LEAVING THE FIELD – GOVERNMENT REGULATORY AGENCIES AND MEDIA SELF-REGULATION

MICHAEL BLAKENEY*

I. THE SELF-REGULATION DEBATE

An important ingredient in the deregulation debate is the assertion of the superiority of industry self-regulation over government regulation. Arguments in support of self-regulation include the observations that not only is the taxpayer apparently saved the expense of regulation, but the relevant industry will be policed by those with the greatest knowledge and expertise — industry members themselves. Being voluntary, industry members will enthusiastically embrace the spirit of the relevant regulatory aims, rather than seeking by "lawyers tricks" to evade their regulatory obligations. Also, since self-regulation is invariably non-statutory, the expense, complexities and delays of the legal system are circumvented and the voluntary codes of practice can avoid the sterile definitional precision of the law.

Against these arguments is the obvious retort that industry members, as judges in their own cause, will be biased in their application of the regulations. Related to this bias is the invariable lack of representation of the public interest, which is usually built into systems of government regulation.

The area in which these competing arguments have been most extensively debated is that associated with media self-regulation. Not only has this particular debate been conducted with a great deal of acrimony, but also the protagonists, for obvious reasons, have been able to attract a high level of media attention. Indeed, the industry protagonists have even engaged in

* B.A., LL.M. (Syd.), Associate Professor, Faculty of Law, University of New South Wales, Barrister of the Supreme Court of New South Wales.

advocacy advertising to publicise their cause![1] The principal referees before whom the adversarial contests have been conducted to date are the Trade Practices Commission and the Australian Broadcasting Tribunal.

One of the consequences of entertaining the competing arguments about media self-regulation is that the Trade Practices Commission has embarked on a long-term project to ascertain the nature and role of self-regulation in Australian industry and professions. In an interim report issued in June 1985 the Commission lists some 399 trade associations which have indicated that they operate self-regulation schemes.[2] Some 2,200 trade and industry associations were surveyed from which 1,220 responded. The massive incidence of self-regulation in the Australian economy has elevated the debate on the virtues and vices of self-regulation in the media industry to a touchstone significance. The legitimacy for which this industry system is fighting and is in fact winning, can easily spread to the other 400 odd schemes which have not yet come under formal scrutiny.

This paper examines recent developments in the media self-regulation debate.

II. FACTS CAD AND THE REGULATION OF TELEVISION ADVERTISING

Commercial television stations are licensed to broadcast by the Australian Broadcasting Tribunal. At three-yearly intervals the performance of the television stations is examined in licence renewal hearings. One of the factors considered before renewal is the extent and nature of compliance by the stations with advertising standards promulgated by the Tribunal. These standards have ranged from a general requirement that all advertising matter must comply with State and Federal laws, to more detailed prohibitions against advertisements which, for example, lack good taste, which pertain to gambling or involve depictions of the Royal Family. Standards have also dealt with the amount and timing of advertisements.

To assist the television stations to arrange their advertising in accordance with these standards, the Television Advertising Board was established by four stations in 1956. With the development of national networks of commercial stations the Federation of Australian Commercial Television Stations (FACTS) was established in 1956. Simultaneous with the passage of the Trade Practices Act 1974 (Cth), FACTS set up the Commercials Acceptance Division (CAD) to preview all advertisements submitted to it to ascertain their compliance with the Tribunal standards, the advertising provisions of the Trade Practices Act as well as relevant State legislation. Additionally, FACTS CAD has promulgated forty-two guidelines dealing

1 *E.g.* the Australian Advertising Industry Council's "They don't have advertising to annoy them in some countries" campaign mentioned in G.Coleman, "The Great Ad Wars" (1985) 4 (10) *Australian Society* 11.

2 Trade Practices Commission, *Interim Compendium of Self-Regulation Schemes in Australia* (1985).

with a range of disparate topics such as taste and decency, pet food commercials, personal products, water-skiing, indiscriminate littering and children's advertising. Commercials are vetted to see that they comply with these standards.

