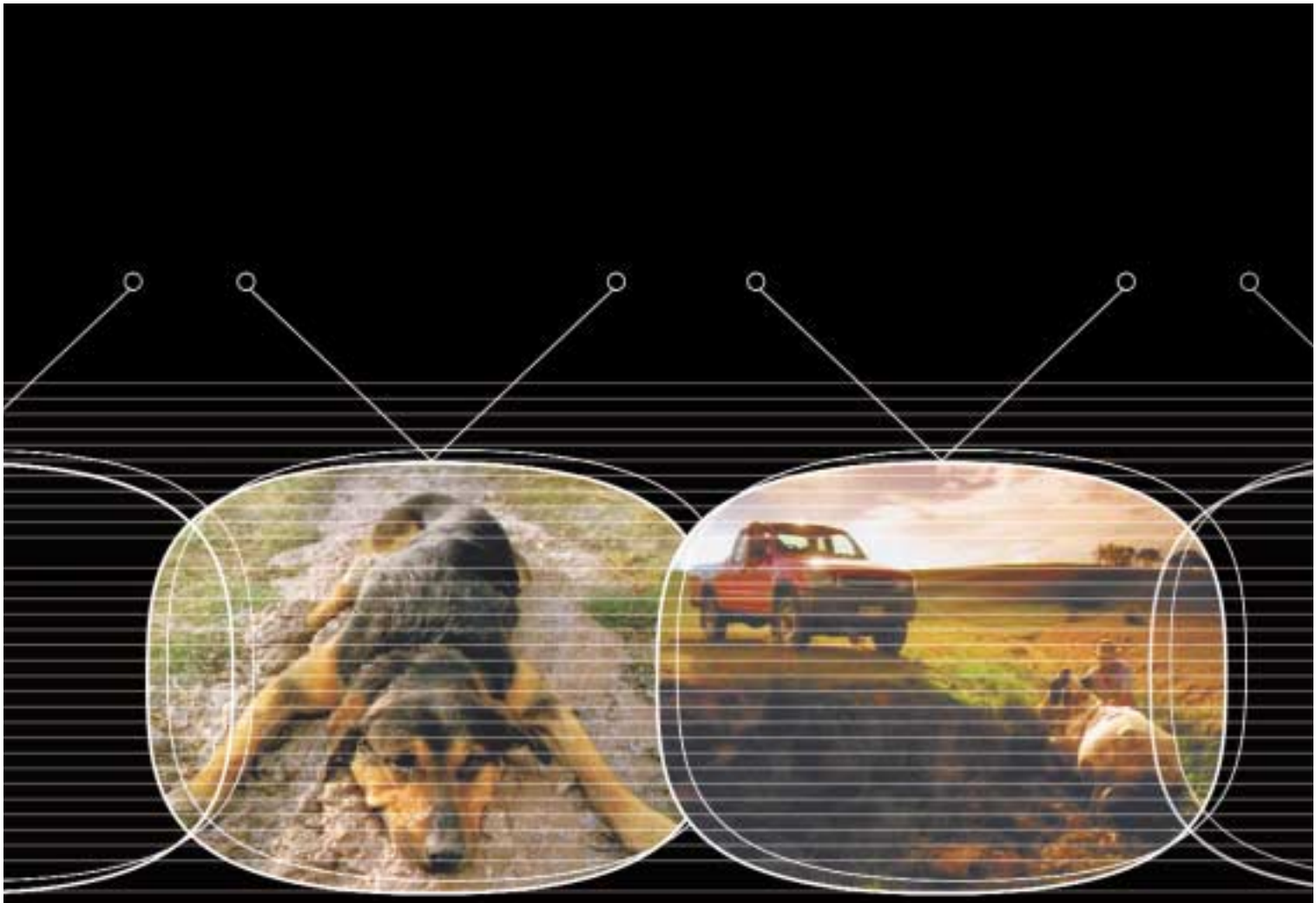


Somebody complained?

“Bugger!”

The self-regulation of advertising

By Owen Morgan

A major consideration for any advertiser is the cost of making an advertisement. While effective advertisements can be created for an outlay that is relatively small in terms of an overall marketing budget, other advertisements, such as television commercials, represent a significant investment even for large corporations.

It is important, therefore, that advertisers should gain the maximum benefit from their investment. If the media withdraws an advertisement from publication or ceases to broadcast it, the advertiser will not obtain that benefit.

The makers of a number of well-known television commercials have faced the possibility that the commercials might no longer be screened because a member of the public has lodged a complaint about a particular advertisement. If a complaint about an advertisement is upheld, the advertiser and the media are requested to withdraw the advertisement.

