

BOOK REVIEW

Advertising Regulation by Shenagh Barnes and Michael Blakeney (Law Book Company Limited, 1982) pp i-iii, 1-612; price \$45-00 (limp). ISBN 0 455 20545 0.

It is not an easy task to give a coherent account of advertising regulation. Not only are there many different kinds of advertising, including word-of-mouth, handouts, newspaper and journal advertisements, billboards, broadcast commercials, promotional gimmicks and sales schemes, but also there is a wide variety of regulatory options ranging from the common law requirements through statutory controls and controls imposed pursuant to delegated legislation to private controls exercised by industry associations on their members. Furthermore, advertising is regulated to a diversity of ends, including prevention of falsity, increased provision of information, maintenance of standards of taste and decency, control of the incidence of advertising, furtherance of aesthetic dictates, suppression of racism and sex discrimination, preservation of health and safety and the prevention of electoral malpractices. As this list of regulatory goals indicates, the perceived beneficiaries of advertising regulation include consumers, traders, moralists, radio listeners, television viewers, day-trippers and other travellers, migrants, women (and men), voters and politicians. In short, advertising regulation is not a single topic but a conglomeration of a wide range of concerns affecting a wide range of people in different ways.

Marketing personnel, however, need to have an understanding of advertising regulation in all its forms, as for media executives and lawyers who specialize in marketing and media work. There has for some time been a need for a reference work which pulls together the various strands of advertising regulation. Barnes' and Blakeney's book meets this need very well. On the other hand, the authors' treatment of certain topics (most notably advertising self-regulation) is unlikely to endear either them or the book to some segments of the industry. Industry personnel may take some comfort, though, from the fact that the Trade Practices Commission also comes in for quite a pasting for its perceived timidity in the face of pressure from both business and a conservative government.

The broad scope of the book is signalled in chapter 1 where advertising is defined as including 'any form of promotional communication aimed

at potential consumers by producers and suppliers of goods, services and land', 'regulation' is also defined broadly so as to include private, as well as the more readily recognised forms of government regulation.

The principal aim of chapter 1 is to introduce the reader to some of the policy issues which underpin advertising regulation. This is the weakest part of the book. In the first place, some of the issues dwelt on in the chapter (for instance, intensive advertising as a barrier to entry) are not central to the book at all, while some policy issues which are central have been glossed over. For example, much of the book is concerned in one way or another with the regulation of misleading advertising, but there is no attempt in chapter 1 to explain what might motivate advertisers to lie and why, in any event, advertising regulation is necessary. These questions are important because there is a substantial body of literature concerned with the free market argument that most advertisers will be discouraged from lying by the prospect either of losing repeat purchases or of being exposed by their competitors.¹ It is important, especially in a climate of de-regulation, that apologists for regulation familiarize themselves with these arguments and identify their weaknesses.

The notion that misleading advertising laws are unnecessary is part of the broader thesis propounded by Chicago school adherents that most regulation is at best futile and at worst counter-productive. The authors acknowledge this thesis and with just a few qualifications, accept it. This is an astonishing concession, since the tone of the book overall is unmistakably pro-regulation. The concession would, arguably, never have been made had the anti-regulation thesis been explored a little more systematically.

The only real attempt the authors make to defend regulation against free market attacks lies in their assertion that "cost and efficiency considerations should be subordinated to considerations of fairness, honesty, freedom of choice, consumer information and consumer safety". This statement would send Posner apoplectic. It implies that the listed considerations are incompatible with the economic goal of efficiency. This is not so. In fact, honesty is a pre-requisite to the attainment of efficiency, while freedom of choice is one of its ingredients. The real question for the economist is not whether goals such as those listed ought to be pursued but, rather, how many resources should be expended in their pursuit. In this connection, his concern is that an increase in informa-

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¹ See, e.g., Posner, 'The Federal Trade Commission' (1969) 37 *University of Chicago Law Review* 47; Nelson, 'Information and Consumer Behaviour' (1970) 78 *Journal of Political Economy* 311; Darby and Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 *Journal of Law and Economics* 67; Jordan and Ruben, 'An Economic Analysis of the Law of False Advertising' (1979) 8 *Journal of Legal Studies* 527

tion or the reduction of a risk of injury should be cost-justified, that is, that the marginal value of the increase (or reduction) not exceed the marginal cost of its achievement. This is a powerful proposition. In so far as the passage quoted above implies that it ought sometimes to be foresaken, it offers no justification for doing so nor any alternative basis for isolating the point beyond which pursuit of the listed goals *should* be abandoned.

