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ADVERTISING REGULATION

A HANDBOOK BY THE FOUNDATION FOR ADVERTISING RESEARCH

Foreword

This short handbook is designed to provide a basic understanding and background of advertising Self-Regulation. Globally various forms of advertising Self-Regulation are proliferating at a great rate. Advertising itself is also growing and changing rapidly with new forms of media and communication. This is particularly so in the Asia-Pacific region which has the fastest growth. Regulators have found that the new media such as the Internet is extremely difficult to regulate by Government fiat.

Self-Regulation provides a realistic and effective way of regulation. But Self-Regulation brings with it new responsibilities to the advertising industry to provide best practice Self-Regulation to ensure consumers are properly protected. Accordingly this handbook deals in some detail with the requirements of best practice Self-Regulation.

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The objectives of FAR are to provide research, information and advice on issues of concern to the advertising industry. It has an extensive online database of research and evidence on Self-Regulation, obesity, children, alcohol and other advertising and marketing issues.

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CHAPTER 1

INTRODUCTION

Advertising is a driver of the economy. In March 2012 McKinsey & Company released a report that found that advertising expenditure (adspend) could increase the rate of economic growth of a country by 15%. On the basis of the McKinsey research the greater the adspend as a proportion of GDP the greater the rate of growth. This has been confirmed by other research. It is a well-known truism that companies that spend a significant proportion of their total income on advertising will grow faster than those who don't. The same is true for individual countries – hence the need for Governments to encourage rather than restrict advertising.

The Asia-Pacific region is an area of both high increased adspend and economic growth. Research by eMarketer in association with Starcom MediaVest Group released in a report in October 2012 projects that adspend in the Asia-Pacific region will surpass that of North America by 2014 and become the region with the greatest adspend as shown on the table reproduced below.

Total Media Ad Spending Worldwide, by Region, 2010-2016							
<i>billions</i>							
	2010	2011	2012	2013	2014	2015	2016
North America	\$165.84	\$171.02	\$179.47	\$185.66	\$192.84	\$198.14	\$204.58
Asia-Pacific	\$135.46	\$146.30	\$162.39	\$179.61	\$197.39	\$215.55	\$232.79
Western Europe	\$116.75	\$118.62	\$120.64	\$124.01	\$127.36	\$129.91	\$131.99
Latin America	\$27.41	\$30.94	\$34.65	\$38.12	\$42.69	\$46.75	\$51.33
Eastern Europe	\$19.64	\$21.78	\$23.81	\$25.95	\$28.16	\$30.41	\$32.69
Middle East & Africa	\$14.42	\$15.81	\$17.79	\$19.02	\$20.34	\$21.56	\$22.79
World-wide	\$479.52	\$504.47	\$538.75	\$572.38	\$608.78	\$642.31	\$676.17
<i>Note: includes digital (online and mobile), directories, magazines, newspapers, outdoor, radio and TV; numbers may not add up to total due to rounding</i>							
<i>Source: eMarketer, Sep 2012</i>							
144712	www.eMarketer.com						

Governments and industry alike have a responsibility to ensure the advertising is legal, decent, honest, truthful and socially responsible so that consumers are properly protected. Both industry and Governments have a role to play, which is discussed in this handbook. There is an important place for Government Regulation but industry has a more important role of establishing credible Self-Regulation that complements the Government regulatory framework. This handbook focuses on how industry can provide a best practice Self-Regulatory system.

Best practice Self-Regulation will create an environment where consumers will be protected but also empowered. As a consequence advertising will grow and prosper and with it bring increased economic growth for the benefit of all.

CHAPTER 2

RESPONSIVE REGULATION

Regulating advertising is challenging for policymakers. Advertising regulation globally has a unique structure being a mix of Government Regulation and Self-Regulation and is often referred to as Responsive Regulation. Therefore in designing a regulatory system it is necessary to take into account the desired regulatory result of the policymaker, the global nature of advertising and the regulation of it. This Chapter examines how Government Regulation and Self-Regulation can be combined to meet best practice standards and fulfil the requirements of Responsive Regulation.

The objective of Responsive Regulation is for the Regulator to achieve the required response from those who are regulated. For instance passing a law against theft does not result in nil thefts. Other mechanisms are needed in order to reduce the rate of theft. For advertising a range of regulatory systems are available and it requires a deft mix of those systems to achieve successful Responsive Regulation.

The seminal work on Responsive Regulation is the book *Responsive Regulation - Transcending the Deregulation Debate* by Ayres and Braithwaite (1992, Oxford University Press). Ian Ayres is a Professor of Law at Yale University and John Braithwaite a Professor of Law at Australian National University and a leading authority on regulation. It can be purchased on Amazon.

In essence Responsive Regulation is the philosophical underpinning of advertising regulation. In explaining Responsive Regulation Ayres and Braithwaite state (page 5): *"Responsive regulation is distinguished (from other strategies of market governance) both in what triggers a regulatory response and what the regulatory response will be. We suggest that regulation be responsive to industry structure in that different structures will be conducive to different degrees and forms of regulation. Government should also be attuned to the differing motivations of regulated actors. Efficacious regulation should speak to the diverse objectives of regulated firms, industry associations, and individuals within them. Regulations themselves can affect structure (e.g., the number of firms in the industry) and can affect motivations of the regulated."*

We also conceive that regulation should respond to industry conduct, to how effectively industry is making private regulation work. The very behaviour of an industry or the firms therein should channel the regulatory strategy to greater or lesser degrees of government intervention."

