

## ADVERTISING REGULATION IN AUSTRALIA AN EVALUATION

### 1 Introduction

In Australia legislative concern with the protection of consumers is of fairly recent origin<sup>1</sup> and probably the most important consumer protection statute, the Trade Practices Act 1974, post-dates its American precursors by some 60 to 80 years.<sup>2</sup> The regulation of the way in which consumer expectations are created by advertising is invariably considered an intrinsic element of consumer protection programmes since "the untrained consumer" is said to be "no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor".<sup>3</sup> The abandonment by the law of the principle *caveat emptor* seems to accord with contemporary demands for the social accountability of business.<sup>4</sup> This is reflected in the development of "regulatory offences to which the doctrine of strict or absolute responsibility applies"<sup>5</sup> and, to a lesser extent, by the burgeoning notion of unjust enrichment.<sup>6</sup> The courts are now prepared to accept that it is for the law "to control advertisers and not for what are claimed to be present advertising standards to mould the law".<sup>7</sup>

In the United States the legal regulation of advertising has begun to be questioned. It is argued that there are adequate commercial incentives for

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- 1 For a history of consumerism in Australia see Sutton, "The Consumer Protection Act 1969 (NSW) and Comparable Legislation in other States and Overseas" (1971) 4 Adel L Rev 43; Elliott, "Consumer Activism in Australia" (1973) 10 Politics 188; Newbigging, "The Consumer and Government in Australia" (1973) 14 Int Consumer 17; Layton and Holmes, "Consumerism: A Passing Malaise or a Continuing Expression of Social Concern?" (1974) 46 Aust Q 6; McKeown, "Protecting the Consumer" (1974) 36 Aust J Pub Admin 26; Harland, "Consumer Protection in Australia" (1976) 40 *Rabels Zeitschrift* 631; Thorpe, "Consumerism: Who's Concerned?" in ed Wilson, *Of Public Concern: Contemporary Australian Social Issues* (1977) 60-78.
- 2 The American precursors of the Trade Practices Act include the Sherman Act 1890, the Clayton Act 1914, the Federal Trade Commission Act 1914.
- 3 Hon K Enderby, Minister for Manufacturing Industry, Second Reading Speech on the Trade Practices Bill 1974, 29th Parl 1st sess, 1st per H of R, *Weekly Hansard* No 7, 16 July 1974, 225.
- 4 See Fisse, "Consumer Protection and Corporate Criminal Responsibility" (1971) 4 Adel L Rev 113; ed Nader, *The Consumer and Corporate Accountability* (1973); Fisse, "The Social Policy of Corporate Criminal Responsibility" (1978) 6 Adel L Rev 361; Note, "Developments in the Law: Corporate Crime: Regulating Corporate Behaviour Through the Criminal Law" (1979) 92 Harv L Rev 1227.
- 5 Howard, *Strict Responsibility* (1963) Ch 1, discussed in *Collins v Poole* (1977) 2 TPC 173.
- 6 Eg see *Ranger v Herbert A Watts* (1970) 10 DLR (3d) 395 where Harris J observed: "It seems to me the time has arrived for an examination of our law upon the obligations of manufacturers and vendors of products to implement their undertakings given in the news media by nation-wide television....To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser..." Discussed in Trebilcock, "Private Law Remedies for Misleading Advertising" (1972) 22 U Tor L J 1.
- 7 *CRW Pty Ltd v Sneddon* (1972) 72 AR (NSW) 17, 37.

sellers to provide accurate market information<sup>8</sup> and to challenge, through their own access to advertising channels, false claims by rivals.<sup>9</sup> Industry self-regulation is offered as an alternative to government regulation.<sup>10</sup> In addition to these economic arguments, American commentators have begun to raise objections to the interference with commercial free speech constituted by advertising regulation<sup>11</sup> and, on a more philosophical level, question what they regard as the arrogance and paternalism of consumer advocates who wish to replace "the rhetoric of democracy"<sup>12</sup> with their own value systems.

This article is concerned with an evaluation of the philosophy and techniques of advertising regulation in Australia and it discusses a number of reform proposals and the role of industry self-regulation in the regulatory regime.

## 2 Evaluation of Advertising

An evaluation of the legal regime in which advertising is regulated in Australia necessarily entails an evaluation of advertising itself if the regulatory regime is to be placed into a relevant social, political and economic context.

Ideally, the laws regulating advertising should be designed to eliminate any perceived vices whilst preserving any perceived benefits. An initial problem for the legal commentator is that the perception of these benefits and detriments is by no means devoid of controversy, since critics and defenders of advertising tend to adopt diametrically opposed positions. The principal claims made for advertising and the principal criticisms of the institution will now be surveyed to see whether any perspectives can be developed to inform our evaluation of the regulatory regime.

### (1) *Claims made for advertising*

The principal claims made for advertising are that it performs an important informational function and that it confers substantial economic benefits upon consumers.

#### (a) *Advertising as information*

It is frequently stated that the primary function of advertising is to furnish information about commodities to potential buyers. Examples abound of technological innovations communicated to consumers through the medium of advertising.<sup>13</sup> Of course, to the advertiser the provision of information is merely a vehicle by which he encourages consumers to purchase and as such conveys only so much information as is necessary to accomplish that aim. Thus the information transmitted by advertisers

8 Eg see Jordan and Rubin, "An Economic Analysis of the Law of False Advertising" (1979) 8 J Leg Stud 527.

9 Eg see Posner, *Regulation of Advertising by the FTC* (1973).

10 For Australian developments in this regard see text accompanying n231ff infra.

11 See *Virginia State Board v Virginia Citizens Consumer Council, Inc* 425 US 748, 761 (1976) and the authorities referred to in Hammer, "FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising" (1978) 32 Ark L Rev 446, 453-457.

12 Boorstin, "Advertising and American Civilization", in ed Brozen, *Advertising and Society* (1974) 13.

13 Eg the US Texts are fond of attributing the improvement in American dental hygiene to the advertising of toothbrushes, eg Hepner, *Advertising - Creative Communication with Consumers* (1964) 7-8.

is of an incomplete, partisan, selective nature. For example, advertisers of sugared confectionary are not likely to detail the dental consequences of the consumption of their products and advertisers of tobacco products have had to be encouraged by statute to inform consumers of the risks to health involved in smoking.<sup>14</sup> It must be conceded, however, that advertising communicates some information, even if this is confined only to the availability of the advertised product, its name and something about its use. The first question we must ask is whether this informational function is worthy of nurturing and, if it is, what legislative devices best facilitate the delivery of information to consumers.

The fundamental assumption of schemes for the enrichment of the information content of advertising is that the consumer is a rational animal, able to pursue his self-interest in the market place provided that the relevant information is freely available. This assumption forms the basis of regulatory schemes for the obligatory disclosure by advertisers and traders of information to consumers.<sup>15</sup> Examples of this approach are the various State Health Acts, Food and Drugs Acts, weights and measures legislation as well as the State credit and motor dealer's laws.

The principal problem with the assumption of consumer rationality is that it is unrealistic. Not all consumers react the same way to available market information. Some consumers, when faced with conflicting information, seek additional information to clarify the situation, others selectively reject contradictory information in order to simplify their decision making.<sup>16</sup> Among the simplification techniques that may be employed are: purchasing a national brand, the cheapest brand, the most expensive brand or purchasing products with a plain or sensible design.<sup>17</sup> Consumers may, in fact, become "simplifiers" due to what is termed "information overload", the situation where further information only leads to confusion, at which point information gathering is ceased and a decision made on a possibly "irrational" basis, such as the toss of a coin.<sup>18</sup> Thus a legal regime obliging advertisers to disclose a maximum of information might have a counter-productive effect with some consumers. A second objection to the legal enforcement of obligatory disclosure of information by advertisers is that psychological research has not yet settled the way in which information affects purchasing decisions. For example, researchers are not sure whether information first affects cognitive changes (in attention, awareness and comprehension), bringing

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14 For Federal rules affecting broadcast and televised cigarette advertising see Broadcasting and Television Act 1942 s 100A. For the State requirements concerning cigarette packaging see Cigarettes (Labelling) Act 1972 (NSW); Food and Drug Regulations 1964 (Qld); Cigarettes (Labelling) Act 1971 (SA); Cigarette Package Labelling Regulations 1972 (Vic); Cigarette Containers (Labelling) Ordinance 1972 (ACT); Cigarette Containers (Labelling) Ordinance 1972 (NT).

15 Eg see Cranston, *Consumers and the Law* (1978) Ch 9; Goldring and Maher, *Consumer Protection Law in Australia* (1979) 127-141; Smith and Swann, *Protecting the Consumer. An Economic and Legal Analysis* (1979) Ch 6.

16 See Cox, "The Influence of Cognitive Needs and Styles in Information Handling and Product Evaluations", in Cox, *Risk Taking and Information Handling in Consumer Behaviour* (1967) 370-393.

17 Bauer, "Consumer Behaviour in Risk Taking" in ed Hancock, *Dynamic Marketing for a Changing World* (1960) 389-398.

18 On information overload see the series of articles in (1974) 11 J Mktg Res viz, Jacoby, Speller and Kohn, "Brand Choice as a Function of Information Load" 63-69; Wilkie, "Analysis of Effects of Information Load" 462-466; and Summers, "Less Information is Better" 467-468.

about behaviour changes and then attitudinal changes<sup>19</sup> or whether information transmitted to consumers can only affect behaviour after it effects changes in cognition and attitude.<sup>20</sup> It is difficult to see how the law will be able to reconcile these views, clinging as it does to an outmoded cognitional psychology without recognizing the importance of affect or conation.<sup>21</sup> Finally, it is not clear what information consumers require to make purchasing decisions. This question forms the basis of hundreds of studies by consumer behaviourists.<sup>22</sup>

Notwithstanding the questionable utility of information disclosure as a protective device, our legislators appear wedded to the notion that an informed consumer is a protected consumer and to its corollary that the consumer is a rational decision-maker. If these assumptions must be accepted as a basis for advertising regulation then a number of suggestions can be made as to how the informational role of advertising can be improved.

The most obvious suggestion and one made by a former Commissioner with the US Federal Trade Commission, is that "consideration of both fairness and truth would necessarily dictate that consumers be given as complete information as possible about whatever aspect of the bargain is being stressed by the marketer as an indication to the consumer to purchase the product".<sup>23</sup> This regulatory approach is open to a number of objections. The first of these is practical; it may be impossible in the 30 seconds of a television advertisement for an advertiser to give complete information about the several salient features of, for example, a motor vehicle. Secondly, given the complexity of today's consumer goods, there is a real problem of consumer overload if detailed scientific data is reproduced in advertisements. It is suggested that these problems may be overcome if essential disclosure is confined to "information directly contrary to a factual impression conveyed by an advertisement ... when it is likely to affect the consumption decisions of a substantial number of persons".<sup>24</sup> The problem, even with this approach, is that the obligatory amplification of information contained in advertisements would be of little utility in relation to image advertising where the emulation of a prestigious or exciting life-style is often the primary selling point. The ineffectiveness of the health warning in relation to smoking illustrates the limitations of this approach.<sup>25</sup>

19 The view of Krugman, "The Impact of Television Advertising: Learning Without Involvement" (1965) 29 Pub Op Q 349.

20 See Lavidge and Steiner, "A model for Predictive Measurement of Advertising Effectiveness" (1961) 25 J Mktg 59.

21 "Affect" refers to the way we feel about things and "conation" to urges, desires, drives and needs. Wily and Stallworthy, *Mental Abnormality and the Law* (1962) 29.

22 Jacoby estimates that between 1967 and 1976 some 7,000 to 10,000 papers have been published on consumer psychology and 463 of those are listed in Jacoby, "Consumer Psychology: An Octennium" (1976) 27 Ann Rev Psych 331.