How can a complaint from a single member of the public (as opposed to legal action) put a whole advertising campaign at risk?

The prize-winning Toyota New Zealand television commercial, "Bugger" (Axis Best in Show 2000), is an example of an advertisement that faced that possibility. The commercial showed a Toyota Hilux ute in various situations around a farm. Each situation ended unfortunately for the characters in the commercial who responded to their plight by exclaiming: "Bugger."

The complainant objected to the language used in the commercial: "What I objected to was ... that the entire script consisted of the word 'bugger'. I object on the grounds that bugger is a swear word and I would no more like to hear sh-t, f-ck, or p-ss used in a similar manner" (ASCB, Decision 99/23). The decision of the complaints handling body is discussed below in some detail.

The advertising for the pharmaceutical Xenical, a prescription medicine offered as a treatment for obesity, has also had a high profile and has been the subject of a number of complaints. The advertiser, Roche Products (NZ), was successful in resisting a number of complaints concerning the content of various Xenical television commercials, but a complaint about the time at which one of its commercial was screened was upheld. The commercial had been given a general classification, which allowed unrestricted screening, but screening during children's television time was deemed to be inappropriate by the complaints handling body (ASCB, Decision 00/68).

More seriously for Roche, a complaint was also upheld against a Xenical "busback" advertisement that appeared on the rear of a bus in the Auckland metropolitan area. The busback advertisement was a companion to a television advertisement and it featured an image, taken from that advertisement, of an attractive young woman with long hair covering her breasts.

The complainant stated: "I felt that this ad was extremely inappropriate, showing a topless woman front on, with nothing but a very small amount of hair covering either nipple. Is it now acceptable to have blown-up pictures of naked women in the open, and call it advertising?" (ASCB, Decision 00/16).

The complaints handling body described the image, which had been deemed to be acceptable in the context of a television commercial, as being entirely inappropriate in the context of a busback advertisement.

These examples suggest an important question: how can a complaint from a single member of the public (as opposed to legal action) put a whole advertising campaign at risk?

The answer is that the advertising industry in New Zealand has established a system of self-regulation and if the complaints handling body upholds such a complaint then the media will be requested to withdraw the advertisement.

This article has two purposes:

1 To introduce the system of self-regulation established by the advertising industry.

2 To assess whether that system meets the objective of maintaining an acceptable standard of advertising.

INTRODUCTION

Advertising is the principal means companies use to promote their goods and services. It provides information to enable consumers to make choices and it attempts to change their preferences (Hay and Morris, 1991).

These are important functions and it follows that advertising should meet certain basic standards, in particular, that it should be accurate and fair. A well-known commentator on the self-regulation of advertising has proposed that: "In the case of advertising, there is general agreement that it ought to be truthful,

not misleading, fair, in good taste, and socially responsible" (Boddewyn, 1992, p4).

However, not all advertising meets these basic standards. Some commentators have even suggested that firms lie. That is, they advertise in a false or misleading manner (Carlton and Perloff, 1999, p453). Because it is desirable to eliminate bad advertising and because individual advertisers cannot be relied on to meet the basic standards, advertising is subject to regulation.

Boddewyn has identified self-regulatory systems that fill in for weak consumer protection legislation in countries including Brazil and the Philippines and systems that work in parallel with the well-developed legal systems in countries such as Canada and the United Kingdom (Boddewyn, 1992). New Zealand would fit in the second category, as there is a mix of legal regulation and self-regulation.

When an advertiser fails to meet standards imposed under the general law, other advertisers, consumers and regulators (such as the Commerce Commission) can turn to various causes of action. For example, if advertising is misleading and deceptive, those causes of action include Section 9 of the Fair Trading Act 1986 and the common law tort of passing off. However, this article is not concerned with legal regulation.

DEFINING THE SELF-REGULATION OF ADVERTISING

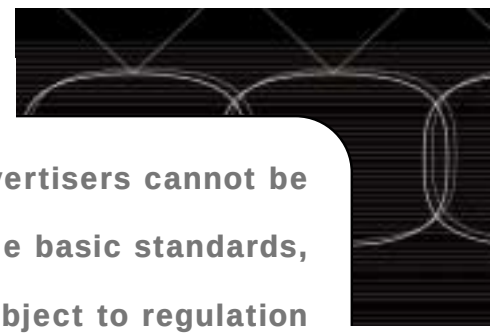
Self-regulation can be interpreted in a number of ways, including situations in which Government has delegated private bodies power to regulate (Campbell, 1999). For the purposes of this article, however, the term "self-regulation" has been given a specific meaning.

