

## **Gender Portrayal Guidelines: An Evaluation of Self-Regulation Policies Regarding Representations of Women**

Lauren Rosewarne  
University of Melbourne  
[lrose@unimelb.edu.au](mailto:lrose@unimelb.edu.au)  
Phone 61 3 8344 9482

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### **Abstract**

This paper will explore how outdoor advertising is regulated in Australia. Drawing on the findings of a recent content analysis of a large sample of outdoor advertisements, this paper will detail current problems with contemporary advertising, specifically relating to sexist portrayals of women. These contemporary problems will be linked to the method of advertising self-regulation in Australia and the flaws with the system that facilitate the continued display of sexist imagery. The flaws that will be explored include legislative shortcomings, the lacklustre profile of the self-regulator (the Advertising Standards Board), inappropriate composition of the self-regulatory board, flawed funding mechanisms and unsound complaints handling procedures.

Self-regulation is the method of outdoor advertising control employed in most Western countries. While there is much to be criticised about this method of regulation, of greatest concern from a feminist perspective is the fear that in dodging government regulation in favour of industry regulation, the interests of advertisers are advanced far more readily than those of the women routinely portrayed in the advertisements themselves. This becomes of particular concern when examining the content of outdoor advertising, given that exposure to such images is unavoidable (see Rosewarne 2005). This paper will evaluate the self-regulatory system used in Australia, outlining the flaws in the self-regulatory system that facilitates the sexist portrayals of women present in Australian outdoor advertising. This paper emerges from the research and writing I am currently undertaking in pursuit of a PhD.

## **Outdoor Advertising Regulation: The Australian Situation**

As with most Western countries, in Australia the advertising industry self-regulates. Put simply, as Pickering and Cousins explain, self-regulation is ‘the control of business conduct and performance by business itself rather than by government or by market forces’ (Pickering & Cousins 1980, pg 17). Australia’s self-regulatory system is facilitated by the Advertising Standards Bureau (ASB) which is a body funded through a voluntary levy paid by advertisers. Advertising self-regulation has existed in Australia for over sixty years, although the system has existed in a number of guises and undergone numerous transformations (Harker *et al* 2001).

The Australian system of self-regulation is known to be ‘tripartite’, whereby the media, advertising agencies and advertisers are involved in the system. The key theorists on the specificities of the Australian system are Debra Harker and Michael Harker. The authors argue that in situations where a tripartite self-regulatory system exists, cooperation is significantly enhanced (Harker *et al* 2001). In Australia, the tripartite system becomes most obvious in that it is the media – i.e., the billboard company – that can step in and remove advertisements that are deemed inappropriate by the ASB, if the advertising agency refuses to do so. This happened in 2000 with the Windsor Smith (shoe manufacturer) case, where the billboard company, Australia Posters, intervened and removed a billboard (which included a simulated fellatio scene) following the ASB decision that the advertiser refused to comply with.

## **The Australian System: Barriers to Fair Portrayals**

Despite feminist awareness and activism on sexist advertising tracing back over forty years, such advertising is still a problem. This paper identifies flaws in the Australian system of self-regulation that facilitate the continued display of sexist advertisements, identifying some of the inadequacies evident in the ASB model and thus establishing areas where policy reform needs to take place.

### *Voluntary Participation*

Because self-regulation is not something that operates under a legislative framework, advertisers are not legally obliged to participate. From an industry perspective, there are numerous positive features of such voluntary compliance. Quit, an anti-smoking program based in The Cancer Council Victoria, outlines some of the advantages of voluntary compliance as relevant to the control of cigarette advertising:

Voluntary agreement allows room for industry negotiation, and allows the industry to claim that it holds a responsible position in the community (whereas the necessity for legislation strongly suggests otherwise). It keeps communication channels open between the industry and the marketing sector, assisting with industry lobbying and defences of the status quo in advertising. At a government level, the voluntary codes have enabled the industry to negotiate directly with Ministers for Health. The cold finality of legislation effectively closes these doors and isolates the industry from potential allies and lobbying opportunities. Further, once passed, legislation is difficult to rescind. It also carries with it penalties for misfeasance, whereas breaches under the voluntary agreements have typically carried little or no penalty (Quit 1995, n.p.).

