Submission to the New Zealand Law Commission

on

The News Media meets ‘New Media’: Rights, Responsibilities, and Regulation in the Digital Age

from the

Advertising Standards Authority (Inc.)

March 2012
Executive Summary

- The Advertising Standards Authority (ASA) acknowledges the significant changes that have taken place in the digital media environment.

- The ASA notes that the flexibility of self-regulation allowed it to respond to these changes as they occurred and adapt its system to ensure that the Advertising Codes of Practice continued to apply to advertisements regardless of the delivery mechanism.

- The purpose of this submission is to confirm the value of the current system of self-regulation for advertising content and placement.

- The ASA has no comment on the best type of regulation to deal with content, other than advertising, in any medium.

1. Information about the ASA

1.1. The Advertising Standards Authority (ASA) is the self-regulatory body that regulates advertising standards in New Zealand.

1.2. The ASA has the following members:

   - Association of New Zealand Advertisers (Inc)
   - Communication Agencies Association of New Zealand (Inc)
   - Community Newspapers
   - Interactive Advertising Bureau
   - Letterbox Media
   - Magazine Publishers Association (Inc)
   - Newspaper Publishers Association (Inc)
   - New Zealand Community Newspapers Association
   - New Zealand Cinema
   - New Zealand Marketing Association (Inc)
   - New Zealand Post Limited
   - Outdoor Advertising Association of New Zealand
   - Pay Television Group
   - Radio Broadcasters Association (Inc)
   - Think TV

1.3. The ASA was established in 1973 and became an incorporated society in 1990.

1.4. The role of the ASA is to regulate advertising of products and services as permitted by law, including the right to freedom of information under the New Zealand Bill of Rights Act 1990.
1.5. The ASA has developed Advertising Codes of Practice, which include the Code of Ethics and 13 specialised codes.

1.6. The ASA funds and resources a separate and independent Advertising Standards Complaints Board (ASCB) that hears complaints from members of the public at no cost to them. There is a right of appeal to the Advertising Standards Complaints Appeal Board (ASCAB) which is also funded by the ASA.

1.7. If a complaint about an advertisement is upheld by the ASCB, the advertiser, advertising agency and the media are requested to withdraw the advertisement immediately. These requests are invariably complied with.

1.8. Both Complaints Boards have a public member majority.

1.9. Public members of the Complaints and Appeal Boards are appointed via an Appointments Panel process. The Appointments Panel is made up of the Chairman of the ASCB (a public member), the Chairman and Deputy Chairman of the ASA, and an independent member, formerly the Chief Ombudsman, Beverley Wakem, currently Hon. Sir Bruce Robertson. Recommendations on appointments from this panel must be unanimous.

1.10. Public member vacancies are advertised in the metropolitan newspapers, and on the ASA website. A wide range of government and non-government agencies are also invited to nominate candidates. In the latest call for applicants, 122 people have applied to be a public member of the ASCB.

2. **The Flexibility of Self-Regulation for Advertising**

2.1 The ASA Advertising Codes of Practice apply to all advertising in all media. Whether or not the Complaints Board has jurisdiction over a complaint is a matter for the Chairman but that decision is informed by a number of factors including precedent and the definition of “advertisement”

2.2 The definition of “advertisement” is set out on page 16 of the ASA Codes of Practice Booklet and says:

“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. The definition includes advertising in all traditional media and new media such as online advertising, including websites. Emails and SMS messaging that are selling or promoting a product, service, idea or opportunity are also covered by the codes, as are neck labels and promotions attached to
a product. Other examples include posters, pamphlets and billboards (whether stationary or mobile) and addressed or unaddressed mail."

2.3 The ASA Codes of Practice use a Principle and Guideline approach to allow a level of flexibility in their application. Key considerations for the Complaints Boards in determining a breach of the Codes are context, medium, audience and product.

2.4 This allows a general set of guidelines to be applied across all advertisements in all mediums – taking account the particular features of each type of media. For example, the niche audiences targeted by radio and magazines, compared to the unrestricted reach of billboards.

3. Efficient and Transparent Complaints Process

3.1 A key objective of the ASA is to properly resource the Complaints Boards so that complaints are processed in a timely manner, as “justice delayed is justice denied.”

3.2 Because of the potentially short duration of advertising campaigns it was important to devise procedures that would deal with complaints speedily, but at the same time adhere to the principles of natural justice by giving all parties the opportunity of a fair hearing.

3.3 In 2011 it took, on average, 26 working days from the time the complaint was received to the time the parties were notified of the result and, if upheld, a request made for immediate withdrawal of the advertisement. The ASA is very conscious of the importance of dealing with complaints in a timely manner.