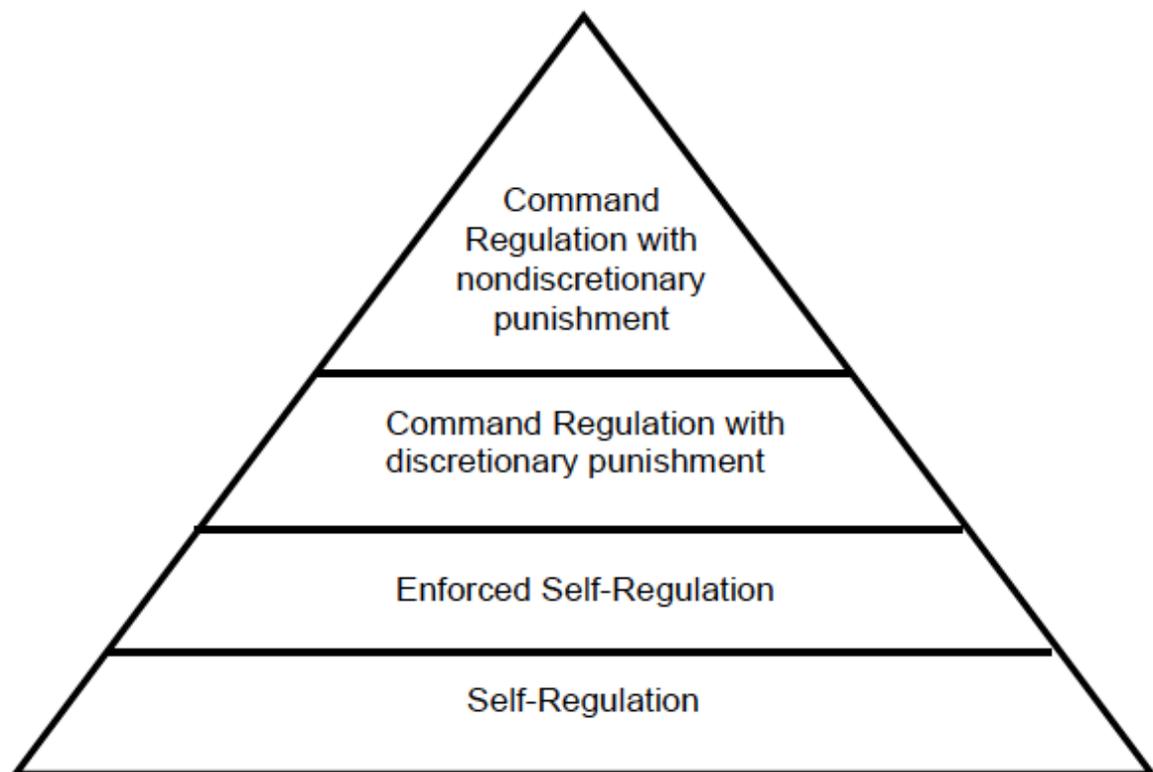
It therefore follows that in designing a regulatory regime that the following should be taken into account:

- Members of the advertising industry are highly motivated to self-regulate in a responsible manner.
- Governments should be cautious to ensure that any intervention does not undermine the motivation of the various industry members to responsibly self-regulate.
- The behaviour of the industry as reflected by the Self-Regulatory regimes in various countries of the world is of a high standard thus any Government intervention should be on a lesser scale.

The Regulatory Pyramid

Ayres and Braithwaite developed the regulatory pyramid, which has been adopted, copied and amended by academics and policymakers

Figure 1 - Pyramid of Enforcement Strategies



At the peak of the pyramid is 'Command Regulation with Nondiscretionary Punishment'. Governments use it for serious crime such as murder where minimum punishments such as life imprisonment are mandated.

Most law for crime and general offences is contained within the second tier – ‘Command Regulation with Discretionary Punishment’. Criminal law sets out various offences such as forgery or assault and then mandates maximum sentences. The judge has discretion as to what sentence will be imposed and whether it is jail, fine or other punishment. This tier can also contain legislation regarding advertising. Misleading advertising is an offence in most countries and the advertiser upon conviction can be fined and/or have the court order corrective advertising at the offender’s cost. However Regulators have found that there is huge cost in administering a prosecution system for advertising. Therefore it is used only for serious cases.

The Self-Regulation tier is the most common model for advertising globally. The advertising industry set codes by which all advertisers should abide. In short the codes require advertisements to be legal, decent, honest, truthful and socially responsible. However compliance also extends to advertising agencies that create the advertisements and the media who publish or broadcast them. There is also a complaints system where members of the public can complain to an independent complaints adjudication board or jury about breaches of the codes. If a complaint is upheld then the advertiser is required to withdraw the offending advertisement. There is usually near 100% compliance. As industry funds the regime there is no cost to Government.

The tier of ‘Enforced Self-Regulation’ requires close cooperation between the Regulator and the Self-Regulatory regime. Industry operates the Self-Regulation model but the State will assist with enforcement. In the UK the Self-Regulatory Advertising Standards Authority (ASA) has a formal arrangement with the Fair Trading Regulator to provide a legal ‘backstop’. If a maverick advertiser refuses to withdraw an offending advertisement the Regulator will enforce the Decision of the ASA. In practice this is rarely used because compliance is near 100%, but the threat remains. This model provides benefit to the Government, as the costs are minimal.

There are variations of Enforced Self-Regulation that are termed Co-Regulation. The Government and industry combine to form and administer a joint system of regulation. Co-Regulatory systems take many forms depending on the responsibilities taken by each of the partners. For instance it may be a Self-Regulatory system with the Government having a formal monitoring role. In such regimes it is common for the Government to be represented on the governing body.

There are certain features relating to every level of the pyramid.

- Those regulatory options higher up the pyramid incur greater costs. Also the punishments are greater.

- The regulatory options higher up the pyramid are slower than Self-Regulation. Advertising Self-Regulatory systems usually take about 6 weeks to resolve a complaint but Command Regulation takes months or years.
- At the lower end of the pyramid the required burden of proof is the civil standard of the 'balance of probabilities', which is much stricter than the criminal standard of 'beyond reasonable doubt' used in the Command Regulation model.
- A consequence of the problems of cost, slowness and higher burden of proof is that under a Command Regulation regime the number of complaints that result in prosecution is substantially less than those considered under Self-Regulation.

Ayres and Braithwaite expand on their views on page 19 and state:

"1. To understand regulation, we need to aggregate firms into industry associations and disaggregate firms into corporate subunits, subunits into individual corporate actors, and individual corporate actors, and individuals into multiple selves. Regulatory agencies advance their objectives in games at each of these levels of aggregation by moves in games at other levels of aggregation.

2. Some corporate actors will only comply with the law if it is economically rational for them to do so; most corporate actors will comply with the law most of the time simply because it is the law; all corporate actors are bundles of contradictory commitments to values about economic rationality, law abidingness and business responsibility. Business executives have profit maximizing selves and law-abiding selves, at different moments, in different contexts, the different selves prevail.