23 Jones, "To Tell the Truth, The Whole Truth..." (1971) 26 Food Drug Cosmetic LJ 173, 179-180.

24 Note, "Fairness and Unfairness in TV Product Advertising" (1978) 76 Mich L Rev 498, 526.

25 See Simon, "The Health Economics of Cigarette Consumption" (1968) 3 J Human Resources 111; Note, "Cigarette Advertising and Public Health" (1970) 6 Colum J of Law and Social Issues 99; Leppo, "Smoking Control, Policy and Legislation" (1978) BMJ 345; Horn, "Effectiveness of Measures Against Smoking (March 1979) 35 Bull Schweiz Akad Med Wiss 131.

A distinction is frequently drawn between advertisements which persuade and those which inform, but, of course, the objective of all advertising is to persuade. This makes any information disclosed by advertisements instantly suspect. The enrichment of existing information by legislative schemes of obligatory disclosure is only one way of overcoming this problem of inherent bias. Another approach which could be adopted is the promotion and provision of alternative sources of more "objective" consumer information, such as that contained in the journals of private consumer agencies like the Australian Consumers Association<sup>26</sup> or MOP UP<sup>27</sup>, or the reports of government instrumentalities such as the Trade Practices Commission, CSIRO and the various State consumer protection bureaux. The problem with this approach is that it makes greater demands on the ideal rational consumer who has to look beyond the relevant advertisement to those information sources. If, as it has been suggested, the typical consumer is "a lazy truth-seeker",<sup>28</sup> he may, after all, be better served by making his present sources of information less imperfect in content.

(b) *The economic benefits of advertising*

A comprehensive catalogue of economic benefits is attributed to advertising, ranging from benefits to the consumer and advertiser through to the stimulation of the economy at large.<sup>29</sup>

The informational function of advertising plays an important economic role. One of the fundamental assumptions underlying the theoretical analysis of competitive markets and the concept of the economic man is that all entrants into the market place should have perfect knowledge of all prices and sources of supply of relevant commodities. The information and content of advertising assists the process of bringing supply into equilibrium with demand. Recent studies have indicated that not only does advertising perform this important informational function, but that it does it less expensively than if consumers had to purchase that information elsewhere.<sup>30</sup> As Demsetz explains:

"In the absence of advertising, we might very well observe lower nominal prices, as popular notions would lead us to expect. But real price must include the cost of acquiring information about the product and its producer. The consumer will bear a larger proportion of this cost in the absence of advertising, and the information-gathering cost that he does bear may well exceed that which would have been passed on to him through the product price if it had been advertised."<sup>31</sup>

26 Publishers of *Choice*.

27 Movement Opposed to the Promotion of Unhealthy Products publishers of *Mopup Newsletter*.

28 Rozoll, Haefner and Sandage, *Advertising in Contemporary Society* (1976) 29-30.

29 On the economic effects of advertising generally see Taylor, *The Economics of Advertising* (1934); Borden, *The Economic Effects of Advertising* (1942); Bishop, *The Economics of Advertising* (1944); Backman, *Advertising and Competition* (1967); Doyle, "Economic Aspects of Advertising: A Survey" (1968) 68 *Econ J* 570; Simon, *Issues in the Economics of Advertising* (1972); Hendon, *The Economic Effects of Advertising* (1976).

30 For a summary of research on information cost, see the authorities referred to in Hirschleifer, "Where Are We in the Theory of Information" (1973) 63 *Am Econ Rev Supp* 31.

31 Demsetz, quoted in Nicosia, *Advertising Management and Society: A Business Point of View* (1974) 218.

Invariably information flow is much more efficient per person when it flows downward from the manufacturer to the consumer than when individual consumers seek information from traders above them in the competitive hierarchy.<sup>32</sup> Thus, if advertising is an efficient low-cost method of communicating, then a scheme of legal regulation which interferes with its flow can be expected to have inflationary consequences.<sup>33</sup>

As well as reducing the cost of information to the consumer, it is often argued that advertising reduces the cost of the advertised product itself. If advertising is able to increase the sales of a product then it may make mass production methods possible, realizing scale economies which can be passed on to the consumer in the form of lower prices. There is no lack of examples to suggest that advertising has helped to speed up growth in the scale of production, thereby reducing costs and prices. The spectacular reductions in price of the ball-point pen and the polaroid camera are two topical examples. Economists, however, are not in complete agreement as to the extent of the effect of advertising upon sales.<sup>34</sup>

Costs borne by consumers are also reduced if advertising improves the marketing efficiency of the advertiser. Effective advertising is impossible without market research. This has in turn induced more efficient product development. Also standardization of the quality of branded goods has been attributed to advertising. Unless repeat orders can be secured, advertising of these goods is rarely worthwhile, because an advertiser will not put an expensive promotion at risk by allowing items of inferior quality to enter the market.

Research is equivocal on the contributions made by advertising to general economic welfare. Borden, in an early study, concluded that although "advertising has not, in itself, been a causative factor of appreciable moment in cyclical fluctuations... it has tended to accentuate fluctuations because expenditures for advertising have varied directly with business activity".<sup>35</sup> On the other hand it is argued that the insignificance of advertising in the gross national product makes it unlikely that such a small tail could wag a very large dog.<sup>36</sup> Current research indicates that our present state of knowledge is inadequate to predict the impact of advertising on the economy at large,<sup>37</sup> although if it can be demonstrated that advertising affects our propensity to consume, it could be employed as an important stimulant in reviving a depressed economy.<sup>38</sup> The

32 Hendon, *supra* n29 at 39.

33 See also Stigler, "The Economics of Information" (1961) 69 J Pol Econ 213; Nelson, "Information and Consumer Behaviour" (1970) 78 J Pol Econ 311; Nelson, "Advertising as Information" (1974) 82 J Pol Econ 729.

34 See Pearce, Cunningham and Miller, *Appraising the Economic and Social Effects of Advertising* (1971); Comanor, "Advertising and the Distribution of Consumer Demand" in ed Divita, *Advertising and the Public Interest* (1974) 59-71; Taylor and Weisserbs, "Advertising and the Aggregate Consumption Function" (1972) 62 Am Econ Rev 642; Comanor and Wilson, *Advertising and Market Power* (1974) Ch 5; Cowling, Cable, Kelly and McGuinness, *Advertising and Economic Behaviour* (1975) Ch 7.

35 Borden, *supra* n29 at 734.

36 See The Economists Advisory Group, *Economics of Advertising* (1967) 16-18.

37 See Schmalensee, "Advertising and Economic Welfare" in Divita, *Advertising and the Public Interest* (1974) 82-97.

38 Simon, *supra* n29 at Ch 8.

burgeoning influence of advertising in socialist countries is cited as authority for the importance of the economic role played by advertising in stimulating economic growth.<sup>39</sup>

## (2) *Criticisms of Advertising*

The intrusiveness of modern advertising probably guarantees that it will always be the recipient of at least some criticism. A measure of this criticism may be the number of apologia produced by industry spokesmen to ensure that advertising's writ always runs large.<sup>40</sup> As we have seen, some of this criticism is constituted simply by a denial of the claims made for advertising. In addition, important economic and social criticisms are made of the institution.

### (a) *Economic Criticisms*

Since Clark's pioneering study in 1940, it has been accepted that there is a close relationship between the extent of advertising in an economy and the level of development of that economy.<sup>41</sup> A corollary to this thesis, strongly asserted by Kaldor, was that advertising promoted market concentration and hence market power.<sup>42</sup> Later studies have questioned whether intensive advertising causes market concentration, but the weight of authority now seems to be that advertising may contribute to market concentration by acting as a barrier to entry into markets.<sup>43</sup>

The aggregation of market power is considered to be undesirable because the beneficiaries of that power are able to gain profits, higher than the average in the economy, invariably out of high prices borne by consumers. The possession of market power may reduce the motivation for efficiency and innovation and may result in the aggregation and abuse of disproportionate social and political power.<sup>44</sup> These undesirable

39 See Swayne, "Soviet Advertising: Communism Imitates Capitalism to Survive" in eds Sandage and Fryburger, *The Role of Advertising. A Book of Readings* (1960) 93-103; Hanson, *Advertising and Socialism* (1974).

40 For Australian examples of this genre see Walker, *Communicators* (1967); Poulton, *The Barrage of Admass; Introduction to Advertising in Australia* (1970); Singleton, *These Thoughts are Genuine* (1971); Adams, *Adams with Added Enzymes* (1974); ed Hewatt, *Advertising in Australia, the Force that Feeds the Market Place* (1975); Carroll, *The Australian Advertising Album* (1975); ed Fowles, *Understanding Advertising* (1975); Eddington, *Advertising A Mixed Blessing* (1977); Singleton, *True Confessions?* (1979); Walker, *Soft Soap Hard Sell in Adland Australia* (1979).

41 Clark, *The Conditions of Economic Progress* (1940).

42 Kaldor, "The Economic Aspects of Advertising" (1950) 18 *Rev Econ Studs* 1.

43 Bain, *Barriers to New Competition: Their Character in Manufacturing Industries* (1956); Mueller, "Sources of Monopoly Power: A Phenomenon Called Product Differentiation" (1969) 2 *Antitrust L and Econ Rev* 1; Landon, "The Relation of Market Concentration to Advertising Rates: The Newspaper Industry and Concentration: New Data and Old Problem" (1971) 16 *Antitrust Bull* 101; Greer, "Some Case History Evidence on the Advertising-Concentration Relationship" (1973) 18 *Antitrust Bull* 307; Comanor and Wilson, *Advertising and Market Power* (1974); *contra* Telser, "Advertising and Competition" (1964) 72 *J Pol Econ* 537; Ekeland and Gramm, "Advertising and Concentration: Sane New Evidence" (1970) 15 *Antitrust Bull* 243; Ekeland and Gramm, "Advertising and Concentration: More on Tests of the Kaldor Hypothesis" (1971) 16 *Antitrust Bull.* 105; Coase, "Advertising and Free Speech" (1977) 6 *J Leg Studs* 1; Brozen, "Entry Barriers: Advertising and Product Differentiation" in Goldschmid, Mann and Weston, *Industrial Concentration: The New Learning* (1974) 115-137.

44 See Kaysen and Turner, *Antitrust Policy, An Economic and Legal Analysis* (1959) Ch 3; Walker, *Australian Monopoly Law* (1967) Ch 1; Sullivan, *Handbook of the Law of Antitrust* (1977) Ch 2; Areeda and Turner, *Antitrust Law, An Analysis of Antitrust Principles and their Application*, Vol 1 (1978) Ch 1; Kintner, *Federal Antitrust Law*, Vol 1 (1980) Ch 1.

aspects of market power were enumerated in the Second Reading Speech to the Trade Practices Act 1974 as the primary targets of that legislation.<sup>45</sup>

Advertising is said to create a barrier to entry to firms seeking to enter a market in two ways: first, intensive advertising by existing firms obliges new entrants not only to emulate that advertising, but to exceed it in order to gain a toe-hold in the market and, secondly, heavy advertising may have the effect of lowering profits for existing firms, thereby making entry less attractive.<sup>46</sup> The erection and maintenance of barriers to entry has been cited by the Trade Practices Tribunal as the principal indicium of a non-competitive market.<sup>47</sup>

It should be noted that it is only in oligopolized markets that advertising is likely to act as an entry barrier and that the anti-competitive effects of advertising will vary in different product markets. It is invariably in markets for homogeneous package goods that the impugned anti-competitive effects may be computed. Homogeneous package goods have slight or no objective physical differences, low unit cost, short time period between repeated purchases, large total dollar volume for each product industry, large proportions of sales spent on advertising and heavy use of the broadcast media, particularly television.<sup>48</sup> Major examples of those goods are soaps and detergents, tobacco products, soft drinks and confectionary, petrol, liquor, perfumes and cosmetics and patent drugs.<sup>49</sup>

Although in the early stages of the development of these goods advertising may have lowered prices by increasing sales volume and thereby achieving scale economies, continued advertising begins to act as a substitute for price competition.<sup>50</sup> The role of homogeneous package goods advertising is to differentiate products by stimulating and inculcating consumer loyalty to the advertiser's brand. Ultimately, this intensive brand advertising will cause prices to rise, but if effective, without a loss of sales to comparable cheaper products.<sup>51</sup> A new entrant seeking to penetrate that market must advertise sufficiently intensively to break down existing loyalties. This is more difficult than inducing repeat purchases<sup>52</sup> and thus constitutes a significant entry barrier as the entrant must offer its product at a price sufficiently below that charged in the market to overcome entrenched loyalties, which may well be unfeasible.