While Quit presents an insight into some of the positives of voluntary compliance, there are also numerous shortcomings. The most obvious shortcoming is the consequences of something being voluntary. While indeed, 85% of advertisers are members of the Australian Association of National Advertisers (AANA undated, n.p.) (Which can infer that 85% of advertisers are participants in the self-regulatory system), the voluntary nature of the system means that an advertiser can withdraw their participation at anytime without disincentive. In practice for example, an advertiser may spontaneously choose not to follow the code of conduct set by AANA. This illustrates the first avenue for an advertiser's non-compliance. If their maverick advertisement is complained about, and if the ASB undertakes adjudication and recommends that the offending advertisement be withdrawn, the advertiser may simply refuse. This illustrates an advertiser's second avenue for non-compliance. In 2000, the ASB upheld complaints against the aforementioned simulated-fellatio Windsor Smith billboard. The ASB upheld the complaint under Section 2.2 of the AANA Code, claiming that 'the image was highly sexually suggestive and was inappropriate for such a broad audience' (ASB 2000, pg 9). In spite of the ASB's judgment, the advertiser refused to remove the billboard and Australia Posters had to remove the billboard following public outcry. The fact that the recalcitrant advertiser refused to do so itself, illustrates an inherent flaw that the voluntary nature of the system poses.

### *Legislative Shortcomings*

In the current self-regulatory system, the main restrictions posed on outdoor advertising pertain to physical sites of advertising and the planning restrictions imposed on the placement of the advertising media (i.e., the actual billboard), along with local governments laws regarding the location and size of advertising media, or as Driver and Foxall explain, the '*physical characteristics* of advertisements' (Driver & Foxall 1984). Restrictions in regards to advertising *content* are far more elusive. The Outdoor Advertising Association of Australia (OAAA) explains:

'The advertisement that is placed [sic] upon the plant must not contravene any criminal laws, such as indecent publications, nor infringe laws generally, such as conveying misleading information. Complex issues can arise and advice may be necessary prior to running the advertisement(s). In circumstances where an advertisement complies with the law, issues of taste and decency can arise as a result of varying views and attitudes within the community' (OAAA, undated, n.p.).

As detailed by the OAAA, the only legislative limitation placed on advertisers is to ensure that advertisements do not contravene any criminal laws. Of course, as the OAAA explains,

content issues are raised in regards to ‘issues of taste and decency’ and it is these issues that form the bulk of feminist criticism of advertising and point to the main problems that regulation of a medium like outdoor advertising pose: issues of criminal law breaches are comparatively clear-cut; issues of taste and decency are notoriously subjective.

Laws such as the *Trade Practices Act* in Australia facilitate consumer protection however again, this legislation is primarily concerned with prohibiting advertising deception – i.e., honesty and accuracy in regards to advertised products and prohibiting fraud. The only time ‘content’ is focused on, is when it pertains to the actual product being advertised – and this is where legislation can be witnessed in regards to advertisements for cigarettes and alcohol. Legislative interest however, does not concern the actual imagery used.

While the lack of appropriate legislation does inhibit advertisers being adequately punished, an advantage of self-regulation and the lack of legislation for a consumer means that, as Boddewyn explains, a consumer who has been harmed by an advertisement, does not need to ‘prove’ their ‘injury’ as is usually required by law. Instead, because it is in the interest of the industry to ensure there is not a widespread public backlash against advertising, ‘individual injury is not necessary’ for resolution (Boddewyn 1988, pg 8). This also helps explain why self-regulation is a cheaper method of control than statutory authority regulation. Of course, as Boddewyn explains, the shortcoming of the lack of legislative authority is obvious: government has the authority to ‘force compliance’ thus the noncomplier problem discussed earlier, is avoided (Boddewyn 1988, pg 11).

#### *Lack of Pre-Vetting*

The aforementioned Windsor Smith case illustrates the situation that in Australia, outdoor advertising does not go through a pre-vetting mechanism prior to display, as is the case with advertising in media like television. The lack of pre-vetting was also a problem acknowledged in the 2002 Victorian Office of Women’s Policy (OWP) report *Portrayal of Women in Outdoor Advertising* (OWP 2002, PG 14).

Because pre-vetting doesn’t currently exist in Australia, the ASB tries to get advertisers to comply with standards through the prescription of a conduct charter: the Australian Association of National Advertisers (AANA) ‘Code of Ethics’. This Code aims to:

‘ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors’ (AANA, undated, n.p.).

In a self-regulatory system, the onus is on advertisers to ensure that their outdoor advertisement complies with the Code before organising public placement. However, because there is no ongoing monitoring of outdoor advertising in Australia (or of advertisers’ compliance to the AANA charter), the only gauge of compliance is audience complaints.

