

‘Censoring God’

The Scope and Limits of Religious Advertising
in New Zealand

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“Learn from yesterday, live for today, hope for tomorrow. The important thing is not to stop questioning”.

- Albert Einstein

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Introduction

Bruce Barton describes advertising as “the very essence of democracy”.¹ This representation reinforces the importance of advertising in societal development, thereby underlining the necessity to carefully consider and regulate “the impact of advertising on their culture, media systems, and political practices”.² Furthermore, as James Twitchell suggests, little in our contemporary cultural environment can survive unless it can serve as a conduit for advertising.³ These arguments highlight fundamental issues and some inherent conflicts of interest. Firstly, advertising is a core component of the society in which we live because without it, informational symmetry is compromised and this ultimately compromises the ability of individuals to share equally in decision-making. Secondly, there must be some form of governance to scrutinise the use of such power. Without this regulation advertising has the ability to expound influential ideas that may mislead or offend. Finally, without advertising, ideas lack the ability to transcend connection limitations to communicate with the masses. It is for this reason that individuals and groups of certain belief systems must realise ‘if you cannot beat them... join them’.

These considerations are further pronounced when layered on top of the volatile concept of religion. In western society today there is a growing feeling that “equality and diversity is code” for marginalising religious beliefs.⁴ This is consistent with Paul W. Kahn’s perception of the political status of religion in America that explains, “the fact that they are religious groups entitles them to no special privilege in the political order”.⁵ However, the increasingly secular approach of the courts, coupled with the standard ‘sez who?’ approach to interpretation within the political realm, does not

¹ Bruce Barton (1955), Chairman of BBDO, quoted in James B. Simpson *Contemporary Quotations* (Vail-Ballou Press, New York, 1964) at 82.

² Robert L. Craig “Advertising, Democracy and Censorship” (2004) 11 *The Public* 49 at 50.

³ See: James R. Twitchell *Adcult: The Triumph of Advertising in American Culture* (Columbia University Press, New York, 1996).

⁴ The Christian Institute *Marginalising Christians: Instances of Christians being sidelined in modern Britain* (The Christian Institute, Newcastle, December 2009) at 5: The statement is made in the context of marginalising Christians in Britain.

⁵ Paul W. Kahn “Changing conceptions of the political status of religion” V-33 to V-34 (n.d.) (unpublished draft, on file with the New York University Law Review) at 1.

remove the faith and dedication of devout believers.⁶ If anything this changing landscape appears to alienate those of more traditional conservative ideals causing the alienated to dig their heels in further. How then can these tensions be reconciled? And how can this occur with the air of efficiency and public acceptance required of the advertising industry?

This study provides a descriptive account of the way New Zealand law tries to synchronise these contentions, offering a critical account that paves the way for potential reform in areas of weakness. The focus of the analysis centers on the scope and limits of religious advertising in New Zealand. In order to achieve a comprehensive evaluation of religious advertising law it is necessary to break the topic into its two constituents. The first component explored is the use of religious content by commercial advertisers where the issue is the offence caused to members of religions from which that content is derived and arguably exploited. The second component is the advertisement of beliefs by religious groups. The catalyst in this sphere concerns not only the offence caused to the beliefs of opposing religions, but the ability of these advertisements to mislead those of whom are subjected to the message.

Chapter One of the paper will first define the concepts of ‘religion’ and ‘advertising’ in order to focus the analysis and solidify the scope. In Chapter Two the general legal controls of religious advertising will be discussed. This chapter will identify the criminal and private law controls on religious advertising that are available to a complainant but are generally not the means by which the issue is dealt with. Chapter Three will then provide a descriptive account of the approach taken by the New Zealand Advertising Standards Authority (ASA),⁷ which exercises close to absolute jurisdiction over the regulation of the advertising industry and therefore represents the key governance mechanism. Chapter Four will attempt to critique the approach of the ASA towards the use of religious content by commercial advertisers against the backdrop of positivist notions of the law, the rights protected in the New Zealand Bill

⁶ Arthur Leff “Unspeakable Ethics, Unnatural Law” (1979) Vol.1979 Duke L.J 1229: “The grand sez who” refers to a term coined by Arthur Allen Leff that relates to a series of articles examining whether there is such a thing as a normative law or morality. Leff answers this question in the negative and follows the consequences to their logical conclusions.