An industry can be said to be self-regulating when it has set up a system of rules to which its members have made themselves subject and which governs the behaviour of those members in respect of industry matters and when the industry enforces those rules. The drafting of the rules and their enforcement takes place without the involvement of the Government.

Self-regulation typically includes a number of elements:

- Administration is usually the responsibility of a trade association established for the protection or regulation of a trade, business or industry in the broadest sense.
- The behaviour of industry members is regulated by a code of behaviour or by a number of codes.
- The public has access to a complaints procedure that provides for the way in which individuals may make a complaint, how that complaint is to be dealt with and the consequences if the complaint is upheld.

The scope of self-regulation is set by the nature of the industry and its activities. Advertising was defined by an Australian court (which was considering the advertising industry's system of codes of behaviour in that country and the procedures to apply them) in the following terms: "For our purposes, it refers to sales promotion messages that are conveyed by the media and consumed independently of the purchases of the products being purchased. Broadly, these are the sales promotion messages



Because individual advertisers cannot be relied on to meet the basic standards, advertising is subject to regulation

which are subject to the codes" (*Re Media Council of Australia*, 1987, p48,430).

That definition is appropriate to the New Zealand context of advertising self-regulation. However, the scope of the self-regulation of advertising in this country is also set by the definition of an "advertisement" that appears in the Advertising Codes of Practice: "The word 'advertisement' is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity."

Taking these two definitions together, it is clear that the scope of the New Zealand advertising self-regulatory system is broad indeed. In the United Kingdom, by comparison, the scope of the corresponding self-regulatory system is restricted to non-broadcast advertising.

THE OBJECTIVE: ACCEPTABLE ADVERTISING

In New Zealand, the Advertising Standards Authority (ASA), formed in 1973, is at the heart of the self-regulation of advertising. The ASA's first objective is "to seek to maintain at all times and in all media a proper and acceptable standard of advertising and to ensure that advertising is not misleading or deceptive, either by statement or by implication" (The Advertising Codes of Practice, 2000, p9).

An essential question, therefore, is: what is a proper and acceptable standard of advertising?

Whether an advertisement meets the standard of acceptable advertising is tested in the courts or in the complaints procedure within the self-regulatory system. An advertisement that is held to breach legal standards, such as those enshrined in the Fair Trading Act 1986, is unlawful. An advertisement that is unlawful must be deemed to be unacceptable to the general community given that it breaches standards established by Parliament, whose members represent the community.

Likewise, if an advertisement is found to infringe the norms set by the self-regulatory body, it is unacceptable on the basis that the community was consulted in setting those norms and is represented on the complaints handling body that decided the advertisement infringed the norms.

The answer to the question of what is acceptable advertising can, therefore, be given as advertising that does not "fall foul of legal or self-regulatory standards" (Harker and Harker, 2000, p157; Harker 1997). It should be recognised, however, that it is not the action of laying a complaint that makes an advertisement unacceptable. That an advertisement is unacceptable is a conclusion for the court or the complaints handling body.

THE STRUCTURE OF SELF-REGULATION

The efficient functioning of a system of self-regulation depends on the co-operation of the individual firms and the groupings of firms that go to make up the relevant industry. In the advertising industry, such co-operation is formalised through the obligations voluntarily assumed by firms on becoming members of trade associations and their consequent agreement to abide by the rules of those associations. (It is also in the interests of firms supporting self-regulation to do more than to pay lip service to the concept of self-regulation.)

Self-regulation still has an impact, however, even if an individual advertiser has not joined the advertisers' trade association, the Association of New Zealand Advertisers (ANZA), or has not otherwise submitted to the jurisdiction of the ASA.

The structure of the system of self-regulation of advertising in New Zealand is characterised by a number of significant features:

- To meet its objectives, the ASA has introduced Codes of Practice.
- It is a national tripartite system that takes in the three sectors of the industry: advertisers, advertising agencies and the media.
- The system includes a pre-vetting stage and the application of sanctions if an advertisement is subject to an adverse ruling by the complaints handling body.

The Advertising Codes of Practice

The Advertising Codes of Practice (Codes) are rules that members of the advertising industry have voluntarily agreed to abide by in respect of advertising; they are intended to complement the legal regulation of advertising, not to supplant it.

The Codes have been developed with the input, where appropriate, of the public in the form of interested industry groups; consumer groups; and government departments. They are the key to the achievement of the ASA's objectives. They sometimes overlap with the jurisdiction of other trade associations, such as the New Zealand Direct Marketing Association.

