

Editorial

All Change at The Advertising Standards Authority

*Philip Gircus**

This year sees the departure of several key people at the Advertising Standards Authority (ASA) including the Chairman, Lord Rodgers of Quarry Bank, and the Director-General, Matt Alderson. And with the system of advertising self-regulation nudging 40 years old, this makes it a good time to consider the issues now facing the system.

Self-regulation of advertising is not new. Poster contractors in the 1880's operated a form of self-regulation and the first advertising code was launched in 1924 at the International Convention of Publicity Clubs. Advertisers were enjoined to "*To seek the truth and to live it*" because "*Truthful advertising builds brands and good character*".

Systematic regulation of advertising claims began in 1926 when the Advertising Association created an advertising investigation department. It survived for nearly 40 years until its functions were handed over to the newly formed ASA in 1962. The change took place in the shadow of the Malony Committee Report on Consumer Protection – a report which epitomised the dawn of consumerism. Meanwhile, television advertising had, since 1955, been the province of a statutory body – now the Independent Television Commission. Television was considered too powerful and intrusive a medium to be left to industry self-regulation.

Self-regulation of non-broadcast advertising has twice come close to being extinguished and replaced by statutory controls. In 1974, at the height of the consumerist tide, Shirley Williams, the then Consumer Affairs Minister warned the advertising industry that a failure to make improvements would lead to legislation. A year later, a draft EEC directive proposed, initially at least, comprehensive legal controls on misleading advertising throughout the Member States which would have made the system redundant.

These threats have passed and today the ASA is a major player in the consumer protection field. It has come to be accepted by many of those, such as trading standards officers and consumer bodies, who once called for its demise.

Broadly speaking, the traditional arguments against the ASA were that it wasn't known, it wasn't independent and it had no real sanctions.

No one now claims that it is not known, but the independence argument is still heard. How can a system financed by the industry be independent? In answer, the industry points to the fact that independent members are now in the majority on the ASA Council. And, in any event, no one questions the independence of the National Consumer Council even though it is funded largely by a government grant.

The sanctions point is more problematic. For the

majority of advertisers – those with any sort of commercial reputation – an adverse ruling in a case report is a powerful sanction. That is why advertisers have, on a number of occasions, sought judicial review of ASA decisions and their reporting. But some traders don't have a commercial reputation and operate on the fringes of the commercial world in media which does not support the Code. To some extent, this deficiency has been remedied by the reserve statutory powers under the Control of Misleading Advertisements Regulations 1988, whereby the Director General of Fair Trading has a power to apply for injunctions against misleading advertising.

What of the future? Clearly, as the Control of Misleading Advertisements Regulations show, the future of self-regulation lies in a partnership with legal controls. But such a partnership requires an intelligent appreciation by the advertising industry of the limitations, as well as the strengths, of self-regulation. All too often the industry argument is that self-regulatory controls are always preferable to statutory controls. And the trade associations in the advertising world continue to do their best to prevent any public discussion of the issues. It is time for industry leaders to take a more mature approach and support the view of the former Director General of Fair Trading, Sir Gordon Borne, that when it comes to the benefits of law and self-regulation "*It's a case of horses for courses*".

More specifically, the ASA itself needs to reflect on the changes that have taken place in the marketing world since 1962. Then, traditional advertising was the pre-eminent marketing discipline, but its importance has waned as sales promotion and direct marketing have grown in significance. The ASA now polices separate rules on database practice as well as a Code of Sales Promotion, but not a single member of the ASA Council has a background in sales promotion or direct marketing. In the long run, it might make sense for the ASA to re-constitute itself as the "Marketing Standards Authority", but in the short term the new Chairman must ensure that industry appointees to the Council reflect the important marketing disciplines which the ASA now regulates. This will improve the Council's decisions and foster greater respect for them in the industry.

Secondly, the ASA, and the Committee of Advertising Practice – the industry part of the system, needs to assess how best to tackle the many problems thrown up by the media explosion and the growth of internet advertising. This is already happening but it will also require a greater degree of co-operation and co-ordination between the ASA and other regulators – both statutory and self-regulatory.

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Thirdly, the elder statesmen of the industry should consider appointing as Chairman someone with a judicial background – not uncommon in self-regulatory systems overseas. Historically, politicians have always been chosen because it was felt that the ASA's main concern was to justify the system to those who wielded political power. The Labour Party, for one, had the ending of self-regulation in advertising as official party policy until recently.

Times have changed, but, sadly, when I suggested a person with judicial experience, one of the sillier members of the ASA Council told me that judges were quite unsuitable because they would need to be told what cornflakes were!

As Richard Thomas, Head of Public Policy at Clifford Chance, and former Consumer Affairs Director at the Office of Fair Trading has put it:

“The more developed a system of self-regulation becomes, the more it looks like law, and the more it tries to behave like law the more effective it will become.

The process is also an inevitable one given that the courts have acknowledged that the ASA has important public law functions and is susceptible to judicial review. And judicial review is the means by which the growing number of advertising lawyers are increasingly putting the ASA's decisions and procedures to the test.

The time has come to recognise that a judicial background for the Chairmanship is both appropriate and timely and will further enhance the system.