FACTS CAD previews about 20,000 commercials a year. It prides itself on a 'turn-around' time of twenty-four hours. It manages with a staff of six, of whom one member has legal training.[3] In its short history FACTS CAD has come under both Trade Practices Commission and Australian Broadcasting Tribunal scrutiny on a number of occasions.

III. FACTS CAD AND THE TRADE PRACTICES COMMISSION

The power of FACTS CAD to order the suspension of advertisements by all fifty of Australia's commercial television stations potentially breaches section 45 of the Trade Practices Act 1974 which proscribes agreements between competitors which substantially lessen competition. Consequently, FACTS sought an authorisation under the Act to permit it to operate the CAD. Authorisations are granted on proof of a benefit to the public which outweighs the detriment constituted by the lessening of competition. FACTS argued the obvious benefit to the public in having a single body applying uniform standards in evaluating the legality and propriety of advertisements carried by television stations.

Opposed to the grant of authorisation were a number of public interest bodies. The Traffic Authority of N.S.W. examined thirty-six commercials in light of the CAD's own standard on road safety. It found over one hundred breaches of those standards in the commercials and submitted a report to the Trade Practices Commission which concluded that the standards appeared not to be enforced, were not enforced effectively, were not enforced consistently or were too vague or ambiguous to be enforced.

The Health Commission of N.S.W. called into question the impartiality of FACTS CAD which had suspended a number of the Commission's healthy life-style advertisements on the complaint of advertising agencies and marketers of allegedly unhealthy products. Those complaints had been sustained on the basis of lack of taste and decency although the Australian Broadcasting Tribunal subsequently disagreed with two of the three adverse rulings.[4]

The Australian Consumers Association (ACA) submitted a report in which it identified a significant number of breaches in some 902 commercials surveyed by it.[5] The Association, together with the Australian Federation of Consumer Organisations and Canberra Consumers Incorporated, impugned

3 See P.James, *Advertising Self-Regulation in Australia,* B.A. Hons. Thesis, Dept Govt University of Sydney, 1983.

4 For a discussion of this affair see M.Blakeney and S.Barnes, "Advertising Deregulation: Public Health or Private Profit" in R.Tomasic, ed. *Business Regulation in Australia* (1984) 177-196.

5 ACA, *Law and the Self-Regulation of Advertising* (1982).

the lack of consumer representation on FACTS CAD, lack of consumer knowledge of the FACTS CAD standards and of its complaints mechanism.

The Trade Practices Commission, whilst not deciding the merits of these arguments, considered it significant that they had been made, explaining in relation to the ACA's criticism that

> ...it represents the perception of the largest consumer organisation in the country. That perception has to a degree been shared by important authorities in the fields of health and safety. Even if the perception is wrong, or partly wrong, that does not dispose of the matter. It still seems evident that regulation of an industry so closely affecting consumers, when the regulation is done largely by the industry itself and purports to serve not primarily the industry itself but the community at large, needs community confidence rather than opposition. The criticisms, concerning both the validity of what FACTS/CAD does and the way matters such as complaints are handled, represent a signal that the system is seen to be more industry-oriented than the industry itself perceives, or perhaps even desires.[6]

The Commission concluded that since the CAD dealt with "[m]atters of such fundamental importance as audience welfare and consumer protection and which complements public administration"[7] it should, like the latter, be visible and responsive to the public. Consequently, the Commission ordered that authorisation of FACTS CAD procedures be granted subject to three conditions:

(i) that FACTS ensure that information be available to consumers through the television medium as to avenues of complaint about television advertising; for this purpose, FACTS to run two industry campaigns per year involving all member stations; and FACTS to furnish to the Commission during December 1985 and December 1986 a report, for the Public Register, of its compliance with this condition;

(ii) that a copy of the current Commercials Acceptance Division Procedures, Commercials Acceptance Division Guidelines and Commercials Acceptance Division annual report be made available by FACTS to any member of the public on request and that a copy of these documents be made available to consumer and user groups on request on a regularly updated basis; a charge may be made, at the election of FACTS, to cover the cost of postage and the services provided;