The Chivas Regal ‘Yes, God is a man’ advertising campaign of 2000 highlights well the negative consequences of no pre-vetting. This campaign showed a headless woman with a very prominent cleavage and long, bare legs, getting out of a car, captioned by the slogan ‘Yes, God is a man’. Prior to the display of the advertisement, Dom Ogum, the national manager of Adshel (a company that sells billboard space to advertisers) envisaged that the advertisement would create controversy: ‘We took the booking with the provision of a back-

up (toned down version of the ad)... We did foresee that there may be some backlash from the community' (Ligerakis 2000). Sure enough, advertising space was sold to Chivas Regal's advertising agency, and sure enough backlash ensued and Adshel progressively replaced more than 150 Chivas Regal advertisements with the 'back-up'. Yet, the original controversial advertisement went up; people saw it; extra media attention was attracted by the controversy. The damage was done. This point is highlighted well by a comment made in an on-line forum about advertising: 'I'd never seen the Windsor Smith ad until I saw it printed in *The Age*' (in 'Your Say' 2002, n.p.). Even though Adshel knew the advertisement would cause 'backlash', it was displayed because the ASB facilitates a system that enables sexist advertisements to be flaunted in the public arena and then tardily deals with consequent debate.

### *Lack of Medium Monitoring*

Just as advertisements are not pre-vetted before display in Australia, similarly they are not monitored by the self-regulator either. Such monitoring is undertaken by the self-regulators in France and the United Kingdom (Boddewyn 1988, pg 19) as well as by self-regulators in Belgium, Italy, Denmark, Germany, Greece and Ireland (Advertising Education Forum, undated, n.p.).

Engaging in ongoing monitoring, demonstrates, at least in theory, a self-regulator's commitment to monitoring advertisers' compliance with existing codes rather than relying exclusively on consumer complaints and helps overcome the problem of low levels of advertising complaints.

### *Lacklustre Profile*

Given the lack of ongoing monitoring of advertising in Australia, the ASB is completely reliant on consumer complaints for assessing and controlling unfair portrayals. The problem with a complaints driven system however, is that to work, participation needs to be very simple so that community outrage can be properly gauged. Australia receives a comparatively low number of advertising complaints. Boddewyn discusses the situation in Brazil where, like Australia, compliant levels are low. A number of possible explanations for this are offered:

'This may be interpreted as evidence of: (1) very good behaviour on the part of advertisers; (2) a very weak code; (3) limited knowledge of the... code; (4) disinterest in complaining; (5) limited monitoring... and/or (6) more effective alternative remedies (e.g., through the courts)' (Boddewyn, 1998, pg 94 - 95).

'Very good behaviour on the part of advertisers' seems an unlikely explanation for the low number of complaints received by the ASB. A more likely explanation proposed in this paper is that the lacklustre profile of the self-regulator in Australia accounts for the low number of complaints received. As Boddewyn explains, one of the disadvantages of self-regulation is that the systems are often insufficiently publicised and promoted (Boddewyn 1988 pg 10). Boddewyn discusses Brazil where up until 1984, the self-regulator engaged in annual promotion campaigns 'to publicize the existence of the Code and to instruct professionals as well as the general public on how to complain' (Boddewyn 1988, pg 95). Such promotions no longer exist and nowadays Brazil has a 'relatively low' number of complaints. While Boddewyn doesn't directly connect the low complaints with the lacklustre profile of the regulator, it seems a likely explanation.

In the Australian system - as in any complaints-based system - an advertisement has to offend a person enough to motivate them to complain. This is where a major problem surfaces. According to research documented in the 2002 Office of Women's Policy report, of the 37% of the 281 female respondents who had seen something inappropriate in outdoor advertising, 62% of these women thought about complaining but only 4% actually did. Of the 121 male respondents, 32% thought about complaining, but no man actually did (OWP 2002, pg 13). When asked why formal complaints were not made, 22% of respondents claimed that they did not know who to complain to, 13% thought no-one would listen, and 10% did not know *how* to complain (OWP 2002, pg 13).

FreeTV Australia (known previously as the Federation of Australian Commercial Television Stations and Commercial Television Australia) is the peak industry association for free-to-air commercial television services in Australia. FreeTV routinely runs television advertisements advising consumers about how to complain if they see something that offends them on television. The ASB does not market itself in such a way, thus providing a possible explanation as to why so many respondents in the OWP study didn't know who to complain to or how. If the process of complaining is not made more obvious and simple, the consequence is that community silence is read as acceptance thus facilitating sexist advertisements to remain the status quo.