3. A strategy based totally on persuasion and self-regulation will be exploited when actors are motivated by economic rationality.

4. A strategy based mostly on punishment will undermine the good will of actors when they are motivated by a sense of responsibility.

5. Punishment is expensive; persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion. (A highly punitive mining inspectorate will spend more time in court than in mines)

6. A strategy based mostly on punishment fosters an organised business subculture of resistance to regulation wherein methods of legal resistance and counterattack are incorporated into industry socialization (Bardach and Kagan, 1982). Punitive enforcement engenders a game of regulatory cat-and-mouse whereby firms defy the*

spirit of the law by exploiting loopholes, and the state writes more and more specific rules to cover the loopholes.

**"Going by the Book: The Problem of Regulatory Unreasonableness" (1982)"*

Almost all developed countries have a sophisticated network of Self-Regulatory structures that are in keeping with the policy of Responsive Regulation as outlined by Ayres and Braithwaite. The following features are worth highlighting:

- There is an economic imperative to operate a successful Self-Regulatory regime. The media rely on income from advertising to sustain their businesses. If consumers are misled or offended by a particular medium or consider it is publishing or broadcasting advertisements which are socially irresponsible then they will no longer support that medium. Circulation, viewership or listenership will fall as consumers lose trust in the medium. The inevitable consequence is a loss of advertising revenue as advertisers place their advertisements elsewhere. In order to sustain revenue in the longer term the media rely on a high level of trust by consumers.

It is therefore in their self-interest to have codes and a complaints system that genuinely protects consumers and reflects prevailing community standards. It is also why media, on a daily basis, will not accept advertisements that do not meet the standards set out in the self-regulatory codes.

- The same arguments apply to advertisers and advertising agencies for they also will lose revenue in the longer term if they mislead or offend consumers or act in a socially irresponsible manner.

- Self-Regulatory organizations and the wider Self-Regulatory systems make extensive use of persuasion. It is a key reason why it has very high compliance to its requests to withdraw advertisements found in breach of the Codes.

- Instead of a culture of resistance and regulatory cat-and-mouse the Self-Regulatory organizations and the wider Self-Regulatory regimes have established a culture of respect for not only the provisions of the Codes but also the spirit and intent of the Codes.

- If there were a Government Command regulatory regime with a punishment system such as fines then it is likely to lose the goodwill of the industry players, foster a sub-culture of resistance and encourage regulatory cat and mouse. Exploitation of loopholes and vastly increased expenditure would develop. It would be self-defeating.

- Self-Regulation includes social responsibility. The concept of social responsibility is included in Self-Regulatory codes. This is a key advantage of Self-Regulation as black

letter law cannot have such a concept but must spell out in detail the specific disallowable behaviors. This is very restricting and even a junior creative can find ways to design an advertisement that would comply with the law but still be socially irresponsible.

What is the Role of Government Regulation?

Government Regulation is essential for successful Responsive Regulation. Areas that affect health and wealth should have strong regulation. Medicines need to be registered to ensure they are safe and effective. The legislation should also provide that claims concerning the efficacy of medicines are truthful and accurate. The legislation should relate to the labeling and also the advertising and marketing. The role of Self-Regulation is to complement the legislation and to ensure the advertising is socially responsible. Best practice principles require close cooperation between the Regulator and Self-Regulator. The same applies to other therapeutic products and services.

Financial products require similar treatment with legislation covering all aspects including advertising. The same also applies to Fair Trading. Again to meet best practice principles there also needs to be Self-Regulatory codes to complement the activities of the Regulator along with close cooperation. In jurisdictions where this is adopted interesting patterns have developed. The Regulator deals with serious matters and a limited number of prosecutions. The Self-Regulator processes a large number of complaints but less serious matters.

In summary the Regulator operates at the second tier of the pyramid and deals mainly with illegal practices or breaches of the legislation by criminals or unethical traders and the Self-Regulator operates at the bottom tier and primarily deals with breaches of the Codes by otherwise ethical traders.

Conclusion

It therefore follows that in designing a regulatory regime there needs to be a careful selection from the regulatory options available so that the selected option is appropriate to the issue. Taking a mallet to crush a peanut will not get the desired response when dealing with an ethical advertiser who makes a mistake. In selecting the appropriate regulatory system to achieve Responsive Regulation the underlying principle should be to gain the desired response from those who are being regulated. Command Regulation with Discretionary or Nondiscretionary Punishment is appropriate for certain behaviors such as fraudulent advertising by unethical or corrupt advertisers. On the other hand Self-Regulation has a very good track record in various parts of the world of regulating advertising with a high compliance rate.

Best practice Responsive Regulation requires both Government Regulation and Self-Regulation. They are not mutually exclusive but complementary. It follows that both regulatory regimes need to cooperate with each other to achieve the best result and to avoid double jeopardy.

The secret of success of best practice Responsive Regulation is in the design. Careful design will result in a comprehensive regulatory system at moderate cost, which benefits consumers, Government, advertisers, advertising agencies and media.

CHAPTER 3

ADVERTISING SELF-REGULATION

Advertising Self-Regulation can trace its roots back to 1937, when the International Chamber of Commerce (ICC) introduced its first Advertising Ethics Code and encouraged countries to adopt it. There have been numerous revisions of that Code and new ICC Codes introduced on different issues. The ICC Codes still remain as the world standard in Codes and most countries throughout the world have modelled their individual Codes on the ICC Codes. Hence there is worldwide similarity of the codes. The latest version of the ICC Codes can be accessed on this link

<http://www.codescentre.com/index.php/downloads>

The European Advertising Standards Alliance (EASA) is the coordinating body of information and best practice in Europe, as well as running a cross-border complaints regime. It has 26 European members and nine non-European Members (Australia, Brazil, Canada, Chile, India, Mexico, New Zealand, Peru and South Africa). It is the de facto peak world organisation on advertising Self-Regulation. EASA serves as a useful forum for the exchange of information as well as promoting best practice on which it has extensive publications.