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45 Senator L K Murphy, Second Reading Speech, Trade Practices Bill 1974, 30th July 1974, Australia, 29th Parl, 1st sess, 1st per, Senate, *Weekly Hansard*, No 9, 545.

46 See Brozen, *supra* n43.

47 *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169, 186-189.

48 See Simon, *supra* n29 at 270, 271.

49 See figures in Commercial Economic Advisory Service of Australia, *Advertising Expenditure in Main Media 1979* (1979) 9.

50 Comanor and Wilson, *supra* n34 at 43.

51 Mueller, "Sources of Monopoly Power: A Phenomenon Called Product Differentiation" (1969) 2 *Antitrust and Econ Rev* 59, 172.

52 See Carman, "Correlates of Brand Loyalty: Some Positive Results" (1970) 7 (1) *J Mktg Res* 67; Chance and French, "An Exploratory Investigation of Brand Switching" (1972) 9 (2) *J Mktg Res* 226; Bass, "The Theory of Stochastic Preference and Brand Switching" (1974) 11 (1) *J Mktg Res* 1; Anderson, "The Measurement of Buyer Brand Preference and Indifference Under Changing Terms of Trade" (1974) 56 *Am J Agric Econ* 122.



The anti-competitive and inflationary effects of homogeneous package goods advertising was referred to in the 1974 inquiry by the Joint Parliamentary Committee on Prices *Report on the Prices of Household Soaps and Detergents*.<sup>53</sup> The Joint Committee noted that intensive advertising contributed to the high level of market concentration in the soaps and detergents industry, resulting in the charging of excessive prices and the earning of above average profits by each of the participants in the industry.<sup>54</sup> The Joint Committee indicated that the absence of price competition in the industry resulted in an intensification of brand competition as the principal methods of expanding and defending market shares.<sup>55</sup> The Joint Committee found that the combined profit levels of Colgate-Palmolive and Unilever were significantly above the average for the soaps and detergents industry and above the average for the manufacturing sector as a whole.<sup>56</sup> While conceding that this profitability might have been a reward for efficiency, the Joint Committee concluded that it was largely attributable to the absence of price competition and the high degree of concentration in the industry which enabled the companies to set their prices high enough to recoup their substantial advertising expenditure whilst generating high returns.<sup>57</sup> A similar conclusion was reached by the British Monopolies Commission in its investigation into the UK soaps and detergents industry.<sup>58</sup>

#### (b) *Social Criticisms*

Historically, it has been the cultural and social impacts of advertising which are singled out most frequently by the critics of the institution. This criticism has become particularly intense with the emergence of television as a dominant cultural institution in this country. The Senate Standing Committee on Education and the Arts in its recent inquiry into the impact of television on the development and learning behaviour of children, noted that 97% of Australian households possess at least one television set in front of which children spend between 20 and 40 hours per week.<sup>59</sup> On these figures, by the age of eighteen the average child will have spent some 20,000 hours watching television, which is more time than in any activity other than sleeping and almost twice as long as

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53 *Report of the Joint Parliamentary Committee on Prices of Household Soaps and Detergents* (1974) (henceforth referred as "Report") discussed in Duggan, "The Great Soap Opera" (1978) 11 Melb UL Rev 467 and Venturini, *The Administration of the Murphy Trade Practices Act* (1980) 213-242.

54 Cf *Report of the Industries Assistance Commission on Soaps and Detergents* (1976). (Hereinafter referred to as "IAC Report").

55 *Report*, paras 81, 84.

56 *Ibid* para 119.

57 *Ibid* paras 120-121, 127-128.

58 The British Monopolies Commission reported that

"competition in advertising and promotion has tended to displace price competition. The effects of this are not only to increase prices to the extent that the additional expenditure in this field is wasteful, but also...to keep new entrants out of the market, to weaken other restraints on prices and profits and to create a situation in which even the less successful of the two principal competitors...can earn extremely comfortable profits while those of the more successful...are outstandingly high".

British Monopolies Commission, *Report of the Monopolies Commission on the Supply of Household Detergents* (1966) para 116 also quoted in *IAC Report*, 41.

59 Senate Standing Committee on Education and the Arts, *The Impact of Television on the Development and Learning Behaviour of Children* (1978) paras 2.19, 4.8-4.13.

that child will have spent in a class-room. The obvious commercial implication of these statistics is that television is a particularly potent advertising medium. It can "place an expert salesman in every home in the knowledge that the commercial message will reach a captive audience incapable of being reached by any other advertising device".<sup>60</sup> This is reflected in the almost exponential increase in television's share of the total advertising market.<sup>61</sup>

The volume of advertising in the commercial mass media has led to the suggestion that they ought to be viewed not as broadcasting news and features backed by advertising, but as "advertisements which carry news features and entertainment in order to capture audience for the advertisers".<sup>62</sup> This is reflected in the annual battles by the various media for favourable audience ratings and in the fact that as much money is spent on making a sixty second advertisement as on a sixty minute film.<sup>63</sup> Since the primary aim of the commercial media is to capture large audiences, they have tended to follow well-worn formulae of programmes designed with mass appeal. This in itself has important social implications, but more pernicious is the influence which the advertising sponsor may have in television programming.<sup>64</sup> Among the examples of this influence are the failure of 42 of the 48 Australian television stations to broadcast material dealing with the Joint Committee's inquiry into the prices of household soaps and detergents<sup>65</sup> and the suppression of print advertising in northern New South Wales for the State Health Commission's anti-smoking campaign following a complaint to the Media Council of Australia<sup>66</sup> by a cigarette manufacturer.<sup>67</sup> A *cause celebre* was the decision in the late 1930's of the Melbourne *Herald* to underplay the seriousness of a polio epidemic because fear of contagion was keeping people out of large city stores.<sup>68</sup>

In addition to its salesman function, advertising in the mass media plays an important role in education and the inculcation of social values.<sup>69</sup> It thereby attracts the criticism of those who do not share those

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60 Ibid para 2.19.

61 Federation of Australian Commercial Television Stations, *Annual Report 1978-1979*, 16.

62 McQueen, *Australia's Media Monopolies* (1977) 10.

63 Adams, supra n40 at 103.

64 See Cohen, "The Advertiser's Influence in TV Programming" [1970] L & Soc Order 405; Bernouuw, *The Sponsor, Notes on a Modern Potentate* (1978).

65 McQueen, supra n62 at 12.

66 The Media Council of Australia is an unincorporated voluntary association of media associations which are themselves constituted by the proprietors of metropolitan and country newspapers and commercial radio and television stations. It administers a number of self-formulated advertising codes. See *Re Herald and Weekly Times Ltd and Others on Behalf of the Members of the Media Council of Australia* (1978) 17 ALR 281 and text accompanying nn 22 ff infra.

67 See Egger, Frape and Mackay, "Applied Problems of Media Use, the North Coast Experience" (Dec 1980) No 18 New Doctor 24.

68 Edwards, *The Editor Regrets* (1972) 83, 84, cited by McQueen, supra n62 at 12.

69 Bibliographies of the voluminous literature in this area include: ed Hermann, *The Consumer Behaviour of Children and Teenagers: An Annotated Bibliography* (1969); eds Atkin, Murray and Nayman, *Television and Social Behaviour: An Annotated Bibliography of Research Focussing on Television's Impact on Children* (1971); Banks, *Summary of Research on Child Development and the Effect of Mass Media and Television Advertising on Children* (1971); Murray, Mayman and Atkin, "Television and the Child: A Comprehensive Research Bibliography" (1970-72) 16 J Broadcasting 1; eds Murray, Rubinstein and Comstock, *Television and Social Behaviour* 4 vols(1972);

values. Children's television advertising, for example, is criticised for presenting an unrealistic picture of society and for promoting materialism and amoral cynicism.<sup>70</sup> It cannot be denied that commercial advertising carries implied cultural messages and that even if the audience resists the primary commercial message, the supplementary cultural message may still have an important influence.<sup>71</sup> The stereotyping of women in advertising has been extensively documented.<sup>72</sup> The stock roles played by women in advertising appear to be the housewife, mother or sex object and in all are viewed solely in their relationship to men. Advertising in perpetuating these stereotypes, generates the sort of psychological, social and political effects that have been detailed by the feminist writers.<sup>73</sup>

Another specific area where the deleterious social effects of advertising are criticised is the massive promotion of non-nutritious foods, principally by the fast food chains. The twentieth century has witnessed a radical change in dietary patterns in which foods rich in fats, sugar and salt have replaced the complex carbohydrates as staples, to the detriment of public health.<sup>74</sup> To a large extent those changes in eating patterns may be attributed to advertising. In 1980, more was spent on the advertising of foodstuffs than on every other advertising product category.<sup>75</sup> The Australian Consumers Association has stated that "there is little doubt that the large fast food companies consciously attempt to influence eating patterns, especially children's".<sup>76</sup> It observed that an

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69 *Cont.*

- Liebert, Neale and Davidson, *The Early Window, Effects of Television on Children and Early Youth* (1973); Berry, *Children's Television Advertising* (1977); National Science Foundation, *Research on the Effects of Television Advertising on Children* (1978).
- 70 See *Report*, para 12.30 and Thain, "Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the FTC Act" (1976) 56 BUL Rev 65; Wolinsky and Econome, "Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children" (1977) 4 Hastings Const L Q 249; Lees, "Unsafe For Little Ears? The Regulation of Broadcast Advertising to Children" (1978) 25 UCLA L Rev 25; Comment, "Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children" (1979) 54 NYUL Rev 561.
- 71 Mead, "Some Cultural Approaches to Communication Problems" in ed Schramm, *Mass Communications* (1960).
- 72 Recent Australian literature includes Edgar and McPhee, *Media She* (1974); Dowling, "Sex Role Stereotyping of Women in Australian Magazine Advertising" (1978) 3 Aust J Man 65; Dowling, "Female Role Portrayal: An Exploratory Analysis of Australian Television Advertising" (1980) No 17 Media Info Aust 3. Other leading works include, Wagner and Banos, "A Woman's Place: A Follow-up Analysis of the Roles Portrayed by Women in Magazine Advertisements" (1973) 10 J Mktg Res 213; Frisbie, "Women's Role Portrayal Preferences in Advertisements: An Empirical Study" (1974) 38 J Mktg 41; Silverstein and Silverstein, "The Portrayal of Women in Television Advertising" (1974) 27 Fed Com B J 71; Prather and Fidell, "Sex Differences in the Content and Style of Medical Advertisements" (1975) 9 Soc Sci & Med 23; Belkacui and Belkacui, "A Comparative Analysis of the Roles Portrayed by Women in Print Advertisements, 1958, 1970, 1972" (1976) 13 J Mktg Res 168; Lundstrom and Sciglianpaglia, "Sex Role Portrayals in Advertising" (1977) 41 J Mktg 72.
- 73 de Beauvoir, *The Second Sex* (1972 edn); Friedan, *The Feminine Mystique* (1963); Greer, *The Female Eunuch* (1971); Mitchell, *Women's Estate* (1973); Safalior-Rothschild, *Toward a Sociology of Women* (1972); ed Rossi, *The Feminist Papers: From Adams to de Beauvoir* (1973); Thiering, *Created Second? Aspects of Women's Liberation in Australia* (1973); Edgar and McPhee, *supra* n72.
- 74 See Gussow, "Counternutritional Messages of TV Ads Aimed at Children" (1972) J Nutrition Educ 48; Goldstein, "Malnutrition in Australia: The Role of Advertising" (1979) No 12 New Doctor 9.
- 75 *Advertising in Main Media* 1979, *supra* n49 at 9.
- 76 Australian Consumer Association, "Fast Foods" (1979) 20 (8) *Choice* 239, 241.