Some Codes apply to the content of an advertisement or to the target market of an advertisement. Others apply to particular products or services. The subject matter of the various Codes is generally clear from their titles, although the Code of Ethics may need some explanation. That Code is a general statement of the rules that apply to all advertisements. It contains general provisions, such as an obligation to comply with the laws of New Zealand and a ban on misleading or deceptive advertisements. The basic principles embodied in the Code of Ethics will almost certainly catch any advertising of an unfair or unethical nature. The Codes, which are revised from time to time, are published on the ASA website: http://www.asa.co.nz/codes/codes.htm.

They are:

- Advertising Code of Ethics
- Code for Advertising Liquor
- Code for Road Safety in Advertising
- Code for Farm Safety
- Code for Financial Advertising
- Code for People in Advertising
- Code for Advertising for Slimming or Weight Loss
- Code for the Marketing of Tobacco Products (This Code merely states that any promotional and advertising activities of the tobacco companies must comply with the Smoke-free Environments Act 1990)
- Code for Advertising to Children
- Code for Comparative Advertising
- Code for Environmental Claims
- Code for Therapeutic Advertising
- Code for Advertising Food
- Code for Advertising Gaming and Gambling

The tripartite system

Advertisers, advertising agencies and the media all take an active role in the administration of the self-regulatory system. They are represented through their membership

The basic principles embodied in the Code of Ethics will almost certainly catch any advertising of an unfair or unethical nature

It may come as an unpleasant surprise to an advertiser to be confronted with a complaint and then to be requested, if the complaint is upheld, to withdraw or modify the advertisement

of various incorporated and unincorporated trade associations or groupings. In turn, these bodies form the members of the ASA. The members, as published on the ASA website, are:

- Communication Agencies Association of New Zealand (Inc)
- Magazine Publishers Association (Inc)
- Newspaper Publishers Association of New Zealand (Inc)
- Radio Broadcasters Association (Inc)
- New Zealand Television Broadcasters Council
- Association of New Zealand Advertisers (Inc)
- New Zealand Community Newspapers
- New Zealand Cinema Advertising Council
- New Zealand Direct Marketing Association Inc
- Outdoor Advertising Association of New Zealand
- Pay TV Group

The fact that a particular trade association is a member of the ASA does not mean, however, that every firm in that sector of the advertising industry is represented. ANZA has fewer than 100 member companies, although those companies include the major advertisers. For example, they represent 70 per cent of the total television advertising spend.

It may come as an unpleasant surprise to an advertiser, therefore, to be confronted with a complaint from a member of the public and then to be requested by the ASA, if the complaint is upheld, to withdraw or modify the advertisement. Of course, if an advertiser is a member of ANZA, it is bound by the rules of ANZA and by ANZA's membership of the ASA to support voluntary self-regulation.

Pre-vetting

The self-regulation of advertising encompasses a number of functions. It is more than just a system for the promulgation of codes of behaviour and the adjudication of complaints. It includes procedures for reviewing advertisements before they are published.

There are three main steps to the pre-vetting of advertisements: the first is internal and the second two provide firms with independent advice as to whether their advertisements meet the requirements of the Codes.

The first step in the pre-vetting stage of self-regulation involves internal checks and balances within marketing departments and advertising agencies. People who work in these areas need to be familiar with the requirements of the various Codes and guidelines to ensure that concepts and executions that are judged to fall outside those requirements are discarded at a preliminary stage.

The next step for companies in the liquor industry and the therapeutic products industry is to submit their advertisements to independent approval processes that are specific to those industries. The Liquor Advisory Pre-vetting System (LAPS) and the Therapeutic Advertising Pre-vetting System (TAPS) are administered by ANZA.

Advertisements are submitted to an adjudicator, who advises the advertiser whether the proposed advertisement, or campaign, meets the spirit and intention of the Codes. (The LAPS objectives and guidelines, pre-vetting form and registration form; and a brochure detailing the TAPS system and advertising approvals are all available at the ANZA website: http://www.anza.co.nz.) If an advertisement from those industries does not have approval from the appropriate adjudicator, it should not be published or broadcast by the media.

The final pre-vetting step occurs when the advertisement is submitted to a media approvals body. In respect of television commercials, this is the Television Commercial Approvals Bureau (TVCAB). The major

television companies established the TVCAB to maintain "proper" advertising standards. All commercials must be accepted and classified by the TVCAB before they are supplied for broadcast. The TVCAB uses more than 40 different classifications to guide placement of commercials (see the TVCAB website: http://www.tvcab.co.nz/classifications.htm).