3.4 The ASA Constitution allows for Complaints Boards powers to be delegated to the Chairmen of the respective boards. Therefore, both the ASCB Chairman and the ASCAB Chairman exercise a role in screening complaints to establish a prima facie case.

3.5 If the ASCB Chairman rules that there are no grounds to proceed on a complaint, that ruling can be appealed to the ASCAB Chairman, who may refer the complaint on to the ASCB for consideration. The ASA Annual report provides a breakdown of the complaints numbers. About half of the complaints referred to the ASCB are upheld.

3.6 It is noted that where a decision is not upheld and then appealed, the time taken to complete the complaints process is longer – as additional consideration has to be given to the matters raised in appeal. In addition, complex complaints can take longer to make their way through the system.
3.7 The ASCAB has two public members and one industry member and meets on demand to consider appeals. Both Chairmen are able to refer appeals back to the ASCB or on to the ASCAB, depending on the issues raised.

3.8 The ASA has an 0800 number for complainants to call for assistance with complaints, and has an online complaints form on its website, www.asa.co.nz. About 70% of complaints are received via the online form. The ASA is committed to a quality complaints process and to making this process accessible to consumers.

3.9 The complaints process for consumers is free, there is a cost for competitor complaints as a separate hearing is held with the attendance of parties. If a complaint is accepted to be heard by the ASCB, complainants are asked to sign a waiver, undertaking that they will not pursue the complaint in another jurisdiction. This is intended to minimise the risk of ‘forum shopping’ and confirms to all parties that the complaint is to be taken seriously.

3.10 In 2011 the ASA received 1197 complaints about 759 advertisements. A more detailed review shows that of the 1197 complaints, 438 were duplicates, and 353 did not proceed to the Complaints Board for a number of reasons including no prima facie case, a previous decision applied or the complaint was resolved. The Complaints Board considered 321 complaints, 186 were upheld or settled and 135 were not upheld.

4. **Why does it Work for Advertising?**

4.1 *Tri-partite*
All of the key parties in the advertising industry are strongly engaged in supporting advertising self-regulation. As a result, there is a high level of compliance and the knowledge of the code requirements is spread across advertisers, agencies and the media. This strengthens the likelihood of compliance with the code prior to the advertisement being seen and also compliance with an ASCB decision once a complaint has been received.

4.2 *Comprehensive*
It is important to realise that self-regulation in New Zealand is not just the formulation of codes of practice by the ASA and decisions on complaints by the ASCB. Self-regulation in the ASA model is much more complex. Codes and complaints resolution are clearly a key part of any successful system of self-regulation but the ASA system also includes education. The ASA Chief Executive gives many seminars and presentations throughout the country on compliance with the codes and decisions. Media are also pro-active in monitoring the advertising that they accept. The Commercial Approvals Bureau is responsible for assessing advertising for code and legal compliance prior to television advertisements being broadcast and most other media have screening and advice services in place to ensure their risk of non-compliance is
minimised. The ASA also provides advice on a daily basis to advertisers, agencies and the media about code interpretation and compliance. In addition formal pre-vetting is in place for alcohol and therapeutic advertising.

4.3 **Complementary to legislation**
The purpose of advertising self-regulation is not to replace state regulation but to complement it. An advertisement which is misleading is not only in breach of the ASA Codes but also possibly breaches the Fair Trading Act. Generally the standard required by the ASA Codes is higher than that by the law. Additionally, and importantly, the standard of proof required by law to achieve a conviction is “beyond reasonable doubt” which is higher than the ‘balance of probabilities’ required by the ASA regime. Any system of justice that incorporates a fine, jail or other punishment requires the higher level of proof. Consumers therefore have the benefit of a two-tier system of self-regulatory codes and a state regulator for the more serious cases.

4.4 **Burden of proof**
An additional feature of the system of advertising self-regulation in New Zealand is that when a claim in an advertisement is challenged, in our system, the burden of proof of that claim shifts from the complainant to the advertiser. Therefore, the complainant is not required to prove to the ASCB that the claim is wrong, the advertiser is required to prove that it is correct. This is not currently the case in legislation like the Fair Trading Act. The burden of proof that a claim is incorrect rests with the Commerce Commission.

4.5 **Social responsibility**
Self-regulatory codes can also require social responsibility, which in law is difficult to legislate for as the actual behaviour must be defined. Some ASA Codes, including the Code for Advertising to Children, the Code for Advertising of Food, the Code for Advertising Liquor and the Therapeutic Products and Services Advertising Codes require a high standard of social responsibility, which is a concept that cannot be legislated.