In the 1980s and 90s the American academic, Professor Jean Boddewyn of Baruch College, New York and Ayers and Braithwaite wrote several articles and texts on advertising Self-Regulation. Although the advertising industry had adopted self-regulation worldwide it tended to be ad hoc with little sophistication and consistency. Boddewyn, Ayers and Braithwaite, Australian academic Debra Harker along with fellow academics, provided the intellectual rigour to the advertising regulation debate. What followed was a rapid development of the theory and practice of advertising Self-Regulation worldwide. Consequently it flourished in the 1990s with an accompanying increase in professionalism.

In the 21st century there has been a renewed interest in Advertising Self-Regulation, particularly in relation to the key areas of food, alcohol, and children. In 2006 the European Union conducted an inquiry, involving a large number of stakeholders including consumer groups, chaired by Robert Madelin (Director-General, European Commission; Health and Consumer Protection DG) into advertising Self-Regulation. The Madelin Report is constructive in that it clearly identified the weaknesses of advertising Self-Regulation as well as its strengths, and formed the foundation for the development of a best practice model to remedy the weaknesses.

The Report sets out the diverse requirements of best practice Self-Regulation. Among those requirements is a regulatory framework within which Self-Regulation operates. For

example Fair Trading legislation sets out the rules regarding misleading conduct. The Self-Regulatory regime uses the same rules to determine misleading conduct in advertising. The Regulator is a senior jurisdiction so it is incumbent on the Self-Regulator to follow the law. The arrangement in the UK where the Government Regulator provides a legal backstop to the ASA is another example.

In short the Madelin Report was repeating the requirements of Responsive Regulation – both Government Regulation and Self-Regulation. The difference was that Madelin was saying the same thing but from the viewpoint of Self-Regulation. For Self-Regulation to be successful there is a requirement for Government Regulation to provide the regulatory framework.

CHAPTER 4

BEST PRACTICE ADVERTISING SELF-REGULATION

Advertising is a global business and usually multi-nationals dominate the top 20 advertisers in any world market. They seek common global rules for advertising and along with other ethical advertisers want advertising to be legal, decent, honest, truthful and socially responsible. The tests for whether advertising is honest and truthful are common worldwide. Standards of decency and social responsibility vary from country to country and ethical advertisers use their best endeavours to meet local standards.

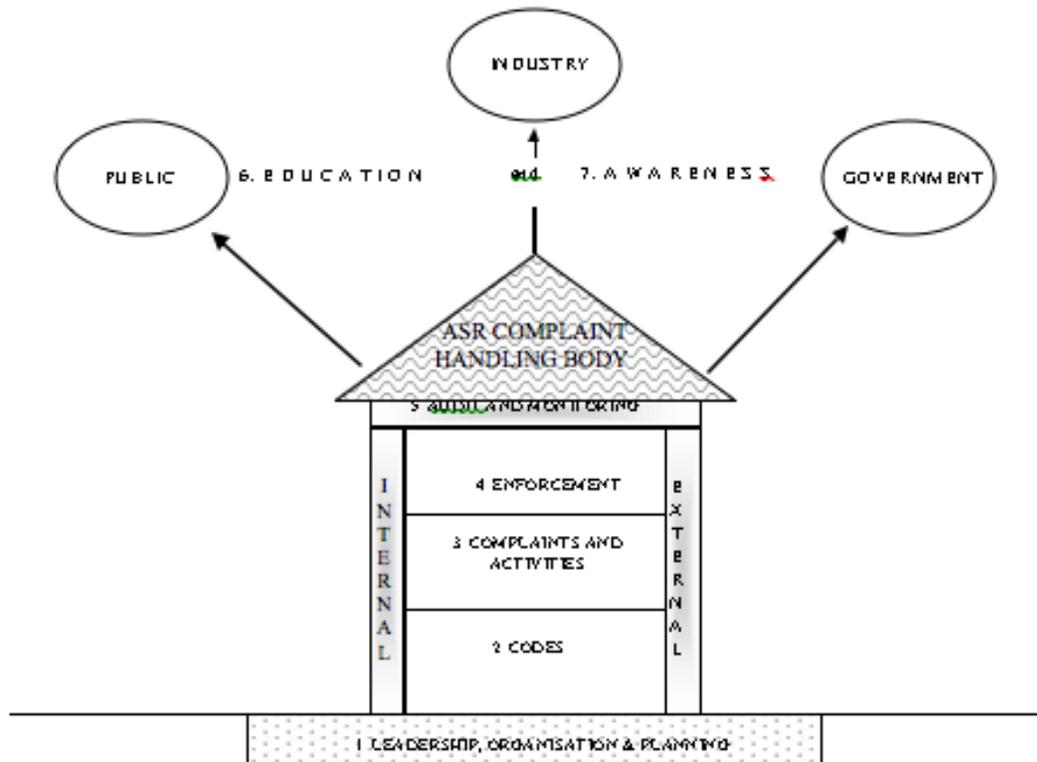
It is in the self-interest of advertisers, agencies and media for advertising to be legal, decent, honest, truthful and socially responsible. If it does not meet these high standards then consumers will lose trust and all sectors will suffer loss of revenue. There is therefore widespread industry support for best practice Self-Regulation. However best practice standards are not cheap to administer thus all of industry needs to invest money in the short term to preserve and enhance long-term revenue streams. This is quite challenging to industry in recessionary times with emphasis on cutting costs. However it is an investment that must be made.

There has been debate as to what are best practice standards. With the advent of the new media many of the standards developed in the 1990s were inappropriate and outdated. The Madelin report in 2006 was important as it clearly articulated the standards required and at the same time raised the bar significantly. The EASA developed 10 Principles of best practice in 2004 and since then has produced best practice guidelines and other very useful publications.

The Foundation for Advertising Research (FAR) team of Dr Debra Harker, Dr Michael Harker and Glen Wiggs has researched advertising self-regulation for the past 20 years. Debra Harker has been a prolific author on advertising Self-Regulation with over 20 published articles and conference papers on various aspects of the topic. Michael Harker, and to a lesser extent Glen Wiggs, have often been co-authors.

The FAR team has used practitioner-based approach to develop 'Seven Components of Best Practice'. It is based on a normative model of best practice originally first developed by Debra Harker in 2003. The model has been revised and refined to take into account the Madelin Report, the EASA's Principles of Best Practice and principles of best practice Government Regulation adopted by the Governments of United States and Australia.