In its decisions, the TVCAB is guided by relevant legislation such as the Fair Trading Act 1986 and the Broadcasting Act 1989, as well as by the various advertising codes and the codes of practice established by the Broadcasting Standards Authority, thus emphasising the complementary nature of self-regulation and legal regulation.

In respect of the print industry, the Newspaper Publishers Association of New Zealand (NPA) also operates an informal pre-vetting system in the sense that, at the request of a newspaper, it will provide an opinion as to whether an advertisement breaches the Codes.

Having survived the various pre-vetting processes, an advertisement can be published or broadcast, but may then become the subject of a complaint by a member of the public.

Sanctions

The co-operation of ASA members is critical to the authority of the Advertising Standards Complaints Board (ASCB) and the Advertising Standards Complaints Appeal Board (Appeal Board) which handles appeals from ASCB adjudications.

It is the media members that provide the sanctions underpinning the system, for if an advertiser's message is to be effective it must be published through the media (including direct marketing communications). The ASA has made it clear in the Codes that if a complaint is upheld, the advertiser and media are requested to withdraw the advertisement in accordance with the principles of self-regulation.

It is conceivable that an advertiser or a media member could refuse to abide by a particular ASCB decision. However, ASA rules provide that the ASA is entitled to decline an application for membership if, in its opinion, the applicant is unable to fulfil the objects of the ASA. As a result, the ASA can have some confidence that ASCB decisions will be upheld.

Neither the ASA nor the ASCB has any power to impose a penalty on the advertiser, the advertising agency or the media. The ASA's authority and the self-regulatory system in general depend on the media members to immediately withdraw the offending advertisement from publication or broadcast.

While this is not a sanction in the same way as a fine would be, the consequences for the advertiser may be enormous. The cost of developing an advertising campaign can be extremely high, but the cost of withdrawing an advertisement in the middle of a promotion may be even greater.

THE COMPLAINTS PROCEDURE

The procedure

There is no formality involved in making a complaint. It is sufficient to send a letter providing the basic details of the advertisement and the reasons for the complaint. When a

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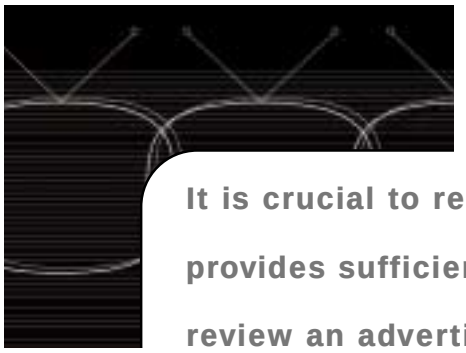


It is crucial to recognise that a single complaint provides sufficient cause for the ASCB to review an advertisement

complaint is received, it is referred to the ASCB's chairperson, who determines whether the complaint comes within the ASCB's jurisdiction. If the chairperson decides it has jurisdiction, then the complaint will go to the ASCB to determine whether the Codes have been breached.

The ASCB receives written submissions on the subject of the complaint from interested parties, including the advertiser, the advertising agency and approvals bodies such as the TVCAB or the NPA. Most complaints are determined by the ASCB without the parties attending, but there is provision for them to attend when the complainant is another advertiser.

The parties are notified of ASCB decisions as soon as practicable within 48 hours and the decisions are released to the media at the direction of the chairperson. Any party interested in the complaint may appeal a decision. The chairperson decides whether the matter is to be placed before the Appeal Board. Pending this decision, the earlier decision of the ASCB may be suspended.

If an appeal is ordered, it is referred to the Appeal Board whose procedures are similar to those of the ASCB. A decision not to order an appeal is itself subject to an appeal to the chairperson of the Appeal Board.

It is crucial to recognise that a single complaint provides sufficient cause for the ASCB to review an advertisement and that the advertisement will be withdrawn from the media should that single complaint be upheld.

The argument has been made that if the unsupported complaint of one member of the public was upheld, it could be construed as gagging the advertiser. The Appeal Board rejected this argument and stated that a complaint of a single consumer is treated as seriously as a complaint by a number of consumers. To do otherwise, in the Appeal Board's view, would be an affront to the complaints system (ASCB, Decision 95/79). This is not say, however, that the determination of whether an advertisement is acceptable may depend on the view of an individual. It is up to the ASCB to rule on that point.

