



NEW ZEALAND

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Country Report

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1. Topic:	<i>Advertising Standards</i>
Who:	Advertising Standards Authority Inc.
When:	2000
What Happened:	<ul style="list-style-type: none">• The Advertising Standards Authority Inc. ("ASA") released its annual report containing a review of its operations during the year 2000. In March 1988, the ASA established the Advertising Standards Complaints Board ("ASCB"), a self regulating body, to administer the Codes of Practice in New Zealand. The main functions of the ASCB are to adjudicate on complaints received about advertisements which may be in breach of the ASA's Codes of Practice; to advise the ASA on the interpretation of Codes and possible improvements to those Codes and, to report to the ASA on any aspect of advertising which is causing concern.• A total of 793 written complaints were received by the ASCB in the year 2000, 690 of which became formal complaints concerning 315 different advertisements. In 1999, there were only 572 formal complaints about 326 different advertisements. Although the number of advertisements complained about was approximately the same as the year before, the total number of complaints and formal complaints was the highest ever recorded in a 1 year period. The increase is attributed to a greater awareness of the complaint system operating in New Zealand. Of the 690 formal complaints made, 375 were duplicates, 76 were not accepted due to various reasons but commonly because of a "<i>previous decision</i>" and 20 were withdrawn, resolved or adjourned. A total of 219 substantive complaints were dealt with by the ASCB. Of the 219 substantive complaints, 72 were upheld, 53 were settled (the parties having accepted there was a breach and withdrawing or amending the advertisement) and 94 were not upheld.

	<ul style="list-style-type: none"> The highest category of complaint was "<i>offensive</i>" with 86 complaints and very close behind "<i>misleading</i>" with 85 complaints. It was the first year that "<i>misleading</i>" was not the highest category. Although complaints were received about a wide variety of products, therapeutic products topped the list receiving 13% of all complaints, followed by consumer products with 8%. In terms of advertising mediums, television attracted the most complaints with 46%, followed by newspapers with 16%, radio with 12% and magazines with 10%. This was similar to previous years.
Comments:	<ul style="list-style-type: none"> In 1991, 48% of all complaints were about liquor advertisements and it is interesting to note that liquor now attracts less than 5% of all complaints. Over the last 10 years the ASA has been particularly vigilant in ensuring that advertisements have a high standard of social responsibility. The introduction of a revised Code and the establishment of both the Liquor Advertising Pre-vetting System ("LAPS") and the Therapeutic Advertising Pre-vetting System ("TAPS") have assisted in dispelling the controversy which especially surrounded liquor advertising.

2. Legislation:	<i>Fair Trading Amendment (No. 3) Government Bill</i> ("Bill")
Topic:	Amendments to the Fair Trading Act 1986
When:	Currently before the New Zealand Parliament
What Happened:	<p>The Fair Trading Act 1986 ("Act") protects consumers and other participants in the market by putting a prohibition on misleading and deceptive conduct and certain unfair trade practices. The Act provides for the disclosure of consumer information relating to the supply of goods and services and promotes product safety. It is the role of the Commerce Commission to enforce the Act as well as to provide consumer information and product safety standards. Since the Act came into force in 1987, there have been some barriers to the effective enforcement of the Act. A number of remedies, including injunctions and corrective advertising orders are rarely able to be used. Penalties that have been ordered have been, on the whole, significantly lower than the current maximum penalties and are not proving to be a deterrent to re-offending. The current maximum penalties for pyramid selling schemes are insignificant when compared with the revenue that may have been raised under those schemes. The Commerce Commission currently has limited investigative tools which reduces its ability to efficiently and effectively investigate matters.</p> <p>The Bill makes a number of amendments that are designed to strengthen the Act by:</p>

