

**Submission on the Regulation of Billboard and Outdoor Advertising to the
House Standing Committee on Social Policy and Legal Affairs**

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In response to the call by the House Standing Committee on Social Policy and Legal Affairs for submissions on the regulation of billboard and outdoor advertising, this submission proposes a number of considerations relevant to the specified media, as well as to the regulation of advertising more generally.

Executive Summary

This submission argues that:

- The unintended consequence of the current Trade Practices and Fair Trading legislation applying to advertising is to confuse the consumer into making incorrect assumptions regarding some types of advertising claim.
- The arbitrary and subjective manner in which the Advertising Standards Bureau (ASB) rules on complaints, combined with the failure of industry-specific self-regulatory instruments such as the Australian Self Medication Industry association (ASMI) has undermined ASB authority and contributed to consumer confusion.
- That complaints received by the ASB and given the generic title “community concerns” should be broken out into the following categories, which this paper will attempt to address individually:
 - i. Complaints from competitors lodged as a means of gaining a competitive edge;
 - ii. Complaints of a vocal minority which do not reflect broader community standards;
 - iii. Complaints which fail to justify or do not distinguish between personal morality and public good;
 - iv. Complaints that represent personal aesthetics rather than public morality.

This submission concludes that:

- Campaigns and advertisements which are currently vetted by regulatory bodies should be clearly identified as such;
- Existing self-regulatory bodies should be required to publicise the objective criteria by which they plan to evaluate submissions to them and to clearly state that recommendations are non-binding where they are made on subjective grounds;
- The inconsistency of complainants’ objections indicates a private motive rather than a concern for the public good;
- Genuine community standards are adequately upheld by marketers’ profit motive and no further regulation is required.

Trade Practices and Fair Trading Legislation

The current trade practices and fair trading legislation is marred by inconsistent application. Some products are subject to advertising claims standards; other products sold through the same channel are not subject to these standards.

The consequence is an incoherent situation, where products with scientifically tested ingredients make moderate claims, while quackery is free to make the wildest claims. This causes a good deal of confusion among consumers who are lulled by the regulation of some substances into the mistaken belief that the government prevents exaggerated claims across all products and media. Take for instance the Advance Medical Institute (AMI) product which claims to treat premature ejaculation and erectile dysfunction. Without Viagra manufacturer Pfizer's good reputation to uphold, AMI blithely bypassed government controls of therapeutic goods. Having skipped product controls, AMI was hardly going to subject its claims to be an "impotency buster" and suggestion that you'll "bonk longer" to ASMI. But what happens behind the scenes of an advertising campaign is not something the public can be expected to know. Even a moderately savvy consumer without experience of the subtleties and loopholes of current Fair Trading Legislation could be forgiven for being confused into believing these unconditional claims must have passed the same regulation Pfizer would be subject to.

Alleviating consumer confusion must be a priority of any investigation into advertising standards, as consistent laws and regulations are fundamental to ensuring consumers are able to make appropriate choices.

A simple way to resolve this issue would be to require vetted products and advertising to display the mark of the approving body. We suggest the government make information on the active ingredients of medications available online and leave consumers to make their decisions at point of purchase themselves. Regulation is a blunt instrument in human communication and should not be used to replace information.

Inconsistency and failure in self-regulation

The Advertising Standards Bureau acts as the public face of a loose group of industry-specific

self-regulatory bodies, quasi self-regulatory bodies, classification services, guidelines and recommendations. Marketers and advertisers pay with a combination of per-piece fees and 'memberships' for help from these bodies in negotiating their way through a series of hoops specific to their industry and media. Some guidelines provide recommendations only; other bodies provide advice and pre-approvals designed to ensure that the advertisement or campaign complies with the trade practices act and other relevant legislation.

This submission will discuss and contrast two of these bodies: the CAD television classification system and ASMI (the Australian Self Medication Industry association) as examples of what currently works and what does not in the regulation of advertising standards.

The Commercials Advice System (CAD) reviews the script of a television commercial before it is filmed and gives an indication of the classification the commercial will receive. The classification will affect the time slot in which the commercial can be aired, so a toy brand will strive to achieve a general viewing time, while a gaming console might be happy with a 'PG' time slot. CAD determines classification based on a set of reasonably objective criteria which are published on its website. The advertiser is then free to amend the campaign to achieve a more desirable time slot or proceed with the classification obtained. While the CAD system is far from perfect, it is at least consistent.

By contrast, the Australian Self-Medication Industry Association (ASMI) goes far beyond its remit of ensuring its members' claims are substantiated and/or bear the industry-required disclaimers; ASMI makes regular expeditions into the highly subjective territory of 'consumer interpretation', pouncing upon statements they consider insufficiently qualified, leading to unclear, uninformative or simply ungrammatical results. What's more, the Association works like a self-aggrandising protection racket, with marketers and advertisers of products subject to ASMI-review 'encouraged' to become members in the hope this will positively influence the ASB when assessing the merits of a complaint. Membership is several thousand dollars, in addition to the per-advertisement processing fees marketers are charged.

But ASMI's decisions count for nothing when a complaint is escalated. When this happens, the Therapeutic Goods Administration's advertising unit (TGA) reviews complaints using a conceptual construct called 'the average consumer'. The 'average consumer' is never

defined, but the assumption appears to be that she is at the same time literate and half-witted. If this 'average consumer' could be misled by an explicit or implicit claim, the TGA rules it unacceptable.