(iii) that FACTS establish annual consultations by inviting, at least, representatives of the following consumer, health and safety bodies,
- Australian Federation of Consumer Organisations
- Commonwealth Department of Health, and
- Federal Office of Road Safety

to jointly consult with respect to the need to extend or revise the FACTS/CAD procedures, guidelines and rules and the way in which they are implemented...[8]

These conditions were not acceptable to FACTS which informed the Commission that it did not intend to comply with them. It informed its members that compliance with CAD directions had become voluntary. In February 1985, the Commission announced that FACTS' position obliged it to refuse the authorisation sought, with the result that FACTS CAD

6 *Federation of Australian Television Stations* (1984) ATPR (Com.) 50-076, para. 60.
7 *Ibid.*
8 *Id.*, para. 102.

operations now risk Trade Practices Act liability, although the Trade Practices Commission has not seen fit to test that issue.

IV. FACTS CAD AND THE AUSTRALIAN BROADCASTING TRIBUNAL

1. The 1982 Hearings

The self-regulation debate has been conducted with considerable vigour in the media industry since the creation of the Australian Broadcasting Tribunal on 1 January 1977 under the chairmanship of Mr Bruce Gyngell. On 6 January 1977 the Minister for Post and Telecommunications issued the Tribunal with the Terms of Reference for an inquiry into self-regulation in the broadcasting industry. FACTS strongly argued that the establishment of the CAD and its initiatives in setting advertising standards demonstrated the suitability of the Federation in regulating its own affairs without government interference. The Tribunal displayed considerable sympathy for this point of view, declaring in its *Report on Self-regulation for Broadcasters*:

> In our opinion the work of the [CAD] exemplifies self-regulation in practice and we have no hesitation, therefore, in recommending that the Federation, through its agency, should, ...have responsibility for classifying all advertising matter used on television, with the exception of matter televised within children's programs ...[9]

The enthusiasm of the Tribunal for the activities of FACTS CAD has not been shared by other public interest bodies. Mention has already been made of the misgivings of the Traffic Authority of N.S.W., the N.S.W. Health Commission and the various consumer organisations which were expressed to the Trade Practices Commission. The opposition of the Australian Consumers Association to an unconditional authorisation of FACTS CAD procedures had, in fact, arisen out of a study undertaken by the ACA of 902 commercials broadcast over a week. This study had been commissioned for the purposes of the 1982 Tribunal hearings for the renewal of the licences of the three Sydney commercial television stations. The ACA concluded that 123 of the advertisements breached relevant laws and industry codes. At the hearings, the Broadcasting Tribunal rejected the ACA's complaints against all but one of the impugned commercials. It took the opportunity to give a ringing affirmation to the activities of FACTS CAD, declaring that

> ...it is rare for the Tribunal to have to interfere with a judgment of the CAD. In the Tribunal's views the CAD adopts a responsible and practical approach to its functions. Although licensees are ultimately responsible under the Act and the Standards for all material televised, the Tribunal considers it reasonable for them to be guided by, and have reliance upon, the decisions of the CAD. Such decisions, because of the experience and expertise the CAD has developed, also carry considerable weight with the Tribunal, although they are not binding upon it.[10]

The ACA persisted with its complaints about the advertisements identified

9 Australian Broadcasting Tribunal, *Self-Regulation for Broadcasters* (1977) para. 9.17.

10 Australian Broadcasting Tribunal, *Report on Inquiries into Application for Renewals of Commercial Television Stations TCN-9, TEN-10 and ATN-7 Sydney* (March-April 1982), 73.

as breaching Tribunal standards in its survey and, in a subsequent report, the Tribunal conceded that an additional fourteen commercials were in breach.[11] However, in relation to the majority of the complaints, which concerned allegations of misleading or deceptive conduct, the Tribunal declared that the ACA had adopted an insufficiently robust approach to the monitoring of compliance.