Membership of the complaints handling bodies

The membership of the ASCB is crucial to the perceived and actual independence of the ASA and of the entire advertising self-regulatory system. Of the eight ASCB members, four (including the chairperson) represent the public and are not connected with the advertising industry. The remaining four represent the ASA. Of the three members of the Appeal Board, two, including the chairperson, represent the public and the other represents the ASA.

The ASCB chairperson has the central role in the complaints procedure. As well as determining the suitability of a complaint for determination by the ASCB, the chairperson decides whether an appeal is to be placed before the Appeal Board. If Appeal Board members are equally divided as to whether the advertisement breached the Codes, the chairperson has a casting vote.

The Toyota Hilux Ute ("Bugger") advertisement

The ASCB decision on the "Bugger" advertisement illustrates the workings of the complaints procedure.

The decision shows how the system responds to a complaint that an advertisement was offensive because of the language used – a matter that would be difficult to legislate for as the language was not obscene. In other words, the self-regulatory system was called upon to

determine the acceptability of the advertisement.

The level of interest in this advertisement and the resulting complaint was very high. Approximately 120 duplicate complaints were received, together with a petition signed by 145 people. The ASCB also received five letters from the public supporting the advertisement, which in itself was most unusual.

The ASCB considered the advertisement in terms of Rule 5 of the Code of Ethics that states: "Offensiveness – Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services)".

The key argument of the advertiser and its agency was that there was no evidence of "serious or widespread offence". The advertiser put forward examples of the use of the term in normal parlance. It also commissioned consumer research showing that "82 per cent of the interviewees did not feel the commercial was offensive". The TVCAB pointed out that the advertisement had been accepted for broadcast with a classification that meant that it could be screened only after 8.30pm.

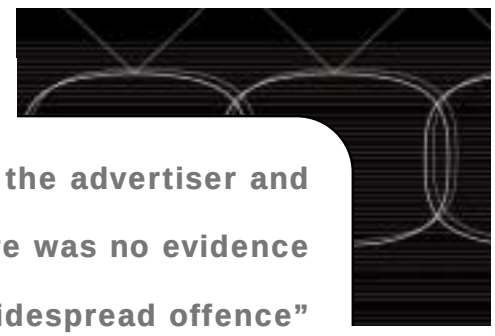
The ASCB first noted that "it was the board's responsibility to reflect society's attitude, rather than to influence it". It then stated that there are two limbs to Rule 5. In the light of prevailing community standards, the advertisement should not contain material likely to cause (i) serious offence, or (ii) widespread offence. Both limbs were to be considered, taking into account the context, medium and audience.

On the question of serious offence, the decision was brief. The record of deliberation merely states that for an offence to be "serious", there is a very high threshold, which the use of "bugger" did not meet in the context of the advertisement. Unfortunately, there is no record of why the ASCB did not think the use of the term gave serious offence, nor is there any indication of what the ASCB thought might meet the threshold.

Turning to the issue of widespread offence, the ASCB noted that the advertiser's consumer research showed that 16 per cent of the interviewees found the advertisement offensive. The question the ASCB had to decide was whether this constituted widespread offence in the light of context, medium and audience.

In reaching its decision, the ASCB referred to various dictionary meanings of the word, particularly entries that showed the word as expressing surprise, disbelief or disapproval. It then turned to the context of the advertisement, which it described as being "distinctly 'New Zealand' and relevant to rural humour". It decided, therefore, that the appropriate meaning of the word, in the context, was to express annoyance or surprise.

As to medium and audience, the ASCB noted that the advertisement was restricted to screening after 8.30pm. In the ASCB's opinion, therefore, the advertisement was unlikely to cause widespread offence. It did not uphold the complaint. (The same television commercial was subject to a complaint in Australia and the Australian Advertising Board made a similar decision.)



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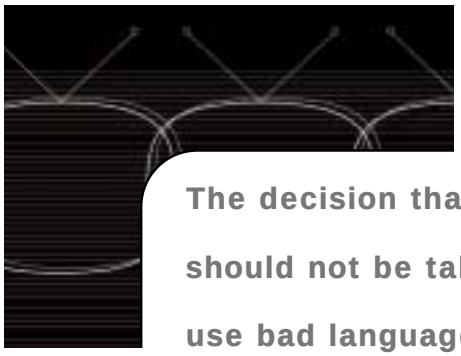

The decision that the advertisement was not offensive should not be taken as an invitation to advertisers to use bad language or other "offensive" material

Apart from confirming that Rule 5 contains a two-part test, the ASCB decision is interesting for a number of reasons.

The ASCB made it clear that its responsibility is to reflect public attitudes rather than to influence them. It can be concluded, therefore, that the acceptability of advertising is to be judged by reference to existing community mores, as interpreted by the ASCB.