analysis of advertising in the Australian Capital Territory in 1978 showed that in the period prior to many children's dinner times, five food advertisers accounted for 41% of all advertising time on television compared with 3% in the succeeding hour.<sup>77</sup> The regulation of this sort of advertising is difficult as nutritional habits are not easily redirected once they have been established.<sup>78</sup> Compounding these nutritional problems is the fact that as food prices increase, ill-informed purchases exacerbate the financial burdens of the low income consumer.<sup>79</sup>

In addition to its social impact in specific areas, advertising plays an important role in transmitting cultural norms and creating consensus, particularly with the decline in the authority of traditional institutions such as the church and the family.<sup>80</sup> Unlike the traditional social institutions, it is alleged that advertising lacks social responsibility as its aim is merely to encourage consumption. In *People of Plenty*, Potter declares that advertising "has in its dynamics no motivation to seek improvement of the individual or to impart qualities of social usefulness... What is basic is that advertising as such ... ultimately regards man as a consumer and defines its own mission as one of stimulating him to consume or to desire to consume."<sup>81</sup> In surveying hundreds of television advertising scripts submitted to the Federal Trade Commission, a former Commissioner found that they expressed two principles: materialism and the personal satisfaction to be derived from emulating neighbours.<sup>82</sup> Critics of the institution thus demand that advertisers be accountable to society. The principal problem with this demand is that it creates the danger of bureaucratically imposed value judgements arising out of an assumption that consumers have to be protected against themselves and which thus impinge upon our democratic notions of freedom of expression.<sup>83</sup>

Considerable social criticism has been directed against some of the persuasive techniques of advertisers. Advertisers of homogeneous package goods, in particular, seek to differentiate their fungible products by communicating emotional appeals concerning the psychological benefits that their products will bring to consumers. This advertising can be criticised as being devoid of information content<sup>84</sup> and because the represented emotional qualities which are paired with a product are often not intrinsic to it. For example, cigarette advertising variously suggests, masculinity, femininity, individuality, peer approval, elitism, egalitarianism, cosmopolitanism and nationalism.<sup>85</sup> On the other hand, emotional appeals are defended by advertisers who contend that the

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77 Ibid.

78 Ibid.

79 Federal Trade Commission, *Staff Statement of Fact, Law and Policy in Support of the Proposed Rule and in Support of Affirmative Disclosures in Food Advertising* 39 Fed Reg Rep 39,852 at 39,854 (1974).

80 See the authorities referred to in supra n69.

81 Potter, *People of Plenty* (1954) 177.

82 Jones, "The Cultural and Social Impact of Advertising in American Society" [1970] L & Soc Ord 379.

83 See Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill LJ 263; Parish, "Consumer Protection and the Ideology of Consumer Protectionists", in eds Duggan and Darval, *Consumer Protection Law and Theory* (1980) 229-242.

84 Blakeney and Barnes, "Psychological Advertising and the Law" (1980) No 18 New Doctor 16.

85 For other examples see Williamson, *Decoding Advertisements, Ideology and Meaning in Advertising* (1978).

symbolic image of the product is as much a part of it as a product's physical characteristics<sup>86</sup> and the implied suggestion that economic factors such as price, quality and utility of products ought to be the basis of advertising rather than "irrational" emotional appeals involves a degree of censorious paternalism on the part of critics of this advertising.<sup>87</sup>

The principal iniquities of psychological advertising are said to be its manipulative and exploitive aspects. The writings of Packard in the 1950's alerted us to the possibility of "psycho-seduction" by the "hidden persuaders",<sup>88</sup> but as early as the eighteenth-century, Dr Johnson warned:

"The trade of advertising is now so near perfection that it is not easy to propose any improvement. But as every art ought to be exercised in due subordination to the public good, I cannot but propose as a moral question to those masters of the public ear, whether they do not sometimes play too wantonly with our passions?"<sup>89</sup>

The broadcast media are particularly suited to conveying emotional appeals through a gestalt of auditory and visual images, tones, colours, pictures, voice inflections and music. Consumers are receptive to these appeals because the broadcast media are used frequently as a background to other tasks, during which the consumer can be bombarded with stimuli without the impediment of his critical attention.<sup>90</sup> The mental passivity which the electronic media are alleged to induce in consumers makes them eminently vulnerable to the employment of Pavlovian conditioning techniques by which the consumer can be taught an emotional response to a product presentation.<sup>91</sup> On the other hand, it is argued that not only is the consumer not a passive *tabula rasa*, but has "anxiety concerning the possibility of being manipulated" by advertising.<sup>92</sup> These counter-arguments seem to have generated equal numbers of partisans,<sup>93</sup> but probably indefensible is the use of subliminal techniques in both the print and electronic media in which words and symbols, usually with a sexual connotation, are introduced into advertising beneath the threshold of conscious attention.<sup>94</sup>

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86 Mayer, *Madison Avenue USA* (1958) 310.

87 See Trebilcock, *supra* n83 at 264-276.

88 Packard, *The Hidden Persuaders* (1957).

89 Johnson, *The Idler*, 20 Jan 1759.

90 Krugman, "The Impact of Television Advertising Learning Without Involvement" (1965) 29 *Pub Opinion Q* 349; Robertson, "Low Commitment Consumer Behaviour" (1976) 16 *J Adv Res* 19, 22 and the authorities referred to in Oshikawa, "Learning and Behaviour Without Awareness: Their Implications to Consumer Behaviour and Sovereignty" (1970) 12 *Calif Man Rev* 61.

91 For a general discussion of Pavlovian conditioning in advertising see Reed, "The Psychological Impact of TV Advertising and the Need for FTC Regulation" (1975) 13 *Am Bus LJ* 171, 175-178.

92 Bauer, "The Limits of Persuasion" (1958) 39 *Harv Bus Rev* 109.

93 For a general survey of research see Jacoby, *supra* n22.

94 Eg, regulation 9.1 of the Canadian Television Broadcasting Regulations provides:

- "9.1 (1) No station or network operator shall knowingly broadcast any advertising material that makes use of any subliminal device.
- (2) In sub-section (1), "subliminal device" means a technical device that is used to convey or attempt to convey a message to a person by means of images or sounds of very brief duration or by any other means without that person being aware that such a device is being used or being aware of the substance of the message being conveyed or attempted to be conveyed."

Subliminal techniques can easily be made the subject of legislative prohibition,<sup>95</sup> but the elimination of undesirable psychological techniques raises important philosophical difficulties. First, the elimination of "irrational" appeals and the encouragement of "prudent" purchasing decisions by consumers presupposes a rationality which may itself be unrealistic<sup>96</sup> and imposes a paternalistic perception of relevant product attributes.<sup>97</sup> Alternatively, it has been argued that advertising, rather than creating social values, merely emulates them, hence those who wish to regulate it are making a futile protest about the social values which advertising mirrors.<sup>98</sup> The pessimistic view of Marcuse is that the correct objective of advertising regulation cannot easily be supplied by the victims of psychological techniques. He explained:

"In the last analysis, the question of what are true and false needs must be answered by the individuals themselves, but only in the last analysis; that is if and when they are free to give their own answer. As long as they are kept incapable of being autonomous, as long as they are indoctrinated and manipulated (down to their very instincts), their answer to this question cannot be taken as their own."<sup>99</sup>

The apocalyptic implications which Marcuse's views have for the policy of advertising regulation may be contrasted with McLuhan's suggestion that advertising contains the seeds of its own destruction. He considers that advertising will eventually "liquidate itself by its own success" when all production and consumption are brought into a pre-established harmony with all desire and all effort.<sup>100</sup> This "withering away" of advertising ignores the norm of expanding production which will always require new wants to be contrived to consume the additional output.

In conclusion, the least that can be said is that some psychological techniques in advertising are objectionable because they are unfair to consumers and ought to be the subject of legal regulation. The problem for the legislature is to identify areas of concern and to promulgate laws which will be effective in eliminating those techniques without arrogating undue powers of social control.

### 3 Regulatory Options

As we stated at the outset, the aim of a legal regime regulating advertising should be to preserve its perceived benefits whilst eradicating its perceived vices. We have observed that the principal benefits alleged for advertising are the provision of information and the reduction of costs whilst the principal vices alleged are the inflationary consequences of the impediments to competition constituted by advertising which creates barriers to market entry and, finally, the deleterious social consequences of psychological advertising.

#### (1) *Current regulatory options*

Most of the objectionable forms of advertising occur in relation to the promotion of homogeneous package goods in oligopolized markets in

95 See text accompanying *supra* nn 16-22.

96 See Galbraith, *The Affluent Society* (1958) 270-271.

97 See Schramm, "The Effects of Mass Communications" in Sandage and Fryburger, *supra* n46 at 204, 207; Bruzzi, *Advertising; Its Cultural and Political Effects* (1968).

98 Marcuse, *One Dimensional Man* 6-7.

99 McLuhan, *Understanding Media: The Extensions of Man* (1964) 202.

100 See *supra* n47.

which product differentiation serves to disguise the homogeneity of competing products and offers competing firms an alternative to price competition. Accordingly, the existing regulatory devices which appear most relevant to eliminate this advertising are first, an assault on the anti-competitive structure of relevant markets through the restrictive trade practice provisions of the Trade Practices Act 1974 and, secondly, the removal of misleading or deceptive messages contained in advertising.

(a) *Structural solutions*

We have already noted the Trade Practices Tribunal's recognition of barriers to entry as the primary indicium of an anti-competitive market, but oligopoly advertising can only be impugned if appurtenant to a restrictive trade practice. It is difficult to see which provisions of the Trade Practices Act could be relied upon as the basis for such an action. A recent United States development which is interestingly suggestive is the allegation of prohibited monopolization by the Federal Trade Commission against the four leading sellers of ready to eat breakfast cereal. The complaint charged that the respondents, with combined sales in excess of 92% of total sales in 1971, had engaged in "brand proliferation", "trademark exploitation", "intensive advertising" and "artificial product differentiation" and monopolized the market in contravention of section 2 of the Sherman Act.<sup>101</sup> An action involving a "shared monopoly" is theoretically possible under s 46 of the Trade Practices Act, since the indefinite article which commences the section could be widened by s 26(a) of the Acts Interpretation Act 1901, to import the plural. The remedies sought by the Federal Trade Commission included the divestiture of the respondents' assets with a view to forming new corporate entities to enter the relevant market, the implementation of a licensing scheme over existing trade marks to prevent the further proliferation of brands in the market, the prohibition of any practices found to be anti-competitive, including shelf-space services or the use of particular methods of selling or advertising, and "any other measures which may later appear to be necessary to counter and remedy the effects of the respondents' anti-competitive practices".<sup>102</sup> Divestiture is unavailable as a remedy for monopolistic abuses under the Trade Practices Act,<sup>103</sup> although s 87 of the Act may envisage orders of this sort. However, given the smaller scale of the Australian economy the remedies sought in the American breakfast cereal litigation would probably be unworkable.

In the absence of a practical option for the regulation of the structure of those markets in which undesirable advertising is most prevalent, an alternative policy option which is available under the consumer protection provisions of the Trade Practices Act is to enrich the information content of that advertising. This may be done in three ways; first, by the elimination of false, misleading or deceptive advertising; secondly, by the promulgation and enforcement of information standards; thirdly, by the ordering of affirmative disclosure and corrective advertising.