2. The 1985 Hearings[12]

(a) The ACA Case

For the 1985 Sydney licence renewal hearings the ACA again monitored the advertisements broadcast by the licensees, this time over a one-day period. The result of this study was to identify two major areas of breach *viz.* sexist advertising and non-nutritional food advertising. Also, miscellaneous breaches were found of the time standards and in relation to generally deceptive advertising.

The ACA adopted as a definition of sexism the description of that term contained in the publication *Fair Exposure* produced by the Office of the Status of Women as a guide for media managers to the depiction of women in the media. Sexism was there described as a consistent pattern of advertising which reinforced "outdated or unrealistic stereotypes of women"[13] and which continued "the projection of women as sex objects".[14] The ACA submitted that the sexist advertising surveyed by it revealed breaches of five Tribunal standards, the taste and decency guideline of FACTS CAD and three clauses of the Media Council of Australia's Advertising Code of Ethics as well as section 52 of the Trade Practices Act 1974 which prohibits conduct in trade or commerce "that is misleading or deceptive or is likely to mislead or deceive".

Among the Tribunal standards allegedly breached by sexist advertising were those concerned with: the broadcasting of material which is "acceptable in terms of standards current in the Australian community; material which takes advantage of the natural credulity of children", which is "harmful to young children", or which produces in "older children and adolescents a false or distorted view of life"; and material which does not take into account "the rights and sensitivities of the public". The depiction of women as sex objects was alleged to have breached a range of standards dealing with taste and decency. Similarly the FACTS CAD guideline number one on taste and decency was alleged to have been breached. Finally a number of claims of the Media Council of Australia's Advertising Code of Ethics were alleged to have

11 Australian Broadcasting Tribunal, *Re Complaint by the Australian Consumers' Association Concerning Various Television Advertisements* (20 December 1983).

12 Quotes in the following discussion are from Australian Broadcasting Tribunal, *Rulings and Directions, Sydney Commercial Television Licence Renewal Inquiries 1985*, 12 June 1985.

13 Office of the Status of Women, *Fair Exposure* (1983), 1.

14 *Ibid.*

been breached, including clause 11 which provides that "[a]dvertisements shall not exploit children nor contain anything which might result in their physical, mental or moral harm".

Similar Tribunal and industry standards and section 52 of the Trade Practices Act were relied upon by the Australian Consumer Association in its arguments in relation to non-nutritional food advertising and in relation to miscellaneous breaches.

(b) The Licensees' Case

Each of the licensees argued that as the advertising which they broadcast had been checked by FACTS CAD they had discharged their statutory obligations to ensure that advertising broadcast by them complied with the law and Tribunal standards. This submission was encouraged by the various Tribunal statements quoted above on the reliability of FACTS CAD. A difficulty which the ACA had in meeting this argument was the fact that the CAD was not a party to the proceedings and thus could not be examined.

In its ruling on the preliminary submissions, the Tribunal, in effect, conceded the substance of the licensees' argument. Departing from its 1982 position the Tribunal declared that it was not concerned with breaches of industry codes and standards. It expressed the view that breaches of State and Federal advertising statutes were none of its concern. Finally, the Tribunal ruled that the ACA's case raised the question of whether breaches it established were attributable to "reasonable reliance on information supplied by another person" or to "the act or default of another person" after "reasonable precautions had been taken and due diligence exercised".[15] In other words, if all the breaches alleged by the ACA had been made out, reliance by the licensees on FACTS CAD provided a defence.

To prove its reliance on FACTS CAD one of the licensees, TEN-10, produced a report by the CAD on the ACA's 1985 complaints. The report was fairly perfunctory in that it repeated the Tribunal's view that breaches of industry codes were not a matter for the Tribunal. Reflecting the Tribunal's opinion, it declared that breaches of the Trade Practices Act were a matter for the Federal Court and not the Tribunal. Finally, it declared that sexism in advertising was "not the subject of any Television Program Standard", therefore such complaints were not relevant to licence renewal hearings. In examination on this point senior executives of the licensees declared that there was little or no community interest in the subject of sexism in the media, therefore it could not be alleged that sexist advertising breached community standards.