#### *A 'Very Weak Code': Distorted Ethics Guidelines*

As detailed in Boddewyn's list of possible reasons for the low number of complaints received by the Brazilian regulator, he lists 'a very weak code' as a possible explanation (Boddewyn, 1998, pg 94). In this section, flaws inherent in voluntary codes will be identified, as well as those specific to the AANA Code used by the ASB in Australia.

As Boddewyn argues, the very concept of 'guidelines' is arguably flawed, given that they are usually not binding and are generically written:

'Guidelines and recommendations are often of a less binding nature because the problems are novel, fluid and/or hard to clearly circumscribe so that precise rules are not possible. Decency, sexism and the use of humor, ethnic discrimination and the like are typically amenable to such looser treatment' (Boddewyn 1988, pg 17).

Issues of sexism and decency are what Boddewyn refers to as 'soft' issues and explains the difficulty in turning these 'soft' principles into rules or guidelines because the principles are never as clear cut as issues of deception:

'First, ASR systems have no particular expertise in soft areas (nobody does, really) while what constitutes advertising deception and even unfairness (at least in the case of competitive behavior) can rely on extensive precedents derived from regulatory standards, court decisions and self-regulatory experience. Second, ASR bodies and supporters fear that 'taste and opinion' has no true boundaries or limits' (Boddewyn 1988, pg 20).

It is Boddewyn's point that helps establish the theory behind why mere guidelines can be deemed so problematic, and helps to set the scene for why the AANA Code used by the ASB in Australia is particularly useless in prohibiting sexist outdoor advertisements.

When an individual makes a complaint about an advertisement to the ASB in Australia, it is the AANA 'Code of Ethics' that is used as a guideline for complaints adjudication. The 'Code of Ethics' is as follows:

1. Section 1

1.1 Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory.

1.2 Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.

1.3 Advertisements shall not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.

1.4 Advertisements shall not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way, which implies a benefit to the environment, which the product or services do not have.

1.5 Advertisements shall not make claims about the Australian origin or content of products advertised in a manner, which is misleading.

2. Section 2

2.1 Advertisements shall not portray people or depict material in a way, which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief.

2.2 Advertisements shall not present or portray violence unless it is justifiable in the context of the product or service advertised.

2.3 Advertisements shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programmed time zone.

2.4 Advertisements which, having regard to the theme, visuals and language used, are directed primarily to children aged 14 years or younger and are for goods, services and facilities which are targeted toward and have principal appeal to children, shall comply with the AANA's Code of Advertising to Children and section 2.6 of this Code shall not apply to advertisements to which AANA's Code of Advertising to Children applies.

2.5 Advertisements shall only use language, which is appropriate in the circumstances, and strong or obscene language shall be avoided.

2.6 Advertisements shall not depict material contrary to prevailing community standards on health and safety.

2.7 Advertisements for motor vehicles shall comply with the Federal Chamber of Automotive Industries Code of Practice relating to Advertising for Motor Vehicles and section 2.6 of this Code shall not apply to advertisements to which the Federal Chamber of Automotive Industries Code of Practice applies. (AANA, undated, n.p.)

The first problem with this Code is its origin and purpose. The AANA is a peak industry body, which was formed in 1928 ‘by a group of 12 concerned advertisers with the same aim and objective - to promote and safeguard the advertising interests of its members’ (AANA, undated [b], n.p.). AANA membership has grown to include the majority of Australia’s major advertisers, representing the interests of companies responsible for 85% of annual national advertising expenditure (AANA [b], undated, n.p.).

Considering that the AANA emerged from concerns over *advertisers’* ‘freedom of commercial communication’ and that their Code was written explicitly to ‘promote and safeguard’ *their* interests (AANA [b], undated, n.p.), it can be interpreted that there is a conflict of interest when this same Code is used by the ASB to promote *public* interests.

Secondly, from a feminist perspective, it is indeed problematic that the closest that the Code’s mission statement gets to mentioning portrayals of women is that advertisements should be ‘decent’. Similarly, the fact that the generic term ‘people’ is used throughout the Code rather than providing any specific reference to women, has been criticised as problematic by media theorists including Margaret Gallagher (Gallagher 2001, pg 61).

The phrasing throughout the code is also problematically vague. If the overwhelming majority of complaints received by the ASB do not contravene the Code, what kinds of complaints do? What constitutes vilification? Discrimination? What is a ‘sensitive’ portrayal of sex, sexuality and nudity? Presumably, the point of having an operating framework such as the AANA Code is to overcome the quandary of subjectivity. Having such an elastic charter actively encourages the dismissal of complaints because the sections are so broad in their catch-all nature, in essence – and practice – they catch nothing.