The major achievement of the book is to draw together the disparate legal issues to which advertising regulation gives rise in a form which is both accessible and readable. The dominant theme of the book is consumer protection, but considerably more than lip-service is paid to the other facets of advertising regulation. Chapter 5 contains quite a detailed discussion of laws relating to the registration of business names in order to "assist the advertiser or producer to avoid unnecessary expenditure on packaging and promotion of a name which is unregistrable or unusable". As already mentioned, chapter 3 incorporates a brief discussion of provisions in electoral legislation relating to advertising, while chapter 11 deals with controls imposed on the promotion of gambling and lotteries, taste and decency in advertising and gender advertising. Chapter 8 contains a brief discussion of restrictive trade practices laws which bear on advertising (including the prohibitions of price-fixing, collective advertising agreements, resale price maintenance and price discrimination).

Chapters 4, 6 7 and 8 contain a full and useful account of the misleading advertising provisions of the *Trade Practices Act 1974* (Cth.) and the discussion of the Australian case-law on these provisions is supplemented by extensive reference to relevant United States authorities.

All writers in the consumer protection field are bedevilled by the pace of developments in this area of the law. Barnes and Blakeney are no exceptions. Their very interesting discussion of the legal standard of audience intelligence must now be read in the light of the High Court's decision in *Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd.*² Their treatment of what constitutes 'misleading' conduct is also affected by *Puxu* as well as by the Full Federal Court's decision in *Taco Company of Australia Inc. v. Taco Bell Pty Ltd.*³ The suggestion made on p.77 that some limit may eventually be imposed on the extraordinary broad scope of section 52 has recently been borne out by Mr. Justice St. John's decision in *Westham Dredging Company Pty Ltd v. Woodside Petroleum Development Pty Ltd*⁴ (currently on appeal to the Full Federal Court). In the same con-

2. (1982) 56 ALJR 715

3. (1982) 42 ALR 177

4. (1983) ATPR s.40-338

nection, but in the other direction, the decision in *Australian Ocean Line Pty Ltd v. West Australian Newspapers Ltd*⁵ has opened up the prospect of section 52 being used as an alternative to common law proceedings for defamation.

The parts of the book concerned with misleading advertising focus almost exclusively on the Trade Practices Act and make only passing reference to the corresponding State legislation. This is a surprising omission, since in other parts of the book, State laws are discussed in some detail (see especially the treatment of packaging and labelling in chapter 6 and promotional schemes in chapter 10). The omission is also an unfortunate one, since State misleading advertising laws possess a number of features and limitations which are not shared by their Commonwealth counterpart. For example, the relevant provisions in the *Consumer Affairs Act 1972* (Vic.) are restricted to advertisements which are published, whereas the Trade Practices Act extends to communications made by salesmen in the course of pre-contractual negotiations; the approach taken to corporate criminal liability by the Victorian Act provides an interesting, if sorry, contrast to the corresponding provisions in the *Trade Practices Act*; section 13A(1) of the Victorian Act, which has no counterpart in the Trade Practices Act, imposes a form of mandatory disclosure to the effect that an advertisement may not indicate the deposit required for goods or services or periodic rates of payment unless reference is also made to the cash price of the goods or services (in a similar vein, section 13A(2) which is referred to on page 214 prohibits statements such as '\$15 off' unless the present price is disclosed in an equally distinct manner). No doubt other States' misleading advertising laws also have unique features. The various points of comparison and distinction really ought to have been drawn out and evaluated.

Chapter 12 deals with the judicial enforcement of advertising legislation. Again, the focus is on the *Trade Practices Act* and, in particular, on the jurisdiction of the Federal Court and the battery of remedies and sanctions available to it. Chapter 13 deals with the regulation of advertising by government agencies. It contains a useful discussion of the role of the Australian Broadcasting Tribunal in the regulation of radio and television advertising (with special reference to children's advertising), of the Commonwealth Department of Health in the regulation of advertising for therapeutic goods and of the Trade Practices Commission and State consumer protection instrumentalities.

Chapter 14 explores the acronymic wonderland of advertising self-regulation. It introduces the reader to FARB and FACTS, as well as to

5. (1983) ATPR s 40-349

the MCA, the ASC, the AANA, the AAIC, the APB, the TPAC, the ABAC, the NMMC, the APMA and the NTCG. The authors are scathingly critical of self-regulation principally because of its lack of sanctions and because it appears frequently to be motivated not by public interest but by a desire on the part of the industry to avoid the threat of government regulation. On the other hand, they see considerable promise in self-regulation as a concept. In fact, the book concludes with a proposal for the development of a system of co-regulation where advertising standards would be administered by a body comprising industry, government and consumer representatives. The advantages the authors see in self-regulation are "freedom from the rigidity and delays of the legal system, expertise in administration, breadth and practicality of standards, expedition in administration and, above all, acceptability to advertisers, advertising agencies and the media".⁶ In this connection, one possible weakness in the authors' proposal for co-regulation is that the deficiencies they seek to eliminate from the current self-regulatory system may well be the very features which make self-regulation acceptable to the industry.

There are seventeen appendices to the book which contain some of the less accessible documentation relevant to advertising regulation, including the Australian Broadcasting Tribunal's broadcast advertising and television programme standards, the Trade Practices Commission's information circulars relating to advertising and advertising codes issued by the Medical Council of Australia.

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