(c) The ACA's response

Since the Tribunal had provided the licensees with the defence of "reasonable reliance upon information supplied by another person", *viz.*

15 Note 12 *supra*, 50.

FACTS CAD, the ACA responded with arguments that the alleged reliance was not reasonable and that FACTS CAD was not "another person".

The unreasonableness of the reliance was alleged to lie first on the fact of FACTS CAD's assertion that the advertising breaches alleged by ACA were outside the jurisdiction of the Tribunal. Secondly, the ACA reiterated the personal obligation imposed by the Broadcasting Standards on licensees to ensure, for example, that advertising matter complies with State and Federal laws. Thirdly, the ACA drew attention to the revocation by the Trade Practices Commission of the FACTS CAD authorisation, which called into question the legality of FACTS CAD operations. Also the ACA surveyed the various criticisms which had been made during the Commission's inquiry into FACTS CAD determinations.

Finally, the ACA took the technical but important point that FACTS CAD could not be characterised as "another person" since it was an unincorporated association made up of the licensees themselves. Senior executives of the licensees were senior executives of FACTS CAD. Consequently the argument that "another person" was to blame wore a trifle thin.

(d) The Implications of the 1985 Hearings for Media Regulation

The licences of the Sydney applicants were due to expire in May 1985. In November of that year the Tribunal announced that it had decided upon a renewal of all the licences and that it would publish the reasons for its decision, which it did in May 1986.

An important aspect of the Tribunal's 1985 hearings were the procedures it adopted. Sub-section 83(1) of the Broadcasting and Television Act 1942 obliges the Tribunal to hold a public inquiry before granting a broadcasting licence. Sub-section 83(2) permits the Tribunal to disallow submissions which in its opinion are "frivolous, vexatious or not made in good faith". In the Policy Statement POS 06, the Tribunal has defined these terms as including matters "not worthy of serious notice", which consist of "allegations or assertions of a far-fetched or damaging nature, for which insufficient supporting evidence is provided" or views which are "not honestly held". On this basis the various Costigan Commission allegations about the owner of Channel TCN-9 were rejected by the Tribunal.

This policy statement formed the basis of submissions by the licensees that the ACA could be ignored as it "was engaged in a publicity-seeking exercise" (TCN-9); that its case was "the dying gasp of an organisation searching for a theme to justify its intermeddling" in the proceedings (ATN-7) or that, at best, it should be thanked for its written submissions and the renewal be left to discussions between the Tribunal and the licencees (TEN-10). The Tribunal betrayed a considerable sympathy for the latter course. In opening proceedings the Chairman, David Jones, announced that, as far as possible, the Tribunal would proceed along the lines recommended by the

Administrative Review Council on the Tribunal's procedures.[16] An important aspect of these recommendations is the reduction to writing of the case as a preliminary matter for the competing parties. The request for further and better particulars served by the Tribunal on the ACA pursuant to a request by TCN-9 bore this impress. The ACA was served with a schedule of 633 questions to be answered within five working days. As laudable as the search for precision in defining the differences between parties may be, it reflects a lawyer's bias which may be at odds with the public interest concerns which stand at the heart of the inquiry process. For example, typical of the particulars sought by the Tribunal from the ACA was the following:

> (d) Please state in respect of each advertisement referred to in Appendix 2, how and why it failed to comply with Programme Standard 38(f) and in particular having regard to the content of 38(f) how it is alleged that each such advertisement is unsuitable for viewing by children (referring to Programme Standard 11). Is it alleged that the advertisements are not suitable for children and if so, state precisely how it is alleged that such advertisements are not so suitable. With respect to Programme Standard 16, state precisely how it is alleged that each advertisement fails to comply with such standard, and in particular whether it is alleged that the advertisements would tend to produce in older children and adolescents a false or distorted view of life and if so in what respects the view of life allegedly depicted by the advertisements is false or distorted. With respect to Programme Standard 40 please state precisely which sections of that Standard are relied upon by ACA in its allegation that the advertisements failed to comply with them, giving full particulars of the facts, matters and circumstances that the submittor will rely upon in pressing that allegation.

