenced with a report by Mike Codd, former head of the Office of Prime Minister and Cabinet in Australia, and a past Chairman of the Productivity Commission who conducted an

in depth examination of the advertising regimes in Australia and New Zealand. He concluded that the New Zealand self-regulatory system was an excellent model. He recommended that the New Zealand regime be adopted in total and that the Australian regime be restructured to include many of the New Zealand features. He commented favourably on the cost benefit of the New Zealand system

Unfortunately, such an investigation has not been carried out in this process, which may account for why the Issues Paper completely overlooks the ASA self-regulatory advertising regime and the contrasting styles and philosophies.

16. The Mike Codd recommendations were adopted and over the past 18 months there have been ongoing meetings by a joint committee which is now nearing the end of the process.

The role of the ACCC during the process has been unhelpful. They did not participate fully in the consultation phase. Late in the process they intervened and, without consultation with the joint committee, came in the back door via the TGA. They attempted to unilaterally introduce a number of measures, which would have the effect of severely limiting the jurisdiction of the ASA. We therefore worked through the joint committee to have these provisions removed or watered down. From our viewpoint, was the apparent lack of transparency by the ACCC.

17. One further point, some years ago as a prelude to harmonisation, the writer participated in a consultation meeting concerning a review of the therapeutic advertising regime in Australia. I spoke and explained the ASA self-regulatory regime in New Zealand and recommended this approach. There was an immediate attack by the ACCC delegate who criticised self-regulation and stated quite firmly that “self-regulation is dobbling in your mates.” The significance of this behaviour was it is contrary to the “Guidelines for developing and endorsing effective voluntary industry codes” paper on the ACCC website.

18. Our perception is that the ACCC fiercely defends its regulatory regime and takes a micro management approach to self-regulatory or co-regulatory regimes that seek to manage misleading advertising or conduct. In Australia, the ACCC requires codes that deal with misleading advertising to be authorised by them or exempt from a authorisation. The Codes are scrutinised and many demands made. The end result is that from an industry perspective it is not worth the hassle to have Codes about misleading advertising, so such Codes are avoided.

The reason for this policy is unknown by us but presumably it is to ensure that the Codes do not allow restrictive trade practices. If so, this can be achieved by other methods (eg. mere surveillance or a consultative advisory role) which are both less bureaucratic and costly. There is no need for the ACCC to be involved in self-regulatory codes.

The end result has been the lack of development of a self-regulatory advertising regime in Australia, which deals with misleading advertising. This has also hindered the development of other codes in sensitive product areas.

The role of self-regulatory codes is to complement the law not replace it. The common world standard for advertising is to have proper consumer protection laws with effective implementation of the law; plus proper self-regulatory advertising codes which complement the law, and an effective complaints system which empowers and protects consumers. This does not exist in Australia.

19. Since first drafting this section we have discussed our view with a senior executive officer in the ACCC. We acknowledge that he had a completely different view. He emphasised that the ACCC actively promotes self-regulation and has put considerable resource into education campaigns. He was also surprised at our contention that the lack of a self-regulatory regime in Australia was out of step with all other countries in the western world.

We replied that our view was certainly our perception and the perception by industry in Australia also. We agreed there was a need for dialogue.

The discussion was a constructive and fruitful. Consequently it could well be most of the issues could be resolved if there were constructive negotiations.

Ministry of Consumer Affairs and Commerce Commission

20. The policies and attitudes of both the Ministry of Consumer Affairs (MCA) and NZCC have been most favourable in encouraging and nurturing self-regulation. Over the past 10 years the MCA has published a number of Policy Papers and conducted seminars encouraging self-regulatory regimes. This has allowed successful self-regulation to flourish in a number of areas.

The ASA regards both MCA and NZCC as partners and we enjoy the most cordial of relationships. They have been supportive and have encouraged a high standard of self-regulation enhancing consumer protection and empowerment. Instead of having difficulties with the regulators, we have a positive working relationship. This is a key reason why the ASA self-regulatory regime is internationally regarded as one of the best in the world.

The MCA, NZCC and ASA have conducted a number of joint activities and in particular joint industry education seminars. All three of us place a great deal of importance on education, which is an ongoing process. When we have differences of opinion, these are settled quickly at face to face meetings. Jurisdictional issues are discussed and decided quickly so that a complaint can be disposed of efficiently by the appropriate forum. The practices and attitudes of the MCA and NZCC are in our view a model which is a harmonised regime could adopt.

Cost Benefit

21. There is little or no data on the cost of the advertising enforcement regimes in both countries. The costs of the ACCC and NZCC relating to misleading advertising can probably be discovered. However, we estimate the ACCC with its high level of bureaucracy and prosecutions are likely to be higher proportionally than NZCC.

We estimate our costs for the regulation of misleading advertising to be NZ \$260,000. There are no equivalent costs in Australia because there is no equivalent self-regulatory system.

There are significant business costs. For instance, with different regulatory systems for advertising there is unnecessary duplication for the two markets which by world scale are both very small. For instance advertisements which have been acceptable in Australia have been found to be misleading in New Zealand by the ASCB. The consequence is that there are two standards which create uncertainty, confusion and duplicate costs in Trans-Tasman advertising. These are estimated to be significant.

Conclusion

22. In principle we are in favour of harmonisation. However, harmonisation is not just harmonising laws, but also policies, philosophic attitudes, proper recognition of and respect for the differences between the corporate cultures. Harmonisation is also respect for, and recognition of, the different co-regulatory and self-regulatory regimes which complement the law. Most important though, it can save businesses operating in both countries significant sums.

Currently Australia has, arguably, the lowest level of consumer protection and empowerment against misleading advertising in the developed world. It has been a matter of comment at world industry forums. If harmonisation is to proceed, then it is important that the current Australian regime is not imported into New Zealand with the resultant reduction of consumer protection and empowerment. We strongly recommend that this key issue be addressed urgently as it is at the very core of any successful harmonisation.

If harmonisation is to be successful, there needs to be a Trans-Tasman regime which encourages self-regulatory regimes which complement the law. There should be a focus on lowering bureaucratic interference and large bureaucratic regimes, along with the policies of micro-management and patch protection. Curbing misleading advertising is too large an issue to be left to one organisation - it is an issue to be shared with the regulatory and industry self-regulatory regimes.

We therefore support harmonisation of consumer protection laws and regimes provided that the policies, attitudes and philosophies of the ACCC undergo a significant shift.

Glen Wiggs

Executive Director