As well, the decision that the advertisement was not offensive in terms of Rule 5 should not be taken as an invitation to advertisers to use bad language or other "offensive" material. The ASCB did specifically comment that the advertisement was "factually and contextually specific", a requirement that would have to be met by other similar advertisements.

Time has, of course, moved on. A television commercial for the Land Transport Safety Authority, which screened recently, included a very young child using the word "bugger" when it was screened after 9pm. When the same commercial was screened earlier, the child said, "Yuck."

ARGUMENTS FOR AND AGAINST THE SELF-REGULATION OF ADVERTISING

The self-regulation of advertising is well established throughout the world (Boddewyn, 1992). Nevertheless, there are arguments for and against (Campbell, 1999). Those arguments reflect the entrenched positions of the parties. On the one hand, the advertising industry has a vested interest in maintaining a system that it has established (Crawford, 1998). On the other hand, the critics of self-regulation, who tend to be consumers and consumer representative organisations, are likely to focus on the system's shortcomings (Middleton and Rodwell, 1998).

The arguments for the self-regulation of advertising

- Self-regulation is a middle path between no regulation and the imposition of a statutory system ultimately enforced through the courts.
- The advertising industry provides a level of expertise in the administration of the system of self-regulation that would be absent from a regulatory system imposed on the industry from outside.
- Firms operating within a self-regulatory system are more likely to adhere to rules that have been voluntarily assumed and have not been imposed from outside the industry. It is unlikely that legislation could easily be drafted that would emulate the levels of self-regulation that businesses voluntarily assume.
- Self-regulation is flexible, avoiding the procedural requirements of an action in the courts. Unlike the courts, the complaints procedure is readily accessible to complainants. Complaints are dealt with quickly and at no cost to the complainant.
- The Advertising Codes of Practice are inherently flexible. They can be interpreted to deal with new types of non-broadcast media and new advertising techniques. As well, the Codes can be easily revised to accommodate new issues or concerns. (The ASCB has determined that advertisements on internet websites are within its jurisdiction.)
- The Codes are interpreted according to the "spirit" in which they were drafted rather than by adhering to the strict words of the Codes in a legalistic manner. Advertisers cannot circumvent those rules on a technicality.
- The costs of self-regulation are met by the advertising industry with no cost to the complainant, other consumers or taxpayers in general.

- Although the bodies that adjudicate on complaints are part of the self-regulation system, both the ASCB and the Appeal Board have independent members, including the chairperson, who represent the public.

The arguments against the self-regulation of advertising

The arguments against self-regulation are not convincing as to the replacement of the system by a statutory system. Nevertheless, they do point to issues of concern, in particular, the credibility and the fairness of the system.

- Self-regulatory systems are usually established by industries that are under threat of regulation by central government and they are actually established only when a real threat exists that legislated regulation is imminent. By emphasising the success of self-regulation in New Zealand, the liquor industry has fended off threats of statutory regulation that would force liquor advertisements from television.
- Although the firms and individuals who support the self-regulation of advertising may bring expertise that would be lacking in a statutory system, that expertise is employed for the benefit of firms within the industry.
- Although the ASA consults with interested parties when drafting the Codes, the system provides solutions to specific breaches of Codes that were drafted by the industry concerned. The long-term interests of the consumer are ignored.
- The self-regulatory system does not require participation by all the firms within an industry or trade group. In fact, only a small proportion of advertisers are ANZA members – although, as noted above, they contribute the major proportion of television advertising spend. In effect, it is those industry members who would, in any case, operate in an honest manner who have submitted themselves to regulation. Self-regulation may, therefore, be ineffective to prevent or to punish the behaviour of unethical firms that do not meet the standards set in the Codes.
- Any sanction is by way of agreement within the industry and may involve nothing more than a "slap on the wrist". The only penalty or sanction is the withdrawal of the offending advertisement from the media. Relatively little publicity is given to the decisions of the ASCB or the Appeal Board. No penalties are imposed on either the advertising agency or the media involved. In situations in which the advertisement is withdrawn after the advertising campaign has run its course, there is no sanction at all.
- Self-regulation may be a cheap alternative to statutory controls, but the complaints procedure is unfair. While the complainant files a single letter of complaint, it is usual for the ASCB to consider submissions from a number of parties that have an interest in upholding the advertisement. These parties include the advertiser, the advertising agency and the media approvals bodies. As well, the chairperson has the power to determine the terms on which the matter will be considered, which may disadvantage the complainant.
- Self-regulation fosters anti-competitive behaviour. The fact that the self-regulatory system is administered by the firms that make up the industry increases the market power of those firms and makes it difficult for new firms to enter the market.