The ACA was in the fortunate financial position of being able to afford lawyers to assist in preparing the relevant paperwork, as well as being able to afford lawyers over the eleven hearing days of the Tribunal inquiry. Other public interest groups are not in as fortunate a position, consequently, exhausting the opposition is a realistic strategic option for licensees. The adoption by the Tribunal of the Administrative Review Council recommendations, as conducive to efficiency as they may be, undermines the objectives of the public hearing procedure. That procedure was adopted on the recommendations of the Green Committee which explained:

> Since broadcasting frequencies are scarce national resources, and since control of such frequencies confers upon broadcasters both a valuable asset and a considerable measure of public influence, the licensing process must be seen to be a fair and open one ... there should be no suspicion of undue influence by any individual or group.
>
> ... the whole of the licensing process to a legitimate area of public interest. As such it should be performed in the course of public inquiries...[17]

The significance of the case brought by the ACA in the 1985 hearings is considerably circumscribed by the fact that in March 1986 the Tribunal announced the introduction of new television program standards and television advertising conditions. Virtually all the standards which the ACA claimed to have been breached by the Sydney licensees have been repealed. An exception is made for children's television advertising broadcast between

16 Administrative Review Council, *Report on Australian Broadcasting Tribunal Procedures* (1981).

17 Postal and Telecommunications Dept *Australian Broadcasting: a report on the structure of the Australian broadcasting system and associated matters* ("Green Report") (1976), 358 paras 214-215.

4.00 pm and 5.00 pm on weekdays in respect of which special advertising standards have been promulgated. Consequently, the Tribunal will no longer concern itself with the question of whether television commercials breach laws other than the Broadcasting and Television Act 1942. In other words, the Tribunal has largely abandoned the field of advertising regulation to the Trade Practices Commission and FACTS CAD.

V. THE MEDIA COUNCIL OF AUSTRALIA

The Media Council of Australia is an association of the organisations responsible for the self-regulation of the various media: FACTS for television, the Federation of Australian Radio Broadcasters, eight associations responsible for print and the associations responsible for cinema and outdoor advertising.[18] It was originally established in 1968 to control the accreditation of advertising agencies. Under the Media Council's rules accredited agencies are those which will be extended credit by media proprietors and the Media Council's Accreditation Authority prescribes the commission rates to be received by accredited agencies. The control of commission rates constitutes price fixing by the Media Council which breaches section 45 of the Trade Practices Act 1974, unless a countervailing benefit to the public can be demonstrated. The Media Council's accreditation rules require that advertising submitted to a media proprietor shall comply with all relevant laws and with advertising standards and codes promulgated by the Media Council of Australia. Compliance with these codes and standards, which cover the topics of advertising ethics, cigarettes, alcoholic beverages, hairpiece/treatments, slimming preparations, domestic insecticides and mail order advertising, was adduced by the Media Council as benefiting the public.

Complaints may be made to the Media Council by consumers or industry members. These are then referred to the Advertising Standards Council (ASC) set up by the Media Council to adjudicate complaints about offending advertisements. An ASC finding of breach may result in the imposition of sanctions on advertising agencies which include the loss of accreditation and fines as well as orders to correct contravening advertisements.

Despite its attempt to represent the public interest in its representation and despite the imposition of penalties, the ASC has attracted considerable criticism. Most of this criticism has originated with public health and consumer groups who allege bias and partiality in the ASC's decisions.

Critics have pointed to the small proportion of complaints which the ASC upholds in comparison with those it either dismisses or declines to entertain. Between 1982 and 1984 only 20% of complaints made were upheld. The ASC's record is perceived to be worst in the area of cigarette advertising. In its first determination against a cigarette company the complaint took over

18 See, S. Barnes and M. Blakeney, *Advertising Regulation* (1982), 449.

eighteen months to be heard.[19] On the other hand, in a number of controversial decisions the ASC has upheld complaints against health authorities advertising the dangers of smoking on the bases that the dangers were overemphasised, sensationalised or not proved.[20] The contravening advertising was ordered to be suspended immediately.