The Seven Components of Best Practice Self-Regulation



1. Leadership, Organisation and Planning

Fundamental for any regulatory regime is that it should be funded and resourced to operate effectively. The preferred method of funding is a levy-based system where a small percentage of the cost of placing the advertisement is collected (usually by agencies) and remitted to the Self-Regulatory organisation. The percentage varies in different regimes from .035% to .2%. It also requires the buy-in of advertisers, agencies and media. All three sectors should also contribute to the funding although the bulk will be from the advertiser levy.

Ideally all three should be members of the Self-Regulatory organisation and take responsibility for running and funding the organisation as partners. This is called tripartite. Although the organisation is owned by industry it should act independently for the benefit of the consumer. Particular care needs to be taken that not only is the complaints panel or jury independent but also it is seen to be independent.

As it is a regulator the organization should have cooperation arrangements with other Self-Regulatory, Co-Regulatory and Government Regulatory organisations. The quality of organisational leadership and planning is vital to a successful operation.

2. Codes

The Codes should be written in plain unambiguous language. They should reflect national culture and values, law and commercial practices. There should be specific Codes to deal with sensitive areas such as alcohol and advertising to children. It is important to involve all stakeholders in the development and revision of the Codes. These stakeholders include Government agencies; academia; relevant business sectors; ethical authorities; lawyers; and consumer, family, youth and other relevant citizen organisations. There should be a commitment by industry to abide by the Codes both in the spirit and the letter.

Article 1 of the ICC Code says that all advertising should be legal, decent, honest and truthful; socially responsible; conform to the principles of fair competition; and not impair public confidence in advertising. All Codes should have jurisdiction over all of these areas and have specific provisions dealing with them.

A new issue is the scope of the Codes. With the advent of the new media new forms of promotion have been developed. These include Internet, email and SMS advertising, viral marketing, word of mouth marketing, advergames, etc. There are also the traditional marketing tools of packaging, in-store and sales promotions and sponsorship that have reached a new level of sophistication. Advertiser home websites are sometimes excluded from the definition of an advertisement on the basis that it is not paid for in third party media. Some of these activities fall within the existing definition of advertising and come within the ambit of the Codes but others do not and are completely unregulated. From a consumer perspective they are all advertising. Therefore either a parallel Self-Regulatory organisation should be established or the Self-Regulatory organisation should assume jurisdiction and extend the definition of advertising. This is a crucial challenge that Self-Regulatory organisations must solve as a matter of urgency.

3. Complaints and Results of Activities

An independent complaints panel or jury is essential. It adjudicates on complaints about advertisements made by consumers. At least 51% of the panel/jury should be independent with no background in the media or advertising. Those independent persons should have diverse backgrounds and skills but importantly should have the ability to fairly and impartially assess and adjudicate on evidence. Independent members should be selected from nominations from Government agencies; ethical authorities; consumer and citizen groups; and from expressions of interest received from public advertisement.

Decisions of the adjudication panel/jury should be in writing and contain the justification and reasons for the conclusion. They should be sent to all parties to the complaint. All decisions should be released publicly and be available on the Self-Regulatory organisation website. Not only should consumers be encouraged to complain but it should be easy to complain and for consumers to make enquiries. Use should be made of websites and toll-free telephone numbers.

Timeliness is a very important factor as justice delayed is justice denied in the fast moving world of advertising. Timeliness and other performance standards should be developed as KPIs that are publicly stated at the beginning of each year and then reported upon at the end of the year. It is not uncommon for complainants to send a complaint to the wrong authority so there should be reciprocal arrangements with other organisations to redirect complaints.

All adjudications should comply with the rules of natural justice and a right of appeal is important.

4. Enforcement

It is a common criticism of advertising Self-Regulation that the sanctions are weak as only the advertisement is withdrawn in the event of a breach of the Codes. Most critics advocate fines and other punishments. The Madelin Report disagrees and says withdrawal is an effective penalty. The Report states:

"... available evidence suggests that the business costs to companies of a withdrawal are real (reputation, share price). These market penalties can be a more effective source of good behaviour than imposition of specific financial penalties."

It is therefore important that advertisements are immediately withdrawn. In a tripartite system this is easily achieved as the media agree to abide by the decisions of the adjudication panel/jury. In non-tripartite systems formal arrangements need to be made with the media. It is recommended that media make adherence to the Codes and adjudications included in their terms of trade. There should be similar provisions in agreements between advertisers and agencies. Difficulties can arise with advertisements in the new media such as websites as the advertiser in effect controls the media. In such cases use can be made of legal backstop arrangements with the state regulator.

5. Audit

The requirement for independent audit goes back to Jean Boddewyn in the 1980s. Debra and Michael Harker also maintained that independent audit and monitoring was an

essential ingredient of successful self-regulation. However, mainly because of the cost, it is probably the area which is most ignored. Critics of Self-Regulation are becoming more vocal about the lack of independent audit and this aspect was an important part of the Madelin Report. Plainly this is the area that needs most attention by Self-Regulatory organisations.

There should be independent audit of the performance standards and KPIs and in particular the timeliness standards. Other areas of audit are the ease of complaint, whether the Codes meet the expectations of stakeholders and the quality of the decisions of the adjudication panel/jury. There should be independent surveys of stakeholder satisfaction, customer satisfaction and consumer awareness of the organisation and right to complain. All audits and surveys should be carried out on a regular basis.

An analysis of the sources of complaint, their type and frequency should be conducted from time to time. An analysis of complaints by number, Code and type should be published at least annually. Upheld rates should be benchmarked against similar international regimes. It can also be useful to benchmark against similar organisations in other fields but care should be taken to ensure that the comparison is appropriate.

6. Education

One aspect that distinguishes Self-Regulation from other regulatory systems is education of the industry. Education is an ongoing process and generally advertisers, agencies and media are keen participants. This does not happen in other areas of regulation where the public are expected to know the law and ignorance of the law is no excuse.

Self-Regulatory organisations should have structured seminar and training programmes and distribution of decisions of the adjudication panel/jury to industry members. Advertising Alerts to inform industry of important decisions of the adjudication panel/jury and new provisions in Codes are also important.

The publication of all decisions is a key part of the education programme to ensure precedents are available for the guidance of industry.

An important function is advice to industry. An effective copy advice system will ensure that ads that breach the Codes are kept to a minimum. Copy advice can be on an informal basis through to formal pre-approval. This is discussed in detail in Chapter 6.