CONCLUSION

It is deceptively simple to ask: does the system of self-regulation of advertising administered by the ASA meet its objective of maintaining in all media a proper and acceptable standard of advertising? It is much harder to provide an answer.

If acceptable advertising is correctly defined as advertising that does not fall foul of legal or self-regulatory standards, then one answer is that the system has failed or it has failed to the extent that complaints are upheld about advertisements.

Merely pointing to the numbers of complaints is an inaccurate measure of the success of the system, however, as the Toyota "Bugger" advertisement demonstrated.

There are far too many variables, the most obvious being:

- The number of complaints upheld or settled should be measured not only against the total number of complaints, but also against the total number of advertisements in the media in a relevant timeframe.
- Complaints may not be made about advertisements that breach the Codes.
- A series of complaints may be made by people representing interest groups opposed to a particular form of advertising. (Complaints about liquor advertisements have traditionally been high.) These variables all skew a simple comparison of complaints upheld or settled versus complaints made.

The statistics available in ASA annual reports suggest another conclusion. In the year ending December 31, 2000, 219 substantive complaints were dealt with by the ASCB. Of these, 72 were upheld; 53 were settled (the parties accepted that a breach had occurred and the advertisement was withdrawn); 94 were not upheld. The 219 substantive complaints over a 12-month period is not high given the number of advertisements in all media, especially when approximately half of them were not upheld.

For the year ending December 31, 1999, 193 substantive complaints were dealt with by the ASCB. Of these, 47 were upheld; 47 were settled (the parties accepted that a breach had occurred and the advertisement was withdrawn); 99 were not upheld.

As an indication of the number of advertisements produced every year that pass through the self-regulatory system, the TVCAB auditions and accepts more than 13,000 advertisements annually (see the TVCAB website: http://www.tvcab.co.nz/role.htm).

Moreover, the complaints demonstrate an important element in self-regulation: that there is a reasonable level of awareness of the system. As well, the sanctions appear to work. No recent instances have occurred of advertisers or the media refusing to withdraw an advertisement when asked to do so.

The system clearly complements the general law by providing an avenue for monitoring advertisements that is cheaper and more accessible than the general law. It fulfils the six tasks that Boddewyn suggests are required to meet the goals of obtaining and maintaining truthful and fair advertising: (1) making standards; (2) publicising the standards; (3) advising advertisers before advertisements are released; (4) pre- or post-monitoring of compliance with the standards; (5) a complaints system; and (6) sanctions (Boddewyn, 1992, p8).

The question posed above can be confidently answered in the affirmative: yes, the system of self-regulation of advertising does maintain proper and acceptable advertising.

POSTSCRIPT

There are lessons for advertisers. They must be alert to the realities of the system and they should respond to complaints from the public and make reasoned submissions to the ASCB if the matter goes that far.

ANZA recently suggested the following checklist should be used by advertisers as a

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guide to responding to consumer complaints to the ASA:

- Advertisers should always reply when called on by the ASCB to respond to a consumer complaint. Advertising agencies should also respond. However, it would be unwise if only the agency responded to the complaint.
- Keep replies concise and to the point.
- Concentrate on the main issues raised by the complainant and argue logically.
- Reject emotional arguments developed by the complainant, but do not undertake a lengthy debate.
- Submit the results of any robust consumer research that may contradict the complainant's main arguments.
- Do not denigrate or patronise the complainant. Argue the merits of the complaint, not the motives of the complainant.

FURTHER READING

The best source of information on the New Zealand system is the ASA website. It contains much more than just the Codes. A wealth of information includes articles on self-regulation and summaries of all the recent ASCB decisions. The ASA will provide copies of the full decisions. The ANZA and TVCAB websites also contain a lot of useful information for readers interested in the nuts and bolts of self-regulation. The work of Boddewyn (1992) is the best general reference. Harker has recently addressed the issue of acceptable advertising: Harker, D. (1998). Achieving Acceptable Advertising: An analysis of advertising regulation in five countries. *International Marketing Review* 15(2), 57-81. For readers interested in a legal analysis of the New Zealand system, two important references are the Court of Appeal decision in *Electoral Commission v Cameron* [1997] 2 NZLR 421, and the analysis of that decision: Morgan, O.J. (1997). An advertisement that was not an advertisement (but is it an advertisement now?) – the self-regulation of advertising. *New Zealand Intellectual Property Journal*, 225-232.

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