VI. EVALUATION BY THE TRADE PRACTICES COMMISSION

In 1985 the Media Council sought an extension of the authorisations it had obtained in 1976 to cover a number of modifications to its advertising codes and standards.[21] This application was used as an opportunity by the Media Council to extol the merits of advertising self-regulation and by its opponents to inveigh against its vices.

The Media Council asserted the public benefit inherent in the alleged flexibility of self-regulation, its wide scope and the efficiency of having an industry body to co-ordinate self-regulatory efforts. Opponents of the application cited the alleged pro-industry bias of the ASC; the confusing proliferation of self-regulatory codes and agencies; the imprecision of the codes; the ineffectiveness of sanctions; the lack of publicity in relation to avenues of complaint and the delays in resolution of complaints.

The Trade Practices Commission, which had earlier decided that the criticisms of FACTS CAD obliged it to insist on a conditional authorisation of that body's codes and procedures, discounted the criticisms of the Media Council and the ASC. The Commission, in its January 1986 determination, took the view that self-regulation was better than no regulation. It decided that the Media Council codes were a useful complement to the statutory regulation of advertising. The Commission was persuaded that the Media Council and the ASC were amenable to representations from outside the industry. The Commission concluded that it

> ...accepts that the codes make an important contribution to serving community standards and bringing about compliance with the law. They do not go as far as some would want but those points of view can be pressed by those seeking legislative action and regulation through ...government bodies.[22]

VII. MEDIA SELF-REGULATION — "LEAVING THE FIELD"

The regulation of the broadcast media has been conceived of as the regulation of a trusteeship because of the finite number of broadcast frequencies on the electro-magnetic spectrum. Individual licensees are under a fiduciary-type obligation to ensure that the material broadcast by them is

19 See S. Chapman, "A David and Goliath story: tobacco advertising and self-regulation in Australia", (1980) 281 *British Medical Journal* 1187.

20 See note 4 *supra*.

21 For the Media Council's 1976 authorisation see *Re Herald & Weekly Times*. (1978) 17 ALR 281.

22 *Media Council of Australia* (1986) ATPR (Com.) 50-107.

not offensive, intrusive or, in the case of advertising, false, misleading or deceptive. The public interest in the proper discharge of the licensees' obligations is intended to be protected both by the Australian Broadcasting Tribunal, as the licensing authority and the Trade Practices Commission as the market regulator.

A fundamental principle of Trusts law is that a trustee is not allowed to profit from its office. The business of the commercial media is the sale of advertising space. The broadcast media are in a particularly advantageous position in this regard. Both radio and television 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".[23] It would appear not to be in the interests of the commercial media, through its self-regulation bodies, to restrict the access to the public of advertisers willing to pay their way. Yet the Australian Broadcasting Tribunal on the one hand assumes the impartiality of FACTS CAD and on the other has vacated the field of advertising scrutiny. The Trade Practices Commission, after having sought to make FACTS CAD accountable to the public for its activities, has declined in its 1986 Media Council determination to impose a similar accountability requirement. Paradoxically, the Media Council's self-regulation procedures instruct persons seeking to complain about television advertisements to make that complaint to FACTS CAD. Thus the Commission has not only left the self-regulatory field to the Media Council, but in its Media Council determination has authorised a procedure which it had declined to authorise in its FACTS determination.

At worst the Media Council determination may represent an instance of regulatory capture. Almost equally unpalatable is the fact that the unqualified approbation of both the Broadcasting Tribunal and the Trade Practices Commission of media self-regulation legitimises a regulatory system which has more general implications for regulation of Australian industry. More specifically, this approbation represents an abdication by both these agencies of an important regulatory responsibility to the public.

23 Senate Standing Committee on Education and the Arts, *Children and Television* (1978) para. 2.19.