7. Awareness

There is little point in having a Self-Regulatory system if no one knows about it. Promotion to the public is an important requirement for an effective advertising Self-

Regulation organization. Tools available include advertisements, brochures, a user-friendly website and media releases about Codes and complaints. All of these tools should be utilised. Decisions, especially about unusual complaints, provide interesting media coverage and good opportunity to publicise the right to complain. Cooperative arrangements with Government agencies and other organisations to redirect complaints will also increase awareness.

CHAPTER 5

TURBO-CHARGING ADVERTISING SELF-REGULATION BY COMBINING LEGAL AND MARKETING PRINCIPLES

Consumers are often suspicious of Self-Regulation and it is seen as an industry protection device. They believe that as a customer they will not get a fair deal and that the industry will always look after its own.

Advertising Self-Regulation can be defined as the process whereby the industry assumes the responsibility of self-disciplining its own affairs by voluntarily setting socially acceptable standards of advertising.

There are two essential legal principles for successful Self-Regulation:

- Justice must be done
- Justice must be seen to be done

These two principles are remarkably simple and well known to most people. Government Regulation abides by the same two principles.

One point should be emphasized. Virtually all Self-Regulatory bodies follow the first principle. It is ludicrous to suggest that when a person is asked to referee or adjudicate he or she will be deliberately unfair. Indeed if there is any bias there is a tendency for an industry to be very hard on its own members who overstep the mark. Those who have observed adjudication panels/juries where there are both industry and independent members will have observed that the independent members tend to be more liberal.

However members of the public simply do not believe it. Unless there is a majority of independent members justice does not appear to be done.

Government Regulation meets the requirements of the two principles by having independent courts or tribunals. There are also rituals of procedure that aid in the perception of justice being seen to be done.

Self-Regulation can be turbo-charged by using a simple marketing principle:

- The system must be customer focused

We discuss the requirements of each of the three principles.

Justice must be done

This is the judicial process and covers two aspects - the Codes and the adjudication process.

The Codes are the responsibility of the industry. They should be clear, comprehensive and set high standards. The ethics should protect individual's rights not the industry.

The adjudication procedure should follow the rules of natural justice. Many people believe that Self-Regulatory bodies are not subject to judicial review. In our view this is incorrect. There have been Court cases in a few countries where it has been alleged that the Self-Regulatory adjudication panel/jury did not follow the rules of natural justice. The adjudication panel/jury must be prepared to have its adjudications reviewed by the Courts.

The rules of natural justice sound very legal and quite formidable but they are not really. In essence the adjudications must be fair. This means that all relevant parties should be given the opportunity to be heard and what they say considered impartially. If a new point arises all parties should be given the opportunity to comment.

It is not necessary for parties to be heard orally. Relevant parties should be given a copy of the complaint and given a reasonable time to comment.

Justice must be seen to be done

It is in this area that Self-Regulation sometimes falters. Appearances are just as important as actuality. Several areas need to be considered.

The adjudication body should be independent of the industry body and should have a mix of industry and independent members. The number of independent members should be in the majority. Some regimes have only independent persons.

The Secretariat should have no history in the industry concerned. Additionally the offices should be in a neutral location.

When drafting the Codes there should not only be full consultation with the industry but, as mentioned in Chapter 4, also Government agencies; academia; relevant business sectors; ethical authorities; lawyers; and consumer, family, youth and other relevant citizen organisations.

There needs to be a review system of both the Codes and the adjudications. Codes should be formally reviewed at regular intervals. Any suggestions received from

members of the public or industry between reviews should be properly considered and if they have merit then the Codes should be amended after proper consultation. For adjudications there needs to be an appeal system. There can be an Appeal Board, but care must be taken to ensure every complaint is not automatically appealed.

The process must be tough but fair. The Self-Regulatory body should expect and demand a high standard from all industry members without fear or favour. Any industry member who does not abide by the decisions of the adjudicating panel/jury or flagrantly breaches the Codes on a regular basis should be severely dealt with.

The system should be customer focused.

This is the secret of successful Self-Regulation. It is the use of marketing principles in a judicial process. Court systems take great care to ensure that justice is done and that it appears to be done but they do not take a marketing approach. Indeed if you leaned over the counter at any Court office and asked who their customers were you would probably receive an unsatisfactory answer.

The Self-Regulatory organization should take particular care to identify its customers, find out their needs and then design the operation of the system to satisfy those needs.

The customers are the users of the complaints service - complainants, advertisers, media and advertising agencies. Each complaint has those four basic customers. Their prime need, which has been confirmed by research, is a fair and efficient system of justice - not a result in their favour. They want an adjudication, which is conducted fairly but importantly quickly, as they perceive that 'justice delayed is justice denied'.

Therefore the entire system must be customer orientated and strategies devised to satisfy customer needs.

The Codes should be easily accessible and given free to enquirers. Each complainant should automatically receive a copy of the relevant Code as should any new party to the complaints system.

There should be total commitment by the industry to Self-Regulation. The commitment and ownership of the system should be promoted to members. With that commitment there is a willingness by the industry to make the system work. With some Self-Regulatory regimes this commitment is so strong it is a passion.

The Codes should be followed not only in the letter but also the spirit. As a consequence members who seek loopholes in the Rules are 'out of court' as this is against the spirit.

This is a concept that lawyers often find difficult to accept as all their training is focused around finding loopholes.

Time must be spent on education. The public must be informed of their rights and the industry of their obligations. With education there is a higher level of adherence to the Codes. The legal maxim "ignorance of the law is no excuse" still applies on adjudications. But in accordance with marketing principles it is the Self-Regulatory body's responsibility to inform the customers of their rights and obligations not the customers' duty to find out.

All systems should be user-friendly. Complainants and other parties should receive prompt and courteous attention to correspondence and queries. There is no such thing as a frivolous complaint. It is deadly serious in the minds of complainants otherwise they would not take the time and effort to complain.

Most importantly the complaints service should be timely.

The written Decision should not only be sent to the parties but also the media. Names of the advertiser and media should be suppressed only in the most extreme circumstances for it is important that the entire process is transparent.