As Boddewyn discussed, the generic nature of guidelines is inherently problematic. On a cursory level, it might be argued that such codes suit their intended purpose of providing advertisers with loose production guidelines. Of course, in a complaints-based self-regulatory system, the codes must serve purposes far broader. When consumers complain about advertisements, the ASB adjudicates cases using this AANA Code as its operating framework. This means that the broad-brush statements contained within it routinely result in – and are actually used to justify - complaints being systematically dismissed. Some recent ASB cases illustrate this point well. In September 2004, complaints were received by the ASB regarding a television commercial advertising Nivea shower oil. The advertisement depicted a man and woman embracing each other. The man runs his hands over the woman’s body and, feeling that it is smooth and soft, asks whether she is wearing new lingerie. She says no and is then filmed in the shower using Nivea Shower Oil (ASB 2004). A sample complaint included:

‘What I find offensive (I was quite amazed when I saw the ad that it had made it onto the screen at all) is that while she is showering, the camera pans down and there are pubic hairs showing quite distinctly. I find this nudity unnecessary and offensive’ (ASB 2004).

The ASB found that the depiction did not contravene the provisions of the Code relating to the portrayal of sex/sexuality/nudity (ASB 2004). The complaint was consequently dismissed. In December 2004, a television commercial for Berlei lingerie featured a group of women following a loudspeaker van, taking off their clothes and walking down the street revealing their bras and/or underwear. The voiceover states that women no longer have to compromise between looking good and feeling good. The tagline is “Berlei. Feels like it’s barely there” (ASB 2004b). This advertisement received numerous complaints including:

‘Suitable for a porn movie but I am furious to see such adverts during the day. Not only do I not want children to see this, I as a woman do not want to see such trash on my TV’ (ASB 2004b).

The complaint was dismissed, the ASB determining that the advertisement did not breach the Code, claiming that ‘the majority of people would not find this advertisement offensive’ (ASB 2004b).

Boddewyn quotes the European Consumer Law Group (ECLG) who argue: ‘Where there is very little, or even no prospect of legislation at all, where the choice is clearly a [voluntary] code or nothing else, then codes should be given careful consideration as a possible means of improving consumer protection’ (ECLG 1983, pg 211 in 1998, pg Boddewyn 1988 pg 10). What this ECLG quote alludes to is that if the industry is enjoying regulating itself without the participation of government, then the onus is on the self-regulator to produce a code that is far tighter and with a greater chance of providing consumers redress – particularly in regards to complaints pertaining to an medium that people have no opportunity to avoid. Of the 2,620 complaints received by the ASB in 2003, only 23 complaints were upheld (ASB 2003). If complaints are routinely dismissed because advertisements are found not to breach the Code, this suggests a revision of the Code may be necessary.

#### *A Flawed Complaints Procedure*

Presuming that a consumer *does* know how to complain, the process of lodging their grievance is not without flaw. The ASB will only accept a written complaint. In the OWP research, it was found that of the respondents who had wanted to complain, 39% stated that they did not have time (OWP 2002, pg 13). The onus of having to put a complaint in writing also means that non-English speakers, the poorly educated, or time-pressed, all of whom have an essential right *to* complain, have this right impaired by not being able to do so easily. It should be noted that this is not just a flaw in the Australian system, but also, as Harker and Wiggs elude, a problem in the N.Z. and U.K. systems also (Harker & Wiggs 1999, pg 4).

Secondly, if a complaint falls within the Code, the procedure to adjudicate this complaint is lengthy. Firstly, agencies and corporations whose advertisement has been subject to complaint will be asked to provide a copy of the advertising material. If there is no response, the Board will proceed to consider the complaint at one of their monthly meetings. This whole process can take months. The problem is that ‘months’ is far longer than any advertising campaign is designed to last. Arguably the lengthy time that adjudication takes proves yet another example of the lack of disincentives for advertisers to produce offensive materials.

### *Flawed Concept of 'Prevailing Community Standards'*

By reading the judgments made in ASB hearings, it becomes apparent that an advertisement is assessed on whether or not 'prevailing community standards' are offended: this is a phrase repeated throughout ASB determinations. This section will argue that 'prevailing community standards' is not a stable ground on which to judge an advertisement.