	<ul style="list-style-type: none"> • Increasing maximum penalties for all offences and by creating a new penalty regime for pyramid selling schemes based on commercial gain. The aim is to deter offending by giving the Courts the flexibility to impose higher penalties that limit the profitability of offending. • Extending the search warrant powers available to the Commerce Commission and by creating a less intrusive power to require the production of information and documents. The Commerce Commission requires the ability to investigate breaches of the Act more efficiently. The obtaining of documentary evidence is the key to giving effect to the new penalty regime. • The criminal limitation period is to be amended to run for 3 years from the date of discovery of a breach of the Act or the date the breach ought reasonably to have been discovered, rather than for 3 years from the date of the breach. The current criminal limitation period prevents prosecution of breaches where the nature of the breach is such that discovery is unlikely until more than 3 years after the event. This aligns the criminal and civil limitation periods in the Act. • Allowing the District Court to hear corrective advertising orders and applications to be made in conjunction with criminal proceedings. Currently the High Court makes orders on all applications and the time period between the filing of an application and the Court determination reduces the effectiveness of corrective advertising orders, which reduces the likelihood of them being granted. This amendment would enable faster determination of applications for corrective advertising orders. • Providing an exemption to the Commerce Commission from the requirement to give undertakings as to damages when seeking an interim injunction. This requirement has proven to be a disincentive to the Commerce Commission to avail itself of this remedy.
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3. Decision:	<i>Tegel Foods Limited</i>
Topic:	Advertisement on television and in brochure
Where:	Advertising Standards Authority Inc.
When:	2002
What Happened:	<ul style="list-style-type: none"> • A member of the New Zealand Parliament (Green's Party), among others complained about the claims being made about a chicken supplier, Tegel Foods Limited, in their advertising. The television advertisement stated that "<i>many people think there are growth hormones in our chickens.</i>" Tegel guarantees "<i>this is not</i>

	<p><i>true</i>". A box labelled "<i>myth</i>" explodes and the viewer then sees a cooked chicken on a platter. The voiceover then states "<i>Tegel – pure, natural, healthy chickens, with no added hormones.</i>" The Tegel logo is also visible.</p> <ul style="list-style-type: none"> • The brochure advertisement has on the front cover the Tegel logo and printed below in large letters it states "<i>non GE crops used in feed. No added hormones. Healthy, barn raised chickens.</i>" In the right hand corner is a small box containing the words "<i>New Zealand chicken is barn raised no hormones added.</i>" On the back of the brochure it states that "<i>Tegel goes to great lengths to bring you pure, natural, healthy chickens</i>" and below is a repetition of the text from the front cover. A picture shows part of a chicken dinner. Inside the brochure it states "<i>Tegel is New Zealand's most preferred and trusted brand of poultry meat products. Tegel goes to great lengths to bring you pure, natural, healthy chicken.</i>" The main claims that appear on the front cover, "<i>Non GE crops used in feed. No added hormones. Healthy, barn raised chickens.</i>" are expanded. • On 9 April 2002, the Complaints Board ruled not to uphold the complaint as it was their view that the claims had been substantiated by Tegel and that it complied with the requirements of the associated government and industry bodies. The fact the complaint is being interpreted against laws or regulations which may need review is not a matter for the Board but for Parliament. • The decision of the Complaints Board was appealed on the basis that it was in the interests of natural justice and that proper procedures had not been followed. • The Appeal Board accepted that all of the claims in the advertisements with regard to the use of the terminology "<i>healthy</i>", "<i>pure</i>", "<i>natural</i>" and "<i>barn raised</i>" complied with the relevant regulations and therefore the advertising Codes of Practice. The Appeal Board went on to state that it was bound by relevant regulations and it was unanimously of the view that there was nothing in the advertisement that was likely to mislead or deceive the consumer. • The Appeal Board observed that if there were ongoing issues which needed to be addressed concerning the use of the terminology, the appropriate place to present them was at a review of the relevant industry codes and food regulations.
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4. Decision:	<i>Pfizer Pharmaceuticals Group</i>
Topic:	Television advertisement for Viagra
Where:	Advertising Standards Authority Inc.