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101 *Kellogg Co* FTC Dkt No 8883 (Complaint issued April 26, 1972), (1970-1973) Trade Reg Rep (Transfer Binder) 19,899 at 21,915.

102 *Ibid.*

103 Although divestiture is a remedy for breaches of the merger provisions of the Act see Trade Practices Act 1974 s 81.

(b) *Elimination of false, misleading or deceptive advertising*

The Trade Practices Act in s 52 prohibits misleading or deceptive conduct and in s 53 prohibits false or misleading representations or statements.<sup>104</sup> This legislation is useful in regulating factual claims in advertisements but is unlikely to embrace the persuasion of image advertising, since, at most, that advertising would be regarded as unfair without being demonstrably false, misleading or deceptive. The traditional conservatism of the law which requires unequivocal proof of falsity or deception may explain the Trade Practices Commission's lack of enthusiasm in grappling with image advertising.

It will be recalled that the more objectionable examples of psychological persuasion occur in homogeneous package goods advertising. Each competitor attempts to induce in consumers the belief that its products have unique characteristics and performance attributes not shared by the others. The Joint Parliamentary Committee on Prices *Report on the Prices of Household Soaps and Detergents*<sup>105</sup> recommended that inconsistent claims in soap and detergent advertising be referred to the Trade Practices Commission for investigation of possible contraventions of the consumer protection provisions of the Trade Practices Act.<sup>106</sup> The Commission declined to institute proceedings in relation to the specific advertising claims objected to by the Joint Parliamentary Committee since they had been discontinued, although the fact of discontinuance should have been regarded as a matter of mitigation, not exculpation.<sup>107</sup> The Commission also declined to institute proceedings in relation to the general advertising themes of brand superiority on the basis that "most consumers are now experienced enough to judge this sort of advertising for themselves".<sup>108</sup> This assessment was contrary to evidence furnished by the Government Analyst to the Commission<sup>109</sup> and probably reflected a political assessment of the inadvisability of proceeding against the soaps and detergents industry<sup>110</sup> and thus involves no authoritative conclusion on the legal actionability of this advertising. Finally, the Commission reported that "lack of information in advertisements that will help consumers compare brands of laundry detergents or be immediately aware that several brands come from different and competing manufacturers does not, of itself, make the general themes misleading

104 For a survey of the voluminous case law under those sections see: Donald and Heydon, *Trade Practices Law*, Vol 2 (1978) Chs 11-12; Tapere!, Vermeesch and Harland, *Trade Practices and Consumer Protection* 2d ed (1978) Chs 14-15; Goldring and Maher, *Consumer Protection Law in Australia* (1978) Ch 7; Barnes, "Deceptive or Misleading' in s 52 in the Light of the Hornsby Case", in *The Trade Practices Act 1974: Problems for Reform*, Seminar Proceedings, University of Sydney Committee for Post-Graduate Studies in the Department of Law (1978).

105 Supra n53.

106 Ibid paras 98, 144.

107 See *Hartnell v Sharp Corporation of Australia Pty Ltd* (1975) 5 ALR 493 per Smithers J at 499.

108 Trade Practices Commission, *Third Annual Report, Year Ended 30 June 1977*, para 2.134.

109 Ibid para 2.132.

110 For a discussion of the "pantouflage" surrounding the Trade Practices Commission's investigation see Venturini, supra n53



and a contravention of the Act".<sup>111</sup> This conclusion was probably inconsistent with the Commission's own guidelines.<sup>112</sup>

In the United States, the Federal Trade Commission has been far more adventurous in its prohibition of deceptive advertising. It has recognised that advertising which is literally truthful might be deceptive in the "general impression" which it conveys about a product<sup>113</sup> and that deception is not confined to the particulars of the product itself but extends to extrinsic factors.<sup>114</sup> In relation to cigarette advertising the FTC has imposed a special duty of fair dealing on advertisers towards consumers "even if no individual advertisement viewed in isolation is deceptive under conventional principles".<sup>115</sup> The FTC's important initiatives in this area reflect a greater sensitivity to policy issues in advertising regulation than the prosaic black letter approach of the Trade Practices Commission.<sup>116</sup>

(c) *Promulgation of information standards*

One reason for the Trade Practices Commission's reluctance to pursue court actions against advertisers of soaps and detergents might have been its observation that the Standards Association of Australia was considering the formulation of information standards which manufacturers and advertisers of laundry detergents would have been expected to follow.<sup>117</sup> The Trade Practices Act was subsequently amended by the insertion of s 63AA which empowers the Minister for Business and Consumer Affairs to declare that a standard prepared or approved by the Standards Association of Australia, or other prescribed body, was a consumer product standard for the purposes of s 63 of the Act. That section imposes civil and criminal liability upon persons supplying goods without the designated product information.

The Industries Assistance Commission in its report on soaps and detergents considered that listing ingredients and their proportions on products would facilitate comparative shopping by consumers.<sup>118</sup> The difficulty with this proposal, as the Commission itself noted, was that few consumers have the scientific knowledge to appreciate the composition differences between brands<sup>119</sup> and that its implementation might preclude beneficial innovations, by entrenching particular compositions.<sup>120</sup> More significantly, as the Standards Association of Australia's approach has been to promulgate minimum composition

111 TPC, *Third Annual Report*, supra n108 para 2.13.

112 Trade Practices Commission, *Advertising Guidelines* (Commission Information Circular No 10) (20th June 1975).

113 *Charles of the Ritz Distributors Corp v FTC* 143 F 2d 676, 679 (1944).

114 See note, "Extrinsic Misrepresentations in Advertising Under Section 5 (a) of the Federal Trade Commission Act" (1966) 114 U Pa L Rev 725.

115 Federal Trade Commission. *Statement of Basis and Purpose of Trade Regulation Rule, Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to Health Standards of Smoking* 29 Fed Reg Rep 8324, 8357 (1964).

116 See Kintner and Smith, "The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency" (1975) 26 Merc L Rev 651.

117 *Report*, supra n53 at para 2.131.

118 *IAC Report*, supra n54 at para 48.

119 *Ibid* 44.

120 *Ibid* 46.

standards,<sup>121</sup> manufacturers can still vary ingredients as a basis for product differentiation.<sup>122</sup> In this highly technical area there is the very real problem of information overload obviating the benefits of standard prescription.

(d) *Affirmative disclosure and corrective advertising*

Section 80A of the Trade Practices Act empowers the Federal Court of Australia on the application of the Trade Practices Commission or the Minister for Business and Consumer Affairs to order a person who has contravened the consumer protection provisions of the Act to make affirmative disclosures or publish corrective advertising. The practical utility of orders under s 80A is significantly circumscribed by the statutory limit of \$50,000 on the amount of affirmative disclosures or corrective advertising which may be ordered under the section in relation to any one contravention or group of related contraventions. Given the expense of television advertisements this amount would be exceeded by one sixty second prime-time commercial and it is difficult to see how such orders will counter the residual effects of long-term misleading advertising campaigns.<sup>123</sup>

The leading American example, where the Federal Trade Commission ordered corrective advertising is *Warner-Lambert Co. v FTC*.<sup>124</sup> where the further advertising of *Listerine* was prohibited "unless it clearly and conspicuously disclosed in each such advertisement ... that 'contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity'".<sup>125</sup> On appeal, the Court varied the order by deleting the confessional preamble "contrary to prior advertising" as unwarranted except in an egregious case of deliberate deception.<sup>126</sup>

The Federal Court has not yet made any orders under s 80A and its comments in *Trade Practices Commission v Annand & Thompson Pty Ltd*,<sup>127</sup> in which an application for an order was refused, suggest that the remedy may well be limited to gross or reckless breaches of the Act, where there has been a pattern of illegal behaviour or where a relatively large section of the public has been affected.<sup>128</sup> Affirmative disclosure has been ordered with the consent of a defendant under s 80, the injunctive provision of the Act.<sup>129</sup> Section 80 does not have the financial ceiling of s 80A, but it is difficult to see how a mandatory disclosure of information under the section could be ordered without the consent of a defendant.<sup>130</sup>

(2) *Reform Possibilities*

The deficiencies in the currently available statutory options for the regulation of advertising counsel a brief examination of the available

121 Eg Standards Association of Australia, *Household Synthetic Laundry Detergents Powder (Composition Basis) (AS 1658-1974)*.

122 Eg see *P Lorillard Co v FTC* 186 F 2d 52 (1952).

123 See Blakeney, "Affirmative Disclosure and Corrective Advertising Orders Under Section 80 A of the Trade Practices Act 1974" (1978) 10 Comm L Ass Bull 63.

124 3 Tr Reg Rep 20, 776 (1974).

125 Ibid.

126 (1977-2) Trade Cases 61,563.

127 (1979) ALR 91.

128 Ibid 115 per Fisher J.

129 Eg in *Trade Practices Commission (Cth) and Attorney General For the Commonwealth v Tooth & Co Ltd and Tooheys Ltd* (1979) 53 ALJR 696 per Mason J at 708-709.

130 *Trade Practices Commission (Cth) and Attorney-General for the Commonwealth v Tooth & Co Ltd and Tooheys Ltd* (1979) 53 ALJR 696.

reform possibilities. Among the legislative schemes that have been suggested are the prohibition or limitation of objectionable forms of advertising, the establishment of an advertising substantiation programme, schemes for price performance labelling and mandatory comparative advertising, the taxation of advertising, counter advertising, and the prohibition of unfair advertising.

(a) *Prohibition or limitation of objectionable advertising*

The prohibition of objectionable advertising will certainly remove the perceived vices of such advertising, but at the expense of the benefits it may confer.<sup>131</sup> The obvious problem with such a proposal, apart from the philosophical one of paternalism and intellectual arrogance on the part of those recommending prohibition<sup>132</sup> is specifying the types of advertising to be prohibited.

Less extreme than a blanket prohibition of objectionable advertising is the suggestion to set an absolute maximum on advertising expenditure by limiting it to a fixed percentage of a firm's sales.<sup>133</sup> As a deconcentration device this suggestion is likely to be ineffective because a non-proportional advantage will go to the larger firms able to spend more in absolute terms,<sup>134</sup> and, further, it will, in fact, act as a barrier to entry as it will restrict the large scale advertising required by a new entrant seeking to break into a market.<sup>135</sup> The assumption that advertising limitation will eliminate undesirable advertising also makes the unwarranted assumptions that it will be the persuasive rather than the informational content which will be sacrificed by an advertiser and that the preservation of informational content will be of utility in homogeneous package goods advertising which is largely by way of emotional appeal.

A means of advertising limitation which has met with some legislative favour is the restriction of advertising to certain audiences. The proposals for the regulation of children's television advertising is a topical example<sup>136</sup> where the vulnerability of the child audience is alleged by those in favour of regulation<sup>137</sup> whilst advertisers themselves place in evidence their voluntary codes of self-regulation<sup>138</sup> and alleged posture of social responsibility.<sup>139</sup>

131 See Benham, "The Effect of Advertising on the Price of Eyeglasses" (1972) 15 J Law & Econ 337.

132 Simon, *supra* n29 at 279.

133 Discussed in Damrosch, "Advertising, Product Differentiation and Market Power: A Critical Look at Proposed Solutions" (1977) 9 (1) Antitrust L & Econ Rev 25.

134 See Smith, "The Rape of Small Business: Advertising and the Conglomerates" (1979) 11 (4) Antitrust L & Econ Rev 27.

135 See Damrosch, *supra* n133 at 37, 38.

136 See Barnes and Blakeney "The Regulation of Children's Television Advertising - The Australian Experience" (1980) 3 J Med L & Prac 265; Peck, "Pictures that Sell - Childrens Television Advertising" in Duggan and Darvall, *supra* n83 at 18-31.