Nor is ASMI's approval any help when a complaint is dealt with by the ASB. For instance in the case of an ad for Berocca which showed a man running along rail tracks faster than a speeding train – which ASMI had approved as a script, then as story boards and finally as a finished TV commercial – the ASB ruled that the ad might encourage the 'average consumer' to take unnecessary risks trying to out-run trains. Confronted by the rulings of this senior body, ASMI shrugs its shoulders and retreats, leaving the marketer who believed they were making an ad which would fall well within guidelines with no option but to withdraw the ad or campaign from the market – often thereby writing off hundreds of thousands of dollars in production costs.

So if the real consumer confusion arises from inconsistent vetting and the regulatory bodies themselves cannot achieve consistency in subjective criteria, the solution is not to introduce more regulation, but to improve consistency. Campaigns and advertisements which are currently vetted by regulatory bodies should be clearly identified as such. Existing self-regulatory bodies should be required to publicise the objective criteria by which they plan to evaluate submissions and to clearly state that their recommendations are non-binding where they are made on subjective grounds. **Regulation should not try to make up for a failure to communicate.**

Who is making these claims anyway?

Competitors

It is common knowledge in the advertising industry that a great many claims are originated by competitors as a means of obtaining a competitive edge. Competitors will put their names to technical complaints regarding effectiveness claims, but often use a family member to 'anonymously' lodge a more general 'consumer concerns' complaint. Their aim is to force the company whose advertisement it is to withdraw from advertising for as long as it takes to create a new ad (which, of course, includes the time it takes to have it approved by the various bodies). The time in which Competitor A is forced to withdraw its ads while

Competitor B continues to advertise gives Competitor B a market advantage.

The ASB is aware of this, as are marketers. Yet both are bound to respond to all complaints – and many of these complaints and responses appear on industry websites. Large corporations fear the damage these complaints can have on their reputation – especially if a number of them amass – even if they are not upheld. This is a particularly sneaky form of corporate sabotage which can be practiced even against the most scrupulous marketers.

The vocal minority

The ASB is obliged to treat each complaint as though it were representative of wider community concerns. Yet a much better indication of genuine community outrage exists and it is even more effective in disciplining marketers: when a broad base of consumers are offended by a marketer, or doubt the veracity of the marketer's claims, they will stop buying that marketer's product. It is far more difficult for a marketer to restore trust and rebuild consumer affinity for their brand than it is to lose it.

Marketers are terrified of venturing into territory that they believe will alienate their audience. They spend huge sums each year on focus groups and consumer research. They put new campaigns through qualitative and quantitative testing. They measure the direction in which their sales head from the moment a new campaign is released into the market to the moment it is withdrawn – and in-between times to serve as a control. They are the first to withdraw a campaign which has an unanticipated backlash – because their business is to please consumers. Marketers have no incentive to offend the wider community. Marketers do not set community standards, they reflect them.

Given that the collective decisions of the entire community are reflected in marketers' bottom lines, trying to gauge them on the basis of a handful of individual complaints is both deceptive and undemocratic.

What really motivates complaints from the public?

We have only to look at what sort of advertisements give rise to complaints and which don't to reveal that complainants are motivated more by an affront to their personal morality than

by a genuine concern for public welfare.

Personal morality versus the public good

The only marketer which is not consumer-led is the government, which regularly produces campaigns that cause fear and distress. And yet there are comparatively few complaints raised against the gory, terrifying ads government agencies bombard us with across all media – perhaps because they are in alignment with the morality of the most common complainants. Complainants often invoke the problem of explaining an adult concept to children to suggest that their complaint is a matter of wider community concern. If this is the case, graphic anti-drug, anti-tobacco and anti-alcohol advertising should also cause them concern. Why is it more difficult to explain to a child that the word “sex” on an ad refers to the love between two adults than it is to explain that grandpa’s toes are probably not going to become gangrenous from the cigarette he smokes after dinner each day?

Aesthetics and morality

Sex and sexualisation are common themes in advertising complaints. This too is a highly subjective area, complicated by the discomfort some people feel about their own bodies and inclinations. The line between a picture of a child and child pornography seems dangerously fine to some complainants. Likewise the line between an image of a semi-naked body and an incitement to commit lascivious acts with strangers. This submission does not attempt to navigate these lines on behalf of others. But inconsistencies should be pointed out. For example, an image of a normal-weight to heavy woman in her underwear does not seem to cause the same offence as that of a model. What’s more, far more suggestive poses than appear in advertisements are regularly shown to children in the name of fine art. A Rubens does not seem to cause the angst that Kate Moss does.

It is not the role of regulators to tend to individual neuroses.

Conclusion

In a society of free individuals it is inevitable that some individuals will cause offence to others. Moreover, some individuals will always be quick to take offence. If it is truly the intention of this committee to come to a ruling which reflects community standards, it must

not be swayed by a handful of complaints, but must attempt to gauge the sentiment of the community at large. In the process, it might look to remedy the confusion regulation has already introduced by passing some simple resolutions:

1. Require campaigns and advertisements which are currently vetted by regulatory bodies to be clearly identified as such;
2. Require existing self-regulatory bodies to publicise the objective criteria by which they plan to evaluate submissions to them and to clearly state that recommendations are non-binding where they are made on subjective grounds.

No further regulation is necessary, because as long as marketers continue to operate on a profit motive, their decisions will remain the best indicator of prevailing community standards.