When:	2001
What Happened:	<ul style="list-style-type: none"> <p>• An advertisement promoting "Viagra" was screened on television during the primetime 6 o'clock News. The advertisement showed a stand-up comedian interacting with an audience comprised mostly of middle aged couples. As an introductory line to part of the advertisement, the comedian said <i>"I find it fascinating what people won't admit to"</i>. Members of the audience were then asked to raise their hands in response to <i>"How many of you older guys wear glasses?"</i> and they were asked if their hair was thinning, to which he responded <i>"Its called middle age guys."</i> The comedian then proceeded with, <i>"Hey, here's one. How many of you guys have a problem getting an erection?"</i> to which the audience response was an embarrassed silence. He then stated, <i>"Now, that's amazing because I read that nearly half of all guys over 40 have that very problem. But, hey, no one in this audience. Looks like I'm the only one."</i> and he raised his hand. Following his lead, several men in the audience gingerly raised their hands, to be congratulated with, <i>"You see, with a bit of encouragement, you can get them up!"</i> The voiceover then states, <i>"Nearly half of New Zealand men over 40 experience some erection problems... Ask your doctor if Viagra is right for you, because you are not alone."</i> This was accompanied by a large bold on-screen graphic which among other background images identifying the advertiser, stated, <i>"You are not alone."</i></p> <p>• A large number of complaints were received about this advertisement which related to 2 main issues. The vast majority of complainants were concerned about the time at which the advertisement had been shown, and the possible consequent impact on younger viewers. The other complaints concerned the content of the advertisement, which was described by some as being disgusting and going well beyond the grounds of decency. The Complaints Board noted that the public reaction had been similar when advertisements for women's sanitary products had first been shown on television.</p> <p>• The Complaints Board was of the opinion that the subject had been treated responsibly and in a dignified and inoffensive manner. The Board found that there was nothing sexually explicit in the advertisement and it did not reach the threshold required to breach Rule 4 of the Code of Ethics, being Decency.</p> <p>• The Complaints Board further found that the subject and style of the advertisement did not reach the threshold required to cause widespread offence and effect a breach of Rule 5 of the Code of Ethics. The Complaints Board further found that a <i>"high standard of social responsibility"</i> had been observed by the advertiser and that there was no breach of Principle 2 of the Code for Therapeutic Advertising. The Television Commercial Approvals Bureau had classified the advertisement as PGRD, meaning that it could be shown anytime after 7:00pm and during the News and any other adult programme during the day as long as discretion was exercised by the Broadcaster. The Complaints Board acknowledged that children may also be watching the News however it observed that it was primarily directed towards an adult audience. The news often contained visuals of violence including criminal offences, which would also</p>

require parental guidance for children watching. The Complaints Board also noted that the advertisement was neither directed at children, nor did it have any evident appeal to children. Although the Complaints Board expressed sympathy for the views of the complainants, the majority of the Board felt strongly that men had a right to be informed about a product which could assist them with a very distressing condition. It was their view that the advertisement achieved this objective in a socially responsible manner.

- The Chairman declined the application for appeal as it was in the Chairperson's view that the Complaints Board had thoroughly canvassed and addressed the matters raised in its decision.
- As an interesting aside, the New Zealand Broadcasting Standards Authority also wants to rule on the advertisement much to the concern and annoyance of New Zealand's television broadcasters. The recent article in the National Business Review, being one of New Zealand's leading business rags (front page 20 September 2002) is **attached**.

Networks turn on Big Brother

Nick Smith

The television industry has declared war on the unprecedented meddling by the Broadcasting Standards Authority which, if not stopped, could cost broadcasters millions of dollars.

TV3, TVNZ and the Television Broadcasters' Council, which represents the industry, including Sky and Prime, will file papers in the High Court at Wellington over a backdoor BSA attempt to increase its ability to exercise control over the industry.

The Advertising Standards Authority is also joining the legal action, a fight over freedom of expression and a BSA attempt to extend its authority to include advertisements.

The BSA wants to rule on a complaint about a Viagra advertisement that screened during *TV3 News*.

If it succeeds and upholds the com-

plaint, the decision could cost broadcasters millions of dollars if they are forced to police the placement of advertisements.

The case comes amid tension over the upcoming TV3 Comgate complaint involving John Campbell's election campaign interview of Helen Clark, which will test BSA independence.

Critics say the BSA is politically tainted and, if it finds in favour of the prime minister, TV3 will immediately appeal the decision.

Both Rick Friesen, managing director for TV3 and TV4, and TVNZ spokesman Glen Sowry said the Viagra case would have far-reaching implications for the entire industry.

Advertisements are already rated for timeslots, with the Viagra promotion not screening during accepted children's viewing before 9am and the two hours after school.

But the BSA, acting on a little-known Justice Ron Young decision last year on the issue of "convergence," says it has a right to rule on the Viagra/news complaint. Convergence means there is a contextual relationship between the advertisement and the programme during which it screens. Justice Young ruled the BSA could rule on a complaint about retail advertising screening on Christmas Eve because of the convergence between the promotion and the Christmas programme.

The Advertising Standards Complaints Board traditionally hears all complaints about promotions. It has already dismissed 98 complaints about the Viagra advertisement screening during *TV3 News*.

Television Broadcasters' Council executive director Bruce Wallace agreed it was ironic parents were more concerned about their children witnessing an

oblique reference to erectile dysfunction than little ones watching Israelis and Palestinians killing each other.

He said it was important broadcasters won their case against the BSA because "it would create real problems in the future."

Mr Sowry said although TV3 had initiated action, TVNZ supported the legal challenge, which was essentially a rehearing of the Justice Young Christmas decision.

A string of BSA decisions relating to privacy, good taste, decency and reporting violence has raised eyebrows in the industry, with fears the regulatory body is too keen to censor.

TV3 successfully appealed a BSA decision this year over a news item that featured graphic footage of an aggravated robbery.