137 See Senate Standing Committee on Education and the Arts, *Inquiry into the Impact of Television on the Development and Learning Behaviour of Children* (1978).

138 For a summary of the codes see Australian Advertising Industry Council, *Self Regulation in Australian Advertising* (1979).

139 *Ibid*; Australian Advertising Industry Council, *The Positive Case for Marketing Children's Products to Children* (1979); Federation of Australian Commercial Television Stations, *A Commentary on the Report by the Senate Standing Committee on Education and the Arts on Children and Television* (1979); Australian Advertising Industry Council, *Speaking Up For Advertising* (1979).

(b) *Advertising substantiation*

The Trade Practices Commission has indicated that claims of product superiority which lack a factual basis may contravene the consumer protection provisions of the Trade Practices Act.<sup>140</sup> The Commission's reluctance to initiate court action in relation to the advertising of household soaps and detergents<sup>141</sup> indicates that S 80A of the Trade Practices Act ought to be amended to enable private litigants to seek substantiation of advertising claims.

Private litigation, even with the availability of legal aid<sup>142</sup> is a costly and cumbersome way of obtaining disclosure of the relevant corrective information. The Joint Parliamentary Committee on Prices in its *Report on the Prices of Household Soaps and Detergents* recommended the establishment of an advertising substantiation programme along the lines of the programme initiated in the United States by the Federal Trade Commission.<sup>143</sup> Under this programme, the Federal Trade Commission requires advertisers in selected target industries, where advertising is significant, to submit on demand such tests, studies or other data concerning advertising claims which they had in their possession prior to the time when the claims were made and which purport to substantiate those claims.<sup>144</sup> Failure of an advertiser to supply adequate test data in support of claims made in its advertising exposes it to an action under s 5 of the Federal Trade Commission Act.<sup>145</sup> All data provided under the programme is made available for public inspection. The technicality of most data submitted under the programme considerably limits its utility as a source of product information for consumers but the programme has proved of immeasurable value in assisting FTC prosecutions against advertisers.<sup>146</sup>

(c) *Price performance labelling and mandatory comparative advertising*

A number of suggestions have been made in the United States to enhance the information content of homogeneous package goods advertising in order to enable consumers to compare competing claims. First, it has been suggested that all advertising by leading firms in concentrated industries be scrutinized by a government official to test its information content. Advertisements which fail "to disclose essential information relating to the product's price, quality and performance characteristics" should be prohibited.<sup>147</sup> This proposal obviously has the threshold problem of defining what is "essential information" as well as the administrative problem of ruling on submitted copy within a practically reasonable period of time.

140 Advertising Guidelines, supra n112 at para 5.4.

141 See text accompanying supra nn 105-116.

142 See Trade Practices Act 1974 s 170.

143 *Report*, supra n53 at para 142.

144 Federal Trade Commission, "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation" (1971) 2 Tr Reg Rep 7-573, 12,181.

145 The section provides that

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful."

146 For a discussion of the operation of the programme see, Note, "The FTC Ad Substantiation Program" (1973) 61 Geo L J 21, 23-24.

147 See Scanlon, "Anti-Competitive Advertising and the FTC: A Ban on Oligopoly Creating Ads?" (1970) 3(3) Antitrust L & Econ Rev 21, 23-24.

A second suggestion is that the advertisers of some 30 or so major consumer products be required

“to include on their product labels a combination of numbers that might be called its “price/performance ratio”, a measure that relates its unit price (in dollars) to its measured performance rating (in average units scored on a standardized performance test). The consumer confronted with a product bearing a price/information ratio of, say “\$150/70/2.14”, for example, would be receiving the information that the product’s price was \$150; that it scored an average of 70 on a series of performances tests (scale of 0 to 100); and that the ratio of the former to the latter was 2.14, a number which tells him the price per unit of performance, the ultimate measure of economic value.”<sup>148</sup>

The major problem with this suggestion is that not all products will be susceptible to this sort of comparison, particularly as not all consumers will attach the same values to each performance characteristic.<sup>149</sup> For example, some consumers purchase breakfast cereal for its nutritional value, others for its taste, others for gifts enclosed in the package and others to satisfy the demands of their children. Additionally, the concept may operate at too high a level of abstraction to permit its efficient use by consumers and there is the philosophical problem of deciding which product attributes should be excluded from the calculation, which may involve the imposition of paternalistic value-judging by a government official.<sup>150</sup>

A typical attribute of homogeneous package goods advertising is the extensive use of laudatory claims by which the advertisers extol the benefits of their products. They eschew any comparison with their competitors’ products. Since exclusively laudatory messages contain little informative content it has been suggested that firms found to be engaging in this consciously parallel advertising behaviour should be obliged “to devote a certain percentage of their future advertising budgets to a discussion of the products produced by rival firms”.<sup>151</sup> The assumption that comparative advertising would be more informative may not be warranted and also paternalistically decides for consumers which features of a product require comparison. However, this suggestion would be an interesting innovation since disparagement of competitor’s products has not been a pronounced feature of Australian advertising practice.<sup>152</sup>

#### (d) *Taxation of advertising*

The Industries Assistance Commission in its *Report on Soaps and Detergents* raised the suggestion that excessive advertising expenditures could be reduced by the imposition of a progressive tax.<sup>153</sup> This was

148 Smith, “Brand Advertising and ‘Price Performance Labelling’: A Modest Proposal” (1974-75) 7 (2) *Antitrust L & Econ Rev* 29, 41-42.

149 Damrosch, *supra* n133 at 43-44.

150 *Ibid* 44-45.

151 Schnabel, “Conscious Parallelism and Advertising Themes: The Case for ‘Comparative Advertising’ ” (1974-75) 7 (2) *Antitrust L & Econ Rev* 11, 18.

152 It should be noted that the Media Council of Australia’s Advertising of Ethics provides:

“15 Advertisements shall not disparage identifiable products, services or advertisers in an unfair or misleading way.”

153 *IAC Report*, *supra* n54 at para 48.

rejected by the Minister for Business and Consumer Affairs who considered the level of advertising to be "a matter for individual companies to determine, unfettered by Government action".<sup>154</sup> This political assessment does not, however, gainsay the practicability of taxation as a regulatory option.

A progressive tax on total advertising expenditure in taxing the firm selling many products at the expense of those selling fewer, may discourage innovation and the introduction of new products. A progressive tax on individual branded products rather than an advertising expenditure generally would be more equitable in that it would catch the saturation advertising and repetitive advertising considered objectionable. This may raise book-keeping problems and exacerbate brand proliferation by firms deliberately fragmenting products with sub-types as an avoidance device.<sup>155</sup>

An alternative approach is the suggestion that advertising not be allowed as a business expense for the purposes of income and profits tax<sup>156</sup> or that it be written off as a depreciating asset in accordance with the fact of its immediacy or delay in effect.<sup>157</sup> The depreciation suggestion may be impracticable given the paucity of research data on cumulative advertising effects.<sup>158</sup>

A final, tax-related suggestion, is that the amount of advertising broadcast per hour on the electronic media be taxed or restricted to raise the price of television advertising<sup>159</sup> although the effect of this may be to produce a greater number of stations and to precipitate a shift into other media.<sup>160</sup>

#### (e) *Counter-advertising*

Another device by which the information content of advertising might be enriched is the broadcast of counter-advertisements in industries which have a history of low information content in their advertising. This suggestion arises out of an American development in which the Federal Trade Commission recommended to the Federal Communications Commission the adoption of a principle of a right to access to the broadcast media for the purpose of expressing views and positions on controversial issues raised by commercial advertising.<sup>161</sup> The FTC listed as examples:

- (1) Advertising claims of product performance that explicitly raise controversial issues of current public performance. Eg: claims that products help solve environmental problems.

154 Press Statement by the Minister for Business and Consumer Affairs, *Consumer Aspects of the Industries Assistance Commission Report on Soaps and Detergents* (Press Statement N 77/13) 18 February 1977.

155 See Simon, *supra* n29 at 278-280.

156 Corder, *A Tax on Advertising?* (1961) 32-34.

157 Simon, *supra* n29 at 251.

158 See Palda, *The Measurement of Cumulative Advertising Effects* (1964).

159 Simon, *supra* n29 at 282.

160 See Rothenburg, "Consumer Sovereignty and the Economics of Television Programming" (1962) 4 *Studies in Public Communication* 45.

161 See Thain, "Advertising Regulation: The Contemporary FTC Approach" (1973) 1 *Fordham Urb LJ* 349-392; Collins, "Counter-Advertising in the Broadcast Media: Bringing the Administrative Process to Bear upon a Theoretical Imperative" (1974) 15 *Wm & Mary L Rev* 799.

- (2) Advertising stressing broad recurrent themes affecting purchase decisions in a manner that implicitly raises controversial issues of public importance. Eg: food ads viewed as encouraging poor nutritional habits.
- (3) Advertising claims that rely upon controversial scientific promises. Eg: test supported claims based on the opinion of some scientists but not others whose opposing views are based on different theories or tests.
- (4) Advertising that is silent about negative aspects of the advertised product.<sup>162</sup>

To facilitate the implementation of its proposals the FTC recommended that costs be reduced by the imposition of strict access rights within each category, by a prohibition of replies to particular advertisements as opposed to advertisement of a type, by limiting the length of counter-advertisements, and by presenting them in blocks of time devoted to the purpose.<sup>163</sup> The FTC further recommended that commercial time be made freely available to anyone willing to pay the specified rates and that time be made available at no charge for groups lacking the funds for counter-advertising.<sup>164</sup> The scheme was to be enforced by the Federal Communications Commission through its broadcast licensing power which was the occasion of a great deal of criticism of the FTC's "side-stepping of its own statutory responsibilities".<sup>165</sup>

Research on the effectiveness of counter-advertising messages is not conclusive<sup>166</sup> although some negative influence on the favourableness of attitude to brand has been detected in one study.<sup>167</sup> An obvious problem with such a programme is that of information overload and an advertiser with superior financial resources may be able to over-power the counter-message. On the other hand, such a scheme would be an improvement on the present situation where counter-advertising depends on slender private resources<sup>168</sup> and where even paid counter-advertising may be suppressed by the media with impunity.<sup>169</sup> If such a scheme is adopted in Australia it could be enforced through the medium of the licensing power of the Australian Broadcasting Tribunal.<sup>170</sup>

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162 Quoted in Summers, "The Fairness Doctrine and Counter-Advertising" in ed Divita, *Advertising and the Public Interest* (1974) 215, 216.

163 *Ibid* 216-217.

164 *Ibid*.

165 Note, "Fairness and Unfairness in Television Product Advertising" (1978) 76 Mich L Rev 498, 524 n151.

166 See Wilkie, "Research on Counter and Corrective Advertising" in Divita, *supra* n162 at 203-214.

167 Hunt, "Measuring the Impact and Effectiveness of Counter Messages" in Divita, *supra* n162 at 189-202.

168 An example of local counter-advertising programme is *Phelps v Western Mining Corp* (1977-78) 33 FLR 327. Discussed in Galloway, "Uranium and the Media" (1978) 1 Social Alternatives 32; Mobbs, "The Uranium Advertising Case - Legal Aid in the Public Interest" (1978) 3 Leg Serv Bull 231.

169 Eg note the fate of the NSW Health Commission's "Healthy Lifestyle Program" at the hands of the Media Council see Egger, Frape and Mackay, "Applied Problems of Media Use, the North Coast Experience" (1980) No 18 New Doctor 24.

170 See Armstrong, "Broadcasting and Television Act 1948-1976: A Case Study of the Australian Broadcasting Control Board" in ed Tomasic, *Legislation and Society in Australia* (1980), 124-145.