Virtually all of these requirements are also part of best practice. It is really a matter of emphasis – adhering to certain procedures will meet the needs of best practice but when they are followed using a customer focused approach their effectiveness is enhanced.

Successful Self-Regulation is not merely a judicial process but an application of a mix of judicial and marketing principles. It is a judicial process where the customer is king - not the law or the process itself.

A consumer focused, fair and efficient Self-Regulatory system designed to benefit the consumer will in the long run benefit the self-interests of the industry itself. Central to a marketing approach is ensuring the needs of customers are met and in doing so revenues will be generated.

The following Table contains the '15 Golden Judicial and Marketing Principles' for a successful advertising Self-Regulatory regime.

Table 1

A GUIDELINE FOR SELF-REGULATION

15 GOLDEN RULES

SELF-REGULATION IS THE PROCESS WHEREBY A PROFESSION OR AN INDUSTRY ASSUMES THE RESPONSIBILITY OF SELF DISCIPLINING - ITS OWN AFFAIRS BY VOLUNTARILY SETTING SOCIALLY ACCEPTABLE STANDARDS OF-PROFESSIONAL PRACTICE

Self-Regulation is not only a judicial process but also an application of a mix of
Judicial and Marketing Principles

OBJECTIVES FOR SELF- REGULATION	OPERATION	FOCUS J - Judicial M - Marketing
1. A commitment by the Self-Regulatory body to protect individual rights not the industry	Establish an independent body	J
2. An adjudication process which is fair	All procedures comply with the principles of natural justice	J
3. Independent adjudicators	Ensure that a majority of public members are appointed to the adjudication body, following consultation and that their names are publicised. The industry members should not be involved in the industry body. The total membership should be representative of diverse aspects of society	J & M
4. Consultation on formation of codes of ethics	Industry consults with government agencies, mainline consumer groups and the public	J & M
5. Code of ethics accessible	Codes provided to interested groups upon request and given to all complainants.	M

6. An impartial secretariat	Select staff with a reputation for sound judgment and integrity – preferably not from industry	J & M
7. Total commitment by the industry to Self-Regulation	Promote commitment and ownership as a condition of membership	M
8. Commitment by industry to codes	Codes to be interpreted and followed in the spirit as well as the letter	M
9. An educated industry	Keep members informed of organisational standards, recent research and precedent decisions. An emphasis on education	M
10. An informed public	Formulate and implement a comprehensive system of education and promotion by using brochures, advertising and publicity	M
11. A review system	Establish a mechanism for review	J & M
12. A commitment to quality service for the customer	Identify and satisfy customer needs by utilising a marketing perspective. All systems should be user friendly	M
13. Prompt action on all complaints	Define time limits for complaint hearings - 6 week turnaround	M
14. Public disclosure of disciplinary actions	Release of all decisions to the media and relevant organisations	M
15. Be tough but fair	Expect and demand a high standard from the industry without fear or favour	J & M

CHAPTER 6

COPY ADVICE AND PRE-APPROVAL OF ADVERTISEMENTS

In accordance with best practice Self-Regulatory organisations should provide a copy advice service to industry members. Copy advice and pre-approval of ads takes many forms. It is common for the secretariat of the Self-Regulatory organisation to receive requests from advertisers, agencies and media as to whether a proposed ad is likely to breach the Codes. This advice is generally informal and is given on a 'best endeavours' basis. There is no guarantee that upon complaint it could be upheld by the independent complaints panel/jury.

However Self-Regulation is not just confined to the Self-Regulatory organisation but also involves the wider industry. It is common for the television media to have a pre-approval system for all ads. The individual channels or a co-operative agency on behalf of all channels can undertake this function. The prime purpose is to classify ads appropriate for different audiences. For instance ads targeting children should not run during adult rated programs particularly if they have violence, bad language or sexual themes. It is therefore relatively easy to add a further task of ensuring the ads comply with the Codes.

Other media such as newspapers offer an advisory service. In Australia there is the Publishers' Advertising Advisory Bureau that advises newspapers and magazines on ads prior to publication. It conducts seminars for its members throughout Australia. It also works in close collaboration with the Government Regulator and the Self-Regulatory organisation. It is a valuable service that has been operating for over 30 years.

There are sector pre-approval organisations. In the UK, Ireland, Australia and New Zealand alcohol brand ads need to be pre-approved by an independent body before the media will accept the ads. Similarly in Australia and New Zealand all medicine ads require pre-approval before media acceptance. These Self-Regulatory systems require goodwill and cooperation by different sectors of the media.

None of the aforementioned pre-approval schemes are operated by the Advertising Self-Regulatory organisation but by independent organisations within the wider Self-Regulatory network. For instance in New Zealand the alcohol and medicine pre-approval systems are owned and operated by the national advertiser organisation.

The Self-Regulatory Philippines Advertising Standards Council operates one of the most sophisticated pre-approval systems. It puts emphasise on preventing non-compliant ads appearing in the media rather than a consumer complaints system. In 2010 it received over 21,000 ads for approval. 86% were approved, 7% were disapproved, 3% referred

to an independent panel for adjudication and the remaining 4% in process. Ads that are disapproved can be amended so as to remedy the breach of the Codes.

The Philippines Self-Regulatory system is unique but importantly it works and suits the local business practice and culture. It is clear evidence that there is no one ideal model of advertising Self-Regulation. There are general principles of fairness and transparency that should be followed and the Philippines regime does this.

CHAPTER 7

OTHER FORMS OF ADVERTISING SELF-REGULATION

Over the past decade there has been a rapid increase in other forms of advertising Self-Regulation. The most common is Pledge Programs. The first Pledge Program was launched in USA in November 2006 and commenced the following year. Europe was next and launched the multi-country EU Pledge in December 2007. Both programs have undergone several changes with a general tightening up of the rules. Other countries followed in quick succession and now there are 14 Programs in 44 countries as follows -

USA – 16 members
 Canada – 19 members
 EU – 11 members – 27 countries
 Thailand – 6 members
 Australia – RCMI – 16 members, QSRI – 4 members
 Brazil – 24 members
 South Africa – 24 members
 Russia – 7 members
 India – 8 members
 Gulf Cooperation Council – 7 members – 6 countries
 Philippines – 13 members
 Mexico – 11 members
 Switzerland – 10 members

The World Federation of Advertisers estimates that Pledge programs cover 2.9 billion people.

