

MEMORANDUM

TO: Mr Mervyn King SC

FROM: Piet Delpont

RE: Statutory Alternatives to the Regulation of Advertising

DATE: 30 July 2003

1. BACKGROUND

It is accepted that self-regulation as presently done by the Advertising Standards Authority (ASA) through the ASA Code of Advertising Practice (Code) is in principle the best form of regulation of the standards of advertising. The reasons for this are manifold, but the following may be listed as those that are the most important if compared with direct statutory regulation as alternative:

- Application of the “spirit” not the letter of a rule;
- Quick resolution of a complaint by consumer;
- Cost effective dispute resolution between competitors;
- New “rules” can be formulated and implemented quickly (compared to legal rules);
- Adjudication by competent persons with advertising industry knowledge.

There are, however, also many disadvantages, the following being some of them:

- Non-members are not bound as the legal basis of the ASA Code is contractual;
- ASA membership only through organizations (e.g. MFSA, ACA NAB);
- Funding only by members – it becomes a disincentive to become a member because sanctions also apply;
- Sanctions limited – not applicable to non-members;
- Choice of sanctions limited;
- Direct enforcement of sanctions against non-members impossible, unless non-members voluntarily subject themselves to the Code.

There are also disadvantages to direct statutory regulations and these are basically the opposite of the advantages of self-regulation as noted above with the disadvantages of self-regulation logically the advantages of statutory regulation.

The above phenomenon is not unique to the advertising industry and for many years many industries and/or associations have encountered the same problems. While it is acknowledged that generalization is dangerous, especially in law, the following categories based on the level of self- and/or statutory regulation may be defined (see also Gower *Review of Investor Protection* (1984)). The different categories are institutional and functional regulation with the latter being subdivided into professional and non professional.

2 REGULATORY MODELS

2.1 Institutional Regulation

In this model the members being regulated and the regulating authority are constituted under a licensing Act. An example of this type of regulator in the South African situation is the Financial Services Board constituted under the Financial Services Board Act 94 of 1990. The FSB regulates, through licensing (by a particular Registrar) and other methods, the financial institutions as defined in the FSB Act and enforces the requirements of the particular enabling Act (e.g. the Long-Term Insurance Act 52 of 1998). If the particular financial institution uses a system of internal rules, these must be published for public comment and approved by the relevant Registrar. Usually the particular licensing Act of the financial institution provides the legal basis for the rules and the minimum principles to be addressed by the rules (See Stock Exchanges Control Act 1 of 1985). The detail of the rules and additional rules are usually only subject to the above requirements of publication and approval by the Registrar.

Members of the FSB are appointed by the Minister of Finance and the FSB is funded by (statutory) levies paid by the different financial institutions. Reporting is done to parliament on an annual basis. The Minister, or any other governmental institution cannot interfere in the operation of the FSB and the only control is through the appointment of the members of the FSB board. The FSB must consult with the Minister on certain issues and must report annually to the Minister.

2.2 Functional Regulation

2.2.1 Professional

In this model a person becomes member of an organization on a “voluntary” basis but the membership is required to do particular acts i.e. practice in a particular profession such as an engineer, quantity surveyor, dental technician etc. and a professional admission requirement or admission examination precedes possible admission to the association. The association is given statutory recognition through a particular “professional” Act, like the Quantity Surveying Profession Act 49 of 2000. In terms of the particular Act a person may only practice a profession if he/she is registered with a body constituted under the Act (board or council). This body sets, within the parameters provided for in the Act, the professional requirements and also administers the disciplinary procedure under the Act. Sanctions in terms of the Act also apply, in certain instances, to persons not registered under the Act.

Members of the professional boards are appointed by the relevant Minister and the government cannot interfere with the operation of the council other than the appointment of the members of the board or council. The method of nominations and the categories of membership of the board or council ensure an independent board or council. The constitution of the professional boards or councils must be distinguished from the constitution of the Media and Development Diversity Agency (MDDA) in terms of section 4 of the MDDA Act 14 of 2002 where the members are appointed by the president on

recommendation of the National Assembly. The difference as to the independence of the board is clear. The boards or councils have an annual reporting duty to the relevant Minister or other public organ. It should be noted that although the requirement that a particular trade or profession can only be exercised if a person is a member of a particular professional organization, may be *prima facie* anti-competitive under the Competition Act 89 of 1998, special dispensation may be given under the said Act for professional organizations where a minimum qualification and/or entrance examination is required to join the organization.

2.2.2 Non Professional

In this system the persons regulated are not required either to be a particular entity registered under a particular Act or required to register under an Act to engage in a specific action, trade or occupation. The basic requirement is that if a certain action is taken, irrespective of the nature of the person taking the action, certain requirements must be met. This category of regulation can also be subdivided into *conditional* or *resultant* regulation.