(f) *Prohibition of unfair advertising*

As we have seen, one of the principal deficiencies of the current laws regulating advertising is that the statutory prohibitions of false, misleading or deceptive advertising are probably too circumscribed to embrace the objectionable psychological techniques prevalent in homogeneous package goods advertising.<sup>171</sup> In the United States the Federal Trade Commission is empowered by the Federal Trade Commission Act to prohibit practices that are "unfair".<sup>172</sup> In the early days of that Act unfairness was thought to be confined to anti-trust matters,<sup>173</sup> but in *FTC v Sperry and Hutchinson Co*<sup>174</sup> the Supreme Court gave a broad interpretation of the Commission's authority to regulate "unfair" commercial practices. The Court declared that:

"the Federal Trade Commission does not arrogate excessive power to itself if in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."<sup>175</sup>

The Court cited with approval the following criteria suggested by the Federal Trade Commission for ascertaining whether a practice that was not deceptive, was nevertheless unfair:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).<sup>176</sup>

Notwithstanding the extensive regulatory authority apparently conferred on the FTC by the decision in *Sperry and Hutchinson Co*, the Commission has made only limited use of an unfairness doctrine in the advertising field.<sup>177</sup> This is attributed to the vagueness of the Supreme Court's ruling as an enforcement guideline<sup>178</sup> and its consequent inability to formulate a legal standard of unfairness,<sup>179</sup> but the failure of the FTC to exploit its authority to regulate unfair practices does not derogate

171 See text accompanying supra nn104-115.

172 See supra n145.

173 See *FTC v Raladam Co* 283 US 643 (1931) discussed in Millstein, "The Federal Trade Commission and False Advertising" (1964) 64 Colum L Rev 439; Note, "Developments in the Law — Deceptive Advertising" (1967) 80 Harv L Rev 1005; Carney, "Section 5 of the Federal Trade Commission Act — Unfairness to Consumers" [1972] Wisc L Rev 1071.

174 405 US 233 (1972).

175 Ibid 244.

176 Ibid 244-245.

177 See authorities referred to in Duggan, "Fairness in Advertising: In Pursuit of the Hidden Persuaders" (1977) 11 Melb U L Rev 50.

178 Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising" (1977) 90 Harv L Rev 661, 681.

179 See Erxleben, "The FTC's Kaleidoscopic Unfairness Statute: Section 5" (1975) 10 Gonzaga L Rev 333, 342; Schwartz, "Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness" (1977) 11 Akron L Rev 1.



from the utility of the concept of unfairness as a means for the regulation of psychological techniques in advertising.

The unfairness criteria listed by the Supreme Court in *Sperry and Hutchinson Co*<sup>180</sup> would be a starting-place for advertising regulation. It has been suggested<sup>181</sup> that "television commercials should also be considered 'unfair' when they exploit and cultivate desires and prejudices that contradict societal principles manifest in American law".<sup>182</sup> An obvious problem with this approach is that a bureaucratic instrumentality will have the task of ascertaining which societal values animate the law. This task is particularly difficult in controversial areas such as the environment, sexism and, to some extent, nutrition, where the better approach may be to allow counter-advertising by interested parties.<sup>183</sup>

Applying the common law of misrepresentation and deceit, which has served as the basis for the FTC's regulation of deceptive advertising, a model based on classical conditioning theory has been proposed for the regulation of emotionally conditioned advertising.<sup>184</sup> This "Proximity Model" declares:

An advertisement becomes "unfair" under section 5 of the Federal Trade Commission Act as it portrays a product or service in proximity with (1) a dramatic display of emotional pleasures; or (2) the satisfaction of emotional needs or desires; or (3) the alleviation of emotional anxieties or fears, where such pleasure, satisfaction, or alleviation is substantially unlikely to be similarly engendered by the actual purchase or use of the product or product types. An advertisement also becomes "unfair" under section 5 as it portrays a failure to obtain the satisfaction of emotional needs or desires or portrays the creation of emotional anxieties or fears in proximity with an omission to purchase or use the advertised product or service, where such failure or creation is substantially unlikely to be similarly engendered by an actual failure to purchase or use the product or product type.<sup>185</sup>

An objection levelled at many advertising regulation schemes, which this model avoids, is that they deny the consumer the satisfaction which may be attributable to factors extrinsic to the product itself, such as status, esteem and familial affection. This model retains extrinsic representations provided that the represented pleasure, satisfaction, or alleviation of emotional anxieties is substantially engendered by product purchase.

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180 See text accompanying supra n176.

181 Mead, supra n71.

182 An example given by Margaret Mead of this approach is her comment that

"It would...be regarded as ethical to try to persuade the American people to drink orange juice as a pleasant and nutritional drink by establishing a style of breakfast, a visual preference for oranges and a moral investment in good nutrition, but not by frightening individual mothers into serving orange juice for fear that they would lose their children's love or their standing in the community."

Ibid 343.

183 See text accompanying supra nn161-170.

184 Reed and Coalson, "Eighteenth-Century Legal Doctrine and Twentieth Century Marketing Techniques: FTC regulation of Emotionally Conditioned Advertising" (1977) 11 Ga L Rev.

185 Ibid 775.

An alternative to a broad unfairness doctrine is the development of specific categories of unfair advertising. Some categories which have been suggested are: claims published without reasonable prior substantiation, claims which exploit particularly vulnerable groups and instances in which sellers fail to provide consumers with information necessary to make choices among competing products.<sup>186</sup>

Prior substantiation would be reasonable for claims relating to health and safety, since it would rarely occur that the expense in determining safety before a product is put on the market would outweigh the economic consequences of injury to consumers because of inadequate warnings.<sup>187</sup> Image advertising would not, of course, be amenable to advertising substantiation since the puffery inevitably employed in such advertising is devoid of claims or representations.<sup>188</sup>

The exploitation of vulnerable groups may well be misleading or deceptive<sup>189</sup> and thus within the proscription of the Trade Practices Act, thereby not requiring to be prohibited by an unfairness doctrine. This seems to have been the view taken in the United States. In *ITT Continental Baking Co*<sup>190</sup> the complaint alleged that ITT Continental Baking Co Inc, the manufacturer of "Wonder Bread", and its advertising agency engaged in deceptive and unfair advertising, because in stressing the special nutritional features of the product and by televising fantasy growth sequences of children, it exploited the aspirations of children for rapid and healthy growth and parental concerns about the growth and development of their children.<sup>191</sup> Finding the advertisements deceptive, the FTC dismissed as unnecessary the separate charges of unfairness. The Chairman of the FTC dissented<sup>192</sup> holding that the unfairness allegations should have been sustained because the advertisements capitalized on children's anxiety about growth and exploited their inability to differentiate between reality and fantasy.<sup>193</sup>

Unfairness through failure to disclose is to some extent a category of deception by silence and probably caught by s 52 of the Trade Practices Act,<sup>194</sup> but deception in these circumstances is usually found only where an express claim is made and not where, as in image advertising, no express claim is made,<sup>195</sup> thus there may be some scope for a category of unfairness catching this latter advertising.

186 Pitofsky, *supra* n178 at 681.

187 *Ibid* 683.

188 As to whether puffery is caught by the Trade Practices Act see *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 501 per Bowen CJ at 570-71 discussed by Donald and Heydon, *supra* n104 at 538-542; Taperell et al, *supra* n104 at 488-490.

189 Eg children — *Parish v World Series Cricket Ltd* (1977) 16 ALR 172, 179; urban and rural poor — *SSS Company v FTC* 416 F 2d 225, 231 (1969); pregnant women — *Aronberg v FTC* 132 F 2d 165 (1942); sick and infirm — *FTC v Raladam Co* 283 US 643 (1931).

190 82 FTC 865, modified 83 FTC 1105 (1973), affirmed 532 F 2d 207 (1976).

191 83 FTC at 872.

192 *Ibid* at 964.

193 83 FTC at 942, see also Chestnut, "Television Advertising and 'Young' Children: Piaget Reconsidered" in Leigh and Martin, eds *Current Issues and Research in Advertising 1979* (1979) 225.

194 See the authorities referred to in Donald and Heydon, *supra* n104 at 542-545.

195 See *McWilliam's Wines Pty Ltd v McDonald's System of Australia Ltd* (1980) ATPR 40-188 per Smithers J.

Although the Trade Practices Act was drafted with the assistance of a lawyer from the Federal Trade Commission it is probable that unfair practices were not sought to be the subject of prohibition by that Act.<sup>196</sup> The Division of the Act in which the prohibition of misleading or deceptive conduct occurs is headed "Unfair Practices". In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*<sup>197</sup> Mason J explained that this context meant that the prohibition of misleading or deceptive conduct in s 52 "emerges as an important general prohibition engaged in a form of conduct, a trade practice, which is unfair".<sup>198</sup> But in *Hornsby Building Information Centre Pty Ltd and Another v Sydney Building Information Centre Ltd*<sup>199</sup> Stephen J contrasted the legislative history of s 5 of the Federal Trade Commission Act with the Australian provision, observing that s 52 "is on the contrary exclusively concerned with consumer protection. It says nothing about unfair acts or practices but devotes itself to the prohibition of conduct which misleads or deceives".<sup>200</sup> In the light of this, the Trade Practices Act, if it is to regulate advertising which, while not misleading or deceptive, is unfair, will require amendment.

A statutory formula for the prohibition of objectionable advertising is suggested by the United Kingdom Fair Trading Act 1973 which in s 34 establishes procedures for the elimination of business conduct which:

- "(a) is detrimental to the interests of consumers in the United Kingdom whether those interests are economic interests or interests in respect of health, safety, or other matters, and
- (b) ....to be regarded as unfair to consumers."

The section goes on to define unfair practices in fairly narrow terms which do not appear to augment any pre-existing legal rights which consumers might have.<sup>201</sup> The conservative approach of the UK statute reflects a generally tentative approach to the regulation of anti-consumer abuses.<sup>202</sup> Should it appear to the Director General of Fair Trading that a person has engaged in detrimental or unfair conduct then the Director

196 Comment by H E Bennett, First Assistant Secretary, Attorney-General's Department, in Committee for Post Graduate Studies, University of Sydney, *The Consumer and the law* (1973) 81-82.

197 (1977) 137 CLR 545.

198 Ibid 561.

199 (1977-78) 140 CLR 216.

200 Ibid at 226-227.

201 Section 34 of the U.K. Fair Trading Act 1973 provides:

- "(2) For the purposes of subsection (1) (b) of this section a course of conduct shall be regarded as unfair to consumers if it consists of contraventions of one or more enactments which impose duties, prohibition or restrictions enforceable by criminal proceedings, whether any such duty, prohibition or restriction is imposed in relation to consumers as such or not and whether the person carrying on the business has or has not been convicted of any offence in respect of any such contravention.
- (3) A course of conduct on the part of the person carrying on a business shall also be regarded for those purposes as unfair to consumers if it consists of things done, or omitted to be done, in the course of that business in breach of contract or in breach of a duty (other than a contractual duty) owed to any person by virtue of any enactment or rule of law and enforceable by civil proceedings, whether (in any such case) civil proceedings in respect of the breach of contract or breach of duty have been brought or not."