In 1973 in the *Miller vs. California* case in the U.S., the Supreme Court settled on a three-part test to determine obscenity. One part was 'whether an average person applying contemporary community standards would find that the work as a whole appealed to the 'prurient interest'' (see D'emilio & Fredham 1988). As Rhode, in her book *Justice and Gender*, questioned, who exactly is the supposedly gender neutral, 'average person' that the judgment refers to (Rhode 1989)? Considering that offence is completely subjective, one must question whose standards are being espoused, and what standards complainants are deemed to subscribe to, if their objections are generally not understood as prevailing. The ASB of course, acknowledges the difficulty in reflecting community standards, but simultaneously claims that the Board's 'composition provides it with a rare ability to do so' (ASB 2000).

In their 2000 Review of Operations, it is stated that 'while Board members read all complaints pertaining to a given ad, their final decision does not turn on the number of complaints an ad attracts' (ASB 2000). The dismissal of an Easyjet advertisement in the U.K. - which featured breasts in a push-up bra and the caption 'weapons of mass distraction' - illustrates the problem with the aforementioned ASB statement. The ASA in the U.K. received 186 complaints about the Easyjet advertisement and yet the complaint was dismissed. If a self-regulator is not using the number of complaints received to help form their determinations, from where are 'prevailing community standards' emerging? When one considers that the vast majority of offended people never actually complain, when an advertisement *does* reap numerous complaints, one explanation is that such an advertisement is actually *contravening* community standards.

The second problem with 'prevailing community standards' is that the ASB seems to be actively exonerating their involvement as actual definers of this concept through their inaction concerning complaints. In their Review of Operations, the ASB claimed that 'the Board holds the view that, while the majority of Australians have a fairly robust attitude to such matters, this should not be regarded by advertisers or their agencies as an invitation to push boundaries beyond current community standards' (ASB 2000). Whether inadvertently or not, in reality the ASB's routine dismissal of complaints does mould community standards. The increasing number of sexist advertisements shown, compounded with the small number ever withdrawn, works to give the impression that this calibre of advertising is tolerable. In the two cases discussed earlier - Nivea and Berlei - the statement 'the majority of people would not find this advertisement offensive' was included in each complaint dismissal. In making this determination, the Board is stating that such advertisements are not offensive *enough* to be withdrawn. This means that advertisers have to take their material a step further to shock, to outrage, to attraction attention. This is exemplified by the comment by Lisa Trendell, the woman responsible for the Windsor Smith billboard discussed earlier: 'We didn't set out to offend people. We just wanted to give our customers more of the type of advertising they had come to expect from us' ("Advertising standards: Is self-regulation sufficient?" 2000, n.p.).

'Prevailing community standards' is not an idea that has germinated bottom up from the public, rather can be interpreted as being a top down system, determined by the media and the ASB. With the current 'show first, complain later' system of regulation, unless consumers actively complain, silence is read as acceptance, and sexist advertisements come to constitute 'prevailing community standards'. John Walsh in the *Independent* claims that 'Yes, porn has become part of the weave of our lives, but we don't have to embrace it. We don't have to stroll around the sex shop, or beg to watch on television our neighbours' midnight rodeo' (Walsh 2004, n.p.). The mainstreaming of pornography is giving the impression that pornography in its various forms is acceptable. By dismissing complaints about advertisements with pornographic elements, the ASB is contributing to this mainstreaming and thus *setting* community standards.

### *Regulatory Capture*

'Regulatory capture' occurs when a party (in this case, an advertiser) with vested interests in the industry exerts pressure on regulators to obtain better conditions. More commonly a term used when referring to practices within government regulation, increasingly, 'regulatory capture' is being understood as a problem with self-regulation. The Australian Securities and Investment Commission (ASIC) acknowledged in their 2000 *Submission to the Inquiry on Industry Self-Regulation*, that the 'distinct limitations to self-regulation' include the fact that 'it can be subject to regulatory capture' (ASIC 2000, n.p.). 'Regulatory capture' therefore, seems an appropriate lens to help us understand why the ASB fails to facilitate fair portrayals of women.