A date has yet to be set for the Viagra hearing.

5. Case

Commerce Commission v Simply New Zealand

Report:	
Topic:	Fair Trading – souvenir and tourist retailer
Where:	District Court, Auckland
When:	July 2002
What Happened:	<ul style="list-style-type: none"> • The text of the Commerce Commission's press release reports as follows: <ul style="list-style-type: none"> ➤ <i>"Souvenir and tourist retailer, Simply New Zealand, was fined \$3,000 in the Auckland District Court today (for breaching the Fair Trading Act regarding country of origin claims on souvenir t-shirts sold in its Wellington Airport and central Christchurch shops.</i> ➤ <i>This follows a successful Commerce Commission prosecution of Christchurch souvenir retailer All Star Trading in March this year. Director of Fair Trading, Deborah Battell said New Zealand-made souvenir clothing can command a price premium of 35%.</i> ➤ <i>"Tourists along with other consumers should be able to rely on the accuracy of representations being made.</i> ➤ <i>Imported goods that imply they are of New Zealand origin are competing unfairly with those made in New Zealand".</i> ➤ <i>A Commerce Commission investigation last year revealed Simply New Zealand were selling t-shirts on which the logos, neck and swing tag labelling implied the garments were made in New Zealand. "Made in Pakistan" labels were sewn in the inside side seams of the garments.</i> ➤ <i>In addition, signage outside both the Wellington and Christchurch shops stated "Simply New Zealand, the Great New Zealand Shop", with exterior signage at the Wellington Airport shop also stating "Original Gifts from New Zealand".</i> ➤ <i>The placement of the labels, combined with the signage, created the impression the garments were made in New Zealand when they were not.</i> ➤ <i>Under the Fair Trading Act, it is illegal to make false or misleading representations concerning the place of origin of goods. The Place of Origin Labelling Regulations require place of origin labels to be accessible for examination by a prospective purchaser.</i> ➤ <i>Judge Lockhart said that whilst the conduct was not deliberate, the defendant had nonetheless displayed a degree of carelessness. "The implied origin of the shirts was false – the design, logo and pictures were all placed in New Zealand – but the fact remains that the t-shirts were made in Pakistan".</i>

6. Case Report:	<i>Smith v Tuskers (Yald Hurst Road) Limited</i>
Topic:	Fair Trading Act 1986 – False and misleading conduct
Where:	High Court, Christchurch
When:	March 2002
What Happened:	<ul style="list-style-type: none"> • The company sold land and a tenanted building used as a restaurant to the Smiths who were looking for an investment for their retirement. After settlement took place, the Smiths found out that the tenants were in dire financial trouble due to deterioration in the restaurant business. Since mid 1998, rental reductions had been conceded because of financial difficulties by C who, along with his wife, was a director and shareholder of the company. • The sale of the property had been marketed in the real estate listing as an "excellent opportunity". The sale price sought was \$650,000 and an annual rental of \$70,000 with a net return of 10.77% predicted. The tenancy had also been described as "excellent long-term with a 10 year right of renewal and personal guarantee". • The Court found that the representation regarding the quality of the investment along with the suppression of information concerning the tenants' financial position gave rise to misleading or deceptive conduct which was based, in part, on silence. The agreement for sale and purchase was declared void on the basis that the Court doubted the Smiths would have purchased the property had they not been misled. • The real estate agent was entitled to be indemnified if proved to have any liability for damages. This was on the basis that the listing sheet was amended according to instructions provided by C and it was accepted that the real estate agent did not know of the tenants' financial difficulties and so was not aware that the document was misleading.

7. Case Report:	<i>Daniel v Barker & Ors</i>
Topic:	Expectation Damages, Interpretation of S9 Fair Trading Act 1986
Where	High Court, Auckland
When:	February 2001

What Happened:	<ul style="list-style-type: none">• A real estate agent misrepresented property boundaries to a purchaser.• It was discovered after the sale that the entrance to the property was situated on an unformed proper road.• The court found that the purchasers had suffered loss as a result of the misrepresentation since they were required to pay out money to rectify the fault in the property they had brought.• An order of \$55,000 damages made by the District Court was upheld, despite the fact that the purchasers had paid \$760,000 on a property valued at \$765,000.• The damages upheld were held to be only reliance and not expectation damages.
Comments:	<ul style="list-style-type: none">• The real estate agent was effectively required to make good his representation, even though the purchasers were not necessarily worse off in financial terms than prior to acting in reliance on the misleading conduct.• The High Court awarded damages based on what the purchasers would have had "but for" the representation.