202 Cranston, *Consumers and the Law* (1978) Ch 8; Harvey, *The Law of Consumer Protection and Fair Trading* (1978).

General "shall use his best endeavours, by communication with that person, or otherwise to obtain from him a satisfactory written assurance that he will refrain from continuing that course of conduct and from carrying on any similar course of conduct in the course of that business".<sup>203</sup> Where the Director General is unable to obtain an assurance, or where the assurance given has not been observed, proceedings may be brought in the Restrictive Practices Court,<sup>204</sup> where an order may be made directing the respondent to refrain from its objectionable conduct.<sup>205</sup> This laborious machinery is probably too cumbersome to deal with advertising abuses, particularly since it does not appear to provide for the remedying of past deception.<sup>206</sup>

A much more useful regulatory approach is suggested by s 14(1) of the Fair Trading Act, which empowers the Secretary of State or any other Minister or the Director General of Fair Trading to refer to a body known as the Consumer Protection Advisory Committee<sup>207</sup> questions as to whether a "consumer trade practice"<sup>208</sup> "adversely affects the economic interests of consumers in the United Kingdom". This could easily embrace advertising powers. The utility of s 14 is restricted by a lack of available sanctions. The Director General can merely recommend to the Secretary of State the promulgation of regulations.<sup>209</sup> Both the ambit of the references which the Director General might make and the regulation which he might recommend, are circumscribed by the Act<sup>210</sup> and even

203 UK Fair Trading Act 1973, s 34 (1).

204 Ibid s 35.

205 Ibid s 37 (2).

206 For actions under s 34 see Director-General of Fair Trading, *Annual Reports* (1975-1979); Harvey, *supra* n202 at 205-206.

207 Created by s 3.

208 Consumer trade practice is defined in s 13 as "any practice which is for the time being carried on in connection with the supply of goods (whether by sale or otherwise) to consumers or in connection with the supply of services for consumers and which relates —

(a) to the terms or conditions (whether as to price or otherwise) on or subject to which goods or services are or are sought to be supplied, or

(b) to the manner in which those terms or conditions are communicated to persons to whom goods are or are sought to be supplied or for whom services are or are sought to be supplied, or

(c) to promotion (by advertising, labelling, or marking of goods, canvassing or otherwise) of the supply of goods or of the supply of services, or

(d) to methods of salesmanship employed in dealing with consumers, or

(e) to the way in which goods are packed or otherwise got up for the purpose of being supplied, or

(f) to methods of demanding or securing payment for goods or services supplied."

209 See Korah, "Fair Trading Act and the Functions of the Director General" [1973] J Bus L 305.

210 Section 17 (2) provides that any references in respect of practices which appear to the Director General to have the effect

"(a) of misleading consumers as to, or withholding from them adequate information as to, or an adequate record of, their rights and obligations under relevant consumer transactions; or

(b) of otherwise misleading or confusing consumers with respect to any matter in connection with relevant consumer transactions; or

(c) of subjecting consumers to undue pressure to enter into relevant consumer transactions; or

(d) of causing the terms or conditions, on or subject to which consumers enter into relevant consumer transactions, to be so adverse to them as to be inequitable..."

may be made under s 14 and the Sixth Schedule to the Act lists the sort of recommendations which the Director General might typically make in order to deal with these abuses. The schedule permits proposals providing:

where the recommendation is acted upon, the Secretary's decision is subject to the overriding veto of Parliament.<sup>211</sup> The extent to which a powerful trader can resist a mere recommendation is illustrated by the way that Hoffman-La Roche and Co AG resisted up to the House of Lords orders of the Secretary of State, which were approved by both Houses of Parliament, reducing the price charged by the company for "Librium" and "Valium", which had been found to be excessive.<sup>212</sup>

The limited efficacy of the United Kingdom legislation should not, however, derogate from its usefulness as a statutory precedent for a flexible rule-making process which is particularly suited to rapidly changing advertising techniques if backed by sanction.

#### 4 Industry Self-Regulation

The inadequacies of the current regime for the legal regulation of advertising in Australia raise the question whether the industry itself is more capable of putting its own house in order. Unfortunately, the enthusiasm with which industry representatives embrace self-regulation probably reflects more their concern about legal regulation than an enthusiasm for the efficacy of their own proposals.<sup>213</sup>

The principal industry scheme for the regulation of advertising is that administered by the Media Council of Australia. The Media Council is a trade association of major media organisations and its regulation of advertising is appurtenant to an accreditation system administered by it. The accreditation system entitles accredited agents to place advertisements with Media Council-affiliated proprietors.<sup>214</sup> The accreditation rules provide that all advertisements submitted to a media proprietor shall conform with the Media Council's Code of Ethics and its codes governing the advertising of products such as proprietary medicines, cigarettes, alcoholic beverages, hair-piece treatments, slimming

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#### 210 Cont.

1 Prohibition of the specified consumer trade practice either generally or in relation to specified consumer transactions.

2 Prohibition of specified consumer transactions unless carried out at specified times or at a place of specified description.

3 Prohibition of the inclusion in specified consumer transactions of terms or conditions purporting to exclude or limit the liability of a party to such a transaction in respect of specified matters.

4 A requirement that contracts relating to specified consumer transactions shall include specified terms or conditions.

5 A requirement that contracts or other documents relating to specified consumer transactions shall comply with specified provisions as to lettering (whether as to size, type, colouring or otherwise).

6 A requirement that specified information shall be given to parties to specified consumer transactions.

211 Sections 22 (4), 134 (1).

212 *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, discussed in Rhineland, "Roche... Case: One Giant Step for British Antitrust" (1974) 15 Va J Int L 1; Note, "Patent Law and Drug Prices: Implications of the Roche Case" (1976) 4 Syr Int L & Com 189.

213 For example, note the industry response to the current proposals for the regulation of children's television advertising discussed in Barnes and Blakeney, *supra* n136 at 277-281.

214 See *Re Herald and Weekly Times Ltd on Behalf of Members of the Media Council of Australia* (1978) 17 ALR 281.

preparations and domestic insecticide.<sup>215</sup> The Trade Practices Tribunal has commented favourably on the scheme. It accepted that:

“the primary object and effect of the Code of Standards in the Accreditation Rules and the associated Standards and Code of Ethics is to promote honesty, fairness and responsibility in advertising. The promotion of such standards is clearly in the public interest.”<sup>216</sup>

The Tribunal felt that the codes were of benefit to the public because:—

Those Codes and Standards cover areas which are not covered by legislation.

They enable immediate action to be taken to stop contravening advertisements without Court proceedings. Legislative codes can only be enforced by Court proceedings which are much more time-consuming and costly.

They enable a common standard to be applied by all media proprietors to a particular advertisement. Under a legislative code different interpretations are likely by different media proprietors in the application of the code to particular advertisements.

They enable standards of advertising to be maintained and improved. Under legislative codes, standards will tend to drop to the minimum standard permissible under the law.

They enable advertisements in areas which experience has shown need special safeguards (e.g. slimming treatments) to be cleared before publication. This procedure is more beneficial to the public than a prosecution under a legislative code against an advertiser long after the advertisement has been published.

They enable advertisements such as advertisements for proprietary medicines to be required to be substantiated before the advertisement is published and for the claims made for the product to be evaluated by an independent medical expert. Under a legislative code, the fate of a prosecution may depend upon the evaluation by a Court of competing medical opinions.

They are conducive to the achievement of uniform standards of advertising throughout Australia.<sup>217</sup>

Some of the benefits to the public identified by the Tribunal reflect an abdication of government responsibility for the protection of consumers. For example, the discrepancies between the detailed provisions of the code governing proprietary medicines and the more general provisions contained in some State legislation ought not be regarded as in the public interest.<sup>218</sup> The Tribunal's contrast between the common standard applied by the codes and differing interpretations of legislative provisions is not borne out in practice. For example, in the recent Paul Hogan case<sup>219</sup> the protagonists argued solely about the interpretation of the

215 These codes are reproduced as appendices to Australian Advertising Industry Council, *Self Regulation in Australian Advertising* (1979).

216 *Re Herald and Weekly Times*, supra n214 at 309.

217 *Ibid.*

218 Darvall, “Self-Regulation of Advertising and the Consumer Interest” (1980) 8 *Aust Bus L Rev* 309, 315.

219 *Re Rothmans of Pall Mall (Aust) Ltd*, per Sir Richard Kirby (Unreported 2 May 1980).

words "major appeal" appearing in the Media Council's cigarette advertising code, an interpretation which could only be settled after an appeal to the Chairman of the Advertising Standards Council.<sup>220</sup> Finally, there is no evidence that standards of advertising practice will be higher in a voluntary scheme than under legislation.

Two important objections to the Media Council's self-regulation scheme are that there are no provisions requiring advertisers to compensate consumers for contravening advertisements and "it is probably unrealistic to expect the advertising industry to subordinate its self-interest to the public good by vigorous enforcement of its codes".<sup>221</sup> Recent experiences with the enforcement of Media Council codes reveal some of these problems. The decision of Sir Richard Kirby that Paul Hogan be removed from cigarette advertising by Rothmans because he was a person of major appeal to children, in contravention of clause 4 of the cigarette advertising code,<sup>222</sup> was not made until 18 months after the first complaint to the Media Council.<sup>223</sup> In addition, the decision by Sir Richard Kirby ordered Rothmans merely "to take steps" to have Hogan excluded from their advertising and that it would be "reasonable" for them to have an additional 6 weeks to "stop this inclusion",<sup>224</sup> although new Hogan posters were seen going up after this time.<sup>225</sup>

The Hogan ruling was not favourably received by the advertising industry, being criticised by the Australian Advertising Industry Council.<sup>226</sup> Further complaints to the Advertising Standards Council about cigarette advertising allegedly contravening the cigarette code have been peremptorily rejected.<sup>227</sup> The procrastination in the Hogan case can be contrasted with the Media Council's expedition in dealing with anti-cigarette advertising by the Health Commission of New South Wales.<sup>228</sup> Within 7 days of a complaint by Phillip Morris Pty Ltd the Health Commission was informed that all its print advertisements had been suspended. Revised advertisements were finally passed for use almost 15 weeks after the original suspension. During this period, cigarette advertisements in the Lismore *Northern Star*, the local newspaper, increased by 260%.<sup>229</sup>

Another important industry agency for the regulation of advertising standards is the Commercial Acceptance Division of the Federation of Australian Commercial Television Stations ("FACTS"). This body previews all television commercials which are within the scope of the

220 Discussed in (1980) 1 (4) *MOP UP Newsletter* 1-11.

221 See Australian Consumers Association, *Self-Regulation and the Consumers' Interest* (1977) 25-30.

222 See supra n219.

223 See Dunoon, 'Cigarette Advertising: Is Self-Regulation Self-Destruction?' (1980) No 18 *New Doctor* 20.

224 Supra n219.

225 Dunoon, supra n223 at 21.

Parsons, "Kirby Rebuked but Codes Stay for the Time Being", *Advertising News*, 6 June 1980.

226 Dunoon, supra n223 at 22.

227 See Egger, Frappe and McKay, "Applied Problems of Media Use in Health Promotion - The North Coast Experience" (1980) No 18 *New Doctor* 24.

228 *Ibid* 25.

229 *Ibid*.

Media Council's codes.<sup>230</sup> If not approved, commercials cannot be screened. If approved, they may be classified in a way which restricts the time of screening. FACTS has also set up a Code Board to devise and administer proposed voluntary codes of conduct.<sup>231</sup>

Advertising standards promulgated as voluntary codes have a propensity for greater flexibility than statutory criteria but are obviously open to abuses in administration. The Australian Broadcasting Tribunal made this observation in its recent report on self-regulation for broadcasters in which it declared that notwithstanding the desirability of industry self-regulation, children's programming and advertising were much too important to be left to the industry alone.<sup>232</sup> Any defects in the legal regime for the regulation of Australian advertising may thus be regarded as a price to be paid for the protection of consumers. But, as we have suggested, this expense can be mitigated by the implementation of some of the reform proposals that we have canvassed above.

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230 For an outline of the activities of the FACTS Commercials Acceptance Division, see FACTS, *Annual Report 1977-1978* (1978), 28; *Annual Report 1978-1979* (1979), 18.

231 This Board was set up in accordance with the FACTS submission to the Australian Broadcasting Tribunal Inquiry into self-regulation for broadcasts. See *Annual Report 1977-1978*, supra n231 at 4.

232 The Australian Broadcasting Tribunal, *A Report on the Public Inquiry into the Concept of Self-Regulation for Australian Broadcasters* (1977) paras 2.26-2.31.