Regulatory theorists present a number of indicators to determine the presence of regulatory capture. Regulatory capture can be witnessed when regulatory agencies become so closely associated with their subject that objectivity becomes impossible; when regulators further industry interests at the expense of consumers; are more responsive to industry than public pressures; have become too identified with the industry; have become overly protective towards the firms it purports to regulate and when they become passive, 'largely rubber stamping' the firms' decisions (Clarke 1993; Price & Verhulst 1997; Villasenor 2000). As Feintuck argues, the risks of regulatory capture is heightened when the regulators are drawn from, and are answerable to, the industry concerned (Feintuck 1999). Gallagher questions the validity of advertisers and advertising self-regulatory bodies making value judgments on behalf of the public (Gallagher 2001, pg 63). This alludes to an obvious question self-regulation raises is will consumer interests be served by a within-industry regulator and does self-regulation constitute the *ultimate* conflict of interest?

In Australia, advertising is regulated by the industry through the ASB. The chairman is an advertiser, and as discussed, the code of conduct used by the Board emerges from the industry itself. When so many complaints are dismissed using the industry's own charter as the operating framework, one must question if regulatory capture is occurring.

### *Inappropriate Board Composition*

Boddewyn praises the participation of 'outsiders' in many advertising self-regulation models around the world. The presence on the ASB of non-industry figures is illustrative of this idea. Boddewyn outlines a number of advantages for using outsiders, particularly in regards to 'soft' issues, where he feels that outsiders 'can help widen opinions beyond what advertising practitioners may simply see as a new attention-gaining technique in a highly competitive

environment' (Boddeyn 1988, pg 39). Boddeyn quotes a Canadian advertising industry representative who argues 'Outsiders force advertising representatives on the ASC Council to focus on the content of the ads discussed rather than on defending advertising at large' (Boddeyn 1988, pg 120).

The ASB claims that its Board members are drawn from 'a cross-section of the Australian community' (ASB 2000, pg 6). On a cursory level this is a fair assessment: the Board comprises of numerous 'outsiders' including artists, academics, writers, journalists, sports people and former politicians. Of course their ability to 'widen opinions' is not so simple. Firstly, as criticised by Australian newspaper columnist Andrew Bolt, the ASB's members 'are picked by those same ad men – grandly known as the Australian Association of National Advertisers' (Bolt 2004b). Therefore, one might propose that those 'outsiders' being chosen, rather than being reflective of the public, are ones that reflect *industry* interests. This point is made by Bolt in an article where he quotes ASB board member, Emma Tom: 'We're used to watching our naked bodies being used to sell everything from children's sweets to concrete edge-makers'. As Bolt suggests, '[t] his refreshing attitude to decorating the streets with soft porn billboards may explain why Tom was signed up the next year to join the ASB board...' (Bolt 2004b, PG 21). As a right-wing political commentator, Bolt's criticism of the board does not pertain to the levels of feminist presence rather the lack of conservatives. However, his comments, illustrate some fundamental flaws with the Board composition nonetheless:

'So who else have the ad men picked as their moral police and advisers? Well, no priests, obviously. No one dealing with damaged children, either. No Liberal ex-politicians, no nuns, no farmers, and no conservative columnists. No conservative anyone at all, really... You know, typical people with typical mum-next-door concerns about the vandalising of our values by cheap-bucks shysters. Not.' (Bolt 2004b, PG 21).

Bolt's point is an interesting one – the 'outsiders' picked for the ASB are certainly not 'conservative', but similarly, they are not the kind of people who would be concerned about sexist portrayals for grounds other than morality either. While their backgrounds may provide a clue about their likely stance on censorship, the other issue is that their position as board members – as opposed to simply members of the public participating in adjudication – may indicate that routinely being involved in judging advertisements may desensitise them to the imagery they review. This is a criticism raised by national vice-president of the Australian Families Association, Bill Muehlenberg; in regards to the 2004 cinema release *Irreversible*, which included a 10-minute rape scene. As Muehlenberg commented about the Office of Film and Literature Classification's decision to allow the film a R rating, 'I don't know how the film got through... They (the board) have come desensitised to this type of violence. They should only be allowed to serve for six months' (in Dean 2004, pg 8 – 9).

### *Flawed Funding Mechanisms*

Boddeyn explains that one of the disadvantages of self-regulation system is that they are routinely insufficiently funded (Boddeyn 1988, pg 10). This is unquestionably a problem in Australia. The ASB is funded by a voluntary levy of 0.035% (\$3.50 per \$10,000 spent) collected and remitted by advertising and media buying agencies (AANA, 1999, n.p.). If we compare the funding situation in Australian to, for example the case in the U.K. where the levy is at 0.1% (ASA, undated, n.p.), or in Ireland where it is 0.2% (ASAI, undated, n.p.), the

Australia regulator is under-funded position where low revenue means that activities such as pre-vetting, monitoring, publicity campaigns etc, cannot be done.