2.2.2.1 Conditional

The shares of a public company may be traded between shareholders on the basic principles of the common law in an unregulated market. However, as soon as the shares (or other securities) are to be traded on a regulated market, the condition is that the requirements of the regulated market must be complied with. These requirements (rules or Listings Requirements) are contractual by nature and form the basis of the relationship between the company and the market. It may be important to note that although these rules may under the enabling Act, like in the case of the JSE Securities Exchange (Stock Exchanges Control Act 1 of 1985), be required to be published for public comment and be approved by a third party (i.e. the Registrar of Stock Exchanges under the FSB Act), the legal basis of the rules are not altered. The sanctions for non-compliance with the rules are also contained in the rules and can include a termination of the contractual relationship, i.e. a suspension or termination of listing. Due to the contractual relationship there does not seem to be a necessity of application of the rules to third parties and therefore the statutory provisions of the enabling Act regulates this position.

2.2.2.2 Resultant

This type of regulation implies that the person regulated is not necessarily part of an existing structure or relationship, and therefore the regulation and sanctions lie outside that relationship. An example of this type of regulation is the Securities Regulation Panel (SRP) under sections 440A to 440N of the Companies Act 61 of 1973. The SRP is appointed by the Minister of Trade and Industry and must consist of representatives of certain categories as defined in the Act. Therefore, unlike the MDDA board, a “loading” of the SRP is not possible. The SRP may make rules, the Code on Take-overs and

Mergers (Code), which have the force of law. The SRP is financed out of levies paid by companies listed on the JSE Securities Exchange.

The importance of the SRP model for the ASA alternative is that no pre-existing relationship, contractual or otherwise, is necessary for the operation and application of the Code. The Code applies to listed companies, but also to other entities like certain private companies or public entities. This “extended” application of the Code is based on the applicable provision in the Code (Par 3 of Section A) and the statutory provisions (Section 440L of the Act). The SRP has wide powers under the Code and can apply for the enforcement of rulings by the High Court. The constitutionality of the latter power has been questioned, but it is submitted that it can be rectified by appropriate drafting.

3. RECOMMENDATION

It is recommended that the self-regulatory model with statutory recognition used in respect of the SRP would be the most appropriate for the ASA alternative. Under this model the ASA will be constituted as a legal person and be managed by a board to be appointed out of certain specific categories bodies representing the marketing and communications industry. The present articles and memorandum of the ASA, as well as the ASA Code of Advertising Practice will be the Rules under the new body, and the Board will have the power to amend the Rules. The reason for this being that any alteration of any of these Rules must be done quickly and efficiently without the necessity of legislative amendments.

The only remaining issue would be the collection of levies. In the case of the SRP the levies are collected by the JSE Securities Exchange from members (listed companies) contractually bound by the Listings Requirements. In the case of the ASA model it may be necessary to provide, either in the enabling Act or in the rules, that a levy be paid on all “advertisements”. This would, however, raise the issue of indirect tax and therefore a constitutional issue and also additional governmental control, also through the Public Finance Management Act 1 of 1999. An alternative to this could be to compel every advertiser to become a member of an association (e.g. MFSA) and to raise the levies through the association. This would be the equivalent of professional regulation as discussed above. Due to the fact that no “professional” entrance requirements would be possible this alternative does not seem viable and becomes less so of possible competition law and constitutional law issues as considered.

P. A. Delport
30 July 2003

The Advertising Standards Authority of South Africa Act

No ### of 200#

PREAMBLE

WHEREAS it is advisable that an effective manner of regulation of advertising being established in the interests of the advertiser, the consumer and the state;

AND WHEREAS human rights, equality and freedom, including the freedom of commercial expression, is protected under the law and the Constitution;

AND WHEREAS it is accepted that South Africa is part of the international borderless world of advertising and that international advertising standards and principles must be accepted and enforced;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows:

1. Definitions

"advertisement" means any visual or aural communication, representation, reference or notification of any kind which is intended to promote the sale, leasing or use of any goods or services; or which appeals for or promotes the support of any cause and also includes the promotional content of display material, menus, labels, and also editorial for consideration.

"ASA" means the Advertising Authority of South Africa as established in terms of this Act.

2. Establishment of the Advertising Standards Authority

(1) There is hereby established a body corporate to be known as the Advertising Standards Authority.

(2) The Advertising Standards Authority will be governed by a board as appointed in terms of subsection (3)

(3) Subject to the provisions of subsection (6), the members of the ASA board shall be natural persons appointed by the Minister and shall consist of-

- (a) the chairperson;
- (b) duly authorised representatives of the;
 - (i) Association for Communication and Advertising,

- (ii) Marketing Federation of South Africa,
 - (iii) Print Media of South Africa,
 - (iii) National Association of Broadcasters,
 - (iv) Cinemark (Pty) Ltd,
 - (v) Out of Home Media South Africa,
- (c) one person nominated by each of such bodies, associations and institutions, which-
- (i) the Minister in consultation with the persons in (b), has determined as being sufficiently representative of the relevant interests in the advertising, marketing and consumer industry ; and
 - (ii) have been designated by the Minister by notice in the *Gazette*;

(4) The chairperson, who need not be one of the nominated members, shall be designated by the members of the ASA board nominated in terms of paragraph (e) of subsection (2); Provided that such chairperson should be independent and a person is deemed to be independent if he or she is not part of the management, whether as member, director, or in any other executive capacity, of any of the bodies or members of the bodies under (b) and (c) above.