The pledges are very similar. Signatories pledge not to advertise food or beverages to children under 12 unless it is of suitable nutritional value – in other words healthy food. Most of the large multi-nationals such as Nestle, Unilever and Kraft are signatories to virtually all programs. The results of the programs have been spectacular. Independent monitoring of various programs shows a steep decline of 'unhealthy' food ads targeted at children. Early studies by health academics claimed there was little change but in recent studies there is reluctant acceptance the Pledge Programs are having a positive effect.

A common criticism is the varying nutrition criteria adopted by the Pledge members. Consequently the US Children's Food and Beverage Advertising Initiative (CFBAI) adopted quite stringent uniform nutrition criteria. It comes into force on 31 December 2013. It will be interesting to observe whether the other Programs follow but in our view that is unlikely until the CFBAI criteria have been tried and tested.

The principles of Self-Regulation best practice can also be applied to Pledge Programs. Generally the Programs meet most of the seven best practice criteria outlined in Chapter 4 but there is still some way to go. Our general observations are:

- There is good leadership, organization and funding. However the Programs are not tripartite
- The Pledges are clear but the varying nutritional data of each participant is confusing
The US is taking the lead to remedy this weakness. Also in Australia the Quick Service Restaurant (QSR) Industry Pledge Program has common nutrient criteria for all signatories.
- There is no complaints system – there are a couple of exceptions. In Australia both the QSR Pledge Program and the parallel Program for packaged goods have a complaints system. Complaints by members of the public are heard by the Advertising Standards Board (ASB), which also adjudicates on normal advertising complaints.
- There is no enforcement mechanism. Because the Pledge Programs are not tripartite non-signatories are not bound by the Pledges and the media accept their ads. However unless there are common nutrition criteria it is impossible for the media to enforce the Pledge as there are varying standards. The only one in the world that the media could enforce is the Australian QSR Program.
- There is independent monitoring of virtually all Pledge Programs and the reports publicly released.
- Generally there are good education programs for the participants and the wider industry.
- The Pledge Programs publicize the Programs but awareness by the public is unknown.

Although there are still some shortcomings when measured against best practice principles the Pledge Programs have been an outstanding success. The first Program was launched only six years ago and there has been a steady flow of changes and improvements. The ASA in the UK was arguably the first advertising Self-Regulatory organization and it has been going for over 50 years. Over that time it has made ongoing changes and improvements to meet best practice principles. We congratulate the proponents of the Pledge Programs for making such huge progress in a short time. The challenge is to continue to strive to meet best practice principles.

There are now emerging Self-Regulatory initiatives in other areas. For example, various Interactive Advisory Bureaus globally are adopting Codes of Conduct regarding Internet advertising and particularly concerning privacy issues. These initiatives are in their infancy and the challenge is to develop them in accordance with best practice Self-Regulatory principles.

CHAPTER 8

CONCLUSION

Self-Regulation is now well established and recognised as an efficient and effect way of regulating advertising. Advertising Self-Regulation has been largely unquestioned by many Governments for several decades. However, in the last few years questions have been raised as to the effectiveness of advertising Self-Regulation. The challenges have come from two different sources.

First, from mainstream consumer groups and some Governments who are concerned about the quality of some of the Self-Regulatory regimes. There is a wide range in quality from the mature, such as in the ASA in the UK, to the newer regimes who are struggling with the challenges of introducing a new regulatory system. These challenges are magnified in countries where there is little history of Self-Regulation and the concepts of best practice not understood either by Government or industry.

Secondly from advocacy groups who want to unduly restrict or ban the advertising of certain products and see that as a means to the end is to discredit Self-Regulation.

These challenges have resulted in an emphasis on best practice as well as a proliferation of other Self-Regulatory initiatives such as Pledge Programs.

Self-Regulation of advertising has a number of advantages, which in brief are:

Quicker – Advertising Self-Regulatory organisations have a quick turnaround of complaints. This can be compared with the court system that can take months or years.

Adaptable - If a Code needs to be revised this can be done quickly to meet changed circumstances. The process with full stakeholder consultation usually takes a few months but can be completed in weeks. State regulation requires legislation, which is usually measured in years.

Versatile – New forms of Self-Regulation such as Pledge Programs have emerged in response to specific needs. A remarkable feature of Pledge Programs is that in a short period of six years they have been introduced in 44 different countries – something that would be impossible to occur by Government regulation.

No Legal Loopholes - A requirement of best practice Self-Regulation is that the Codes be followed in the spirit as well as the letter. Legal technicalities therefore cannot be used in

a defence, as the spirit and intention of the Codes are paramount. In a black-letter law state system legal technicalities can be used.

Burden of Proof – With Government regulation the onus is on the complainant to prove there is a breach of the regulation. With Self-Regulation if a complainant alleges there is a breach of the Codes the onus is on the advertiser, agency and media to provide evidence there is no breach.

Responsive - Advertising Self-Regulation is by its very nature responsive and unlike State Regulation that imposes regulation on an industry, Self-Regulation has the support of the industry along with a determination to make it work.

Persuasion - Self-Regulatory regimes make extensive use of persuasion rather than punishment. It is a key reason why it has very high compliance to its requests to withdraw advertisements found in breach of the Codes. Instead of a culture of resistance and regulatory cat-and-mouse, advertising Self-Regulatory organizations and the wider Self-Regulatory regimes have established a culture of respect for not only the provisions of the Codes but also the spirit and intent of the Codes.

Economic Imperative – It is in the self-interest of the advertising industry to retain the public trust in advertising. A loss of trust whether by being misled or offended will reduce the volume of advertising and therefore revenue.

Global - Advertising is a global business and usually multi-national companies are large global advertisers. There is commonality in the Codes as virtually all are based on the ICC model Codes. Consequently there is a world standard with variations to meet the cultural expectations of individual countries.

The Future

Advertising Self-Regulation has a proud history. The last decade has seen rapid growth globally and new forms of Self-Regulation. At the same time there has been increased scrutiny of Self-Regulatory regimes that has focused the need for constant improvement.

We are of the view that the rate of growth will continue to escalate. There will also be increased focus on best practice. The challenge to industry is to constantly improve and expand Self-Regulatory regimes in accordance with best practice principles.