### *Paralysis to Punish*

As discussed earlier in regards to the non-complier problem, the power of the ASB rests entirely with the advertising industry's voluntary compliance with self-determined standards. However, neither the ASB nor the AANA actually have the power to punish advertisers who fail to comply with the Code.

If a complaint is upheld, the advertiser will be contacted and requested to modify or withdraw the advertisements – they cannot be ordered or forced. This system is totally reliant on advertisers voluntarily adhering to recommendations. With no adequate punishment mechanism, there is no substantial deterrent to advertisers deliberately producing scandalous material. Rather, the presence of such an impotent advertising self-regulator can be interpreted as actually delivering the company *more* publicity because of the controversy over ethics being dragged into the media and debate likely ensuing about the effectiveness of the ASB. Vivienne Winter of the (now defunct) Australian watchdog the National Women's Media Centre suspected that the Windsor Smith campaign of 2000 was deliberately designed to cause brouhaha and to deliver the additional publicity that eventuated (Wynter 2000, n.p.). Lisa Trendell, the woman responsible for the 2000 Windsor Smith campaign referred to earlier claims that the publicity generated by complaints contributed to 'the best branding exercise we could have ever asked for... The media coverage was estimated to be worth more than \$4 million for our brand... The reaction was absolutely fantastic for us and the shoe featured became one of our best sellers' (quoted in "My Shoes are Dirty" 2000, n.p.). While Trendell is not claiming the controversy was deliberated, she has, obviously put a price-tag on it.

John Singleton, then director of advertising agency Singleton Ogilvy and Mather, bolsters Trendell's argument, claiming that offending people outside of target market for a specific product can be positive. An example of this is an advertisement Singleton produced for Eagle Bitter in early 1990s. This advertisement featured a woman getting her pants ripped off by a blue heeler dog and was criticised for being sexist. Following massive press coverage, the client withdrew the advertisement. Singleton insists that the advertisement was successful because the 'exclusively male market' for the product believed that 'offending the feminazis wasn't necessarily bad'. As Singleton explained: "Men figure that they hate us, we hate them so it's a positive if they hate the advertising for our beer" ("Are offensive ads more effective?" 1998, n.p.). As advertiser Bob Garfield criticises, '[i]t was a cynical bet: inflame the many to impress the few' (Garfield 2003, pg 80).

The reality is clear: the determinant of a successful campaign is that it has been noticed. In order to prevent 'being noticed' being coupled with 'being offensive' a strong deterrent (i.e., the threat of punishment) needs to exist to prevent advertisers engaging in offensive practices. Currently such deterrents don't exist.

Boddewyn outlines five types of punishments advertising self-regulators can use and describes how often the tactics are employed:

'(1) denial of access to member media (frequently); (2) publicizing the names of violators and/or recalcitrant advertisers (occasionally); (3) denunciation to the

authorities) rarely); (4) expulsion from the association (very rarely); and (5) suing to protect the interests of the profession (very rarely)' (Boddewyn 1988, pg 23).

In the Australian system, the only example of punishment that we ever see employed is (2) and even then, because so few complaints are every upheld, the opportunity to engage in this is limited.

It should be noted that prior to the established of the ASB in 1998, advertising was monitored by the Advertising Standards Council. Under the former system, media companies were bound to remove ads with the Council found in breach of the code, as Canning argues in his discussion of the old system. In comparison to the ASB, the old system 'had teeth' (Canning 2003, n.p.).

## **Conclusion**

Given that the position of this paper is that Australia's self-regulatory system performs an inadequate job in preventing sexist outdoor advertisements being erected, it would appear that a solution would be to adopt a statutory authority model as discussed earlier. However, despite the attractiveness of government regulation in regards to the protection of the audience, self-regulation exists as the dominant model for advertising regulation in the Western world for a number of well-documented reasons as discussed earlier.

In terms of political feasibility, the reality is that all the key stakeholders in advertising control are serviced positively by the current system. Self-regulation suits the interests of advertisers in that it allows them autonomy of the calibre they wouldn't experience under statutory authority. Self-regulation also serves government interests in that the financial and moral burden that control poses is delegated to the industry. Given the strong level of support for self-regulation amongst key stakeholders, a push for a current system overhaul is unlikely to come from any of the stakeholders that hold the most clout on the issue. Given this reality, incremental changes using and developing upon the existing system will be more palatable to facilitate positive change, and thus is the position advocated by this paper and what will be discussed in the final chapter of my PhD dissertation.

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