(5) The ASA board may designate a member of the panel as acting chairperson to exercise and perform the powers and duties of the chairperson whenever the chairperson is unable to do so or while the office of chairperson is vacant.

(6) The ASA board shall be entitled, from time to time, to co-opt additional members.

(7) Every member of the ASA board shall hold office for a period of not less than three and not more than five years, as the Minister may determine: Provided that any body, association or institution referred to in subsection (3) may apply to the Minister to have the person nominated by it and appointed by the Minister, replaced by any other nominee before the expiry of his term of office.

(8) If, during any the period contemplated in subsection (7), a member of the ASA board nominated pursuant to the provisions of subsection (2), dies, becomes incapacitated, resigns, or becomes disqualified from being appointed or acting as a director of a company in terms of section 218 of the Companies Act 61 of 1973, or ceases for any other reason to be a member of the ASA board, the vacancy arising in this manner may be filled for the unexpired period of such member's term of office by a person nominated by the body, association or institution of which the member who ceases to be on the ASA board was a nominee.

(9) A member of the ASA Board shall, on the expiry of his term of office, be eligible for reappointment.

(10) (a) The meetings of the ASA Board shall be held at such times and places as the chairperson may determine.

(b) The person presiding at a meeting of the ASA Board shall determine the procedure at such meeting.

(c) The decision of a majority of the members of the ASA Board present at any meeting thereof at which there is a quorum (as determined in accordance with the rules of the ASA) shall constitute the decision of the ASA board, and in the case of an equality of votes, the chairperson shall have a casting vote in addition to his deliberative vote.

(d) No proceedings of the ASA board shall be invalid by reason only of the fact that a vacancy existed on the ASA board or that any member was not present during such proceedings or any part thereof.

(11) The ASA board shall appoint an executive director to hold office for such period and on such conditions as the ASA board may determine and the ASA board may likewise appoint an acting executive director when the office of executive director is vacant or when the executive director is absent or for any reason unable to perform his or her functions.

(12) There shall be an executive committee of the ASA board, consisting of the executive director and so many members of the ASA board, of whom one may be the chairperson of the ASA board, as the ASA board may determine.

(13) The ASA board may appoint such officers and employees as are required for the proper performance of the ASA's functions.

(14) The ASA board may delegate any of its powers to the executive committee or to any subcommittee of the ASA which may be established by the ASA.

3. Functions of the ASA

(1) The functions of the ASA shall be to regulate, in such manner as it may deem necessary or appropriate, all advertisements in respect of any medium as contemplated in subsection (2).

(2) Without derogating from the provisions of subsection (1), the functions of the ASA shall include the making of rules, which will have the force of law, in respect of matters falling within the provisions of this Act and matters ancillary thereto.

(3) Subject to the provisions of this Act, the rules shall also make provision for-

(a) ensuring that all advertising will

- (i) be legal, decent, honest and truthful;
- (ii) be prepared with a sense of responsibility to the consumer;
- (iii) conform to the principles of fair competition in business;
- (iv) not bring advertising into disrepute or reduce confidence in advertising as a service to industry and to the public

(b) the administration and financing of the ASA;

- (c) the remuneration and allowances of the executive director and the conditions upon which he or she is appointed;
- (d) the remuneration and allowances of members and officers and employees of the ASA, and the conditions upon which such members, officers and employees are appointed;
- (e) internal appeal mechanisms from decisions of ASA functionaries
- (f) the effective monitoring of compliance with, and enforcement of, the rules;
- (g) sanctions for breach of the rules;
- (h) enforcement of decisions, rulings and sanctions of the ASA;
- (i) the dissolution of the ASA.

(4) Rules made or amended by the ASA and approved by the Minister shall be published by notice in the *Gazette*.

(5) The ASA or its executive committee or its executive director may-

- (a) consult with any person at the request of any interested party with a view to interpreting any aspect relating to any of the rules which have been made by the ASA;
- (b) issue information on current policy in regard to advertising;
- (c) receive and deal with representations relating to any matter with which it may deal in terms of this Act; and
- (d) perform any other function assigned to it by this Act.

4. Financing of the ASA

(1) All fees payable under the rules contemplated in section 3(3)(b) shall be paid to the ASA and shall constitute its funds, and the ASA shall utilize its funds for defraying expenses incurred in connection with the performance of its functions.

(2) The ASA may invest any unexpended portion of its moneys and may establish reserve funds and pay into them such amounts as it may deem necessary or expedient.

5. Short title and date of commencement

This act shall be called the Advertising Standards Authority of South Africa Act ##### and shall come into operation on a date fixed by the President in the *Government Gazette*.