⁷ The New Zealand Advertising Standards Authority (ASA) is the body that self-regulates advertising in New Zealand. They create and apply Advertising Codes of Practice that provide the rules by which all advertisements in all media should comply.

of Rights Act 1990 (NZBORA) and international jurisdictions.⁸ Chapter Five casts a critical eye on the advertising of religious beliefs and its control by the ASA. Relevant to the latter two chapters of critical analysis is the current structure of the ASA and its place within the legal landscape of New Zealand. Finally, a conclusion is submitted that seeks to summarise the current legal position of religious advertising in New Zealand and identify possible areas of improvement.

⁸ The New Zealand Bill of Rights Act 1990.

Chapter 1 - Definitions

A. Definition of Religion

The extent of judicial consideration concerned with the meaning of religion in New Zealand is sparse.⁹ One of the leading reasons for this phenomenon is that the meaning of religion does not have a tendency to encapsulate notions of certainty.¹⁰ Accordingly, the Courts have treated the concept with caution through a committed attempt to abstain from a definition involving formal logic or syllogism.¹¹ This point is made vividly clear in the United States decision *Watson v Jones* where the court found that it was not within the judicial sphere to adjudicate on matters of religious doctrine and practice.¹²

The leading New Zealand case on the point is *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*, involving the small Christian community that was founded on the teachings of Mr. Herbert Potter.¹³ The case concerned whether the community was a charitable trust for the purposes of section 18c of the Stamp and Cheque Duties Act.¹⁴ At common law a purpose is charitable if it falls within the four categories described by Lord MacNaughten, one of which is the ‘Advancement of Religion’ and therefore involved the interpretation of the meaning of “religion”.¹⁵

In light of the flexible jurisprudential approach required, Tompkins J’s decision attempts to strike a balance between the desired flexibility for the meaning of religion, whilst maintaining enough substance to provide some degree of prescriptive value.

⁹ See: *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 per Tompkins J at 692 where he states that he is “not aware of any New Zealand authorities on the meaning of religion” preceding the present case.

¹⁰ Sir James Frazer *The Golden Bough* (abridged edition, Macmillan & Co, London, 1954) at 50: “There is probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible”.

¹¹ *Church of the New Faith v Commissioner for Pay-roll Tax (Victoria)* (1983) 154 CLR 120; 49 ALR 65 at [171].

¹² *Watson v Jones* (1871) 80 US (13 Wall) 679 in which the majority judgment states: “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect” at 728.

¹³ *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*, above n 9.

¹⁴ Stamp and Cheque Duties Act 1971.

¹⁵ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

The mechanism by which he attempted to achieve this was the twofold test formulated in the Australian High Court decision *Church of the New Faith v Commissioner for Pay-roll Tax*. This twofold test establishes that religion is:

“First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.”¹⁶

A recognisable characteristic of the proposed test is the absence of restricting the definition to theistic beliefs. This is contrary to the narrow scope established in the line of cases that require the belief in the existence of a god or gods.¹⁷ However it is consonant with the recent academic theorists perception of the definition that is more concentrated on a spiritual belief rather than a distinct recognition of a god.¹⁸

The final foil to the meaning of religion is the *Centrepoint* inclusion of the indicia from the *Church of the New Faith* case.¹⁹ The characteristics are to be considered as aids in the interpretation but are not to be considered determinative on their own, thereby satisfying a more impromptu approach to interpretation. The final warning cast by the Australian High Court concerns the judiciary’s ability to assess “the intellectual quality, or the essential ‘truth’ or ‘worth’ of the tenets of the claimed religion”.²⁰

B. Definition of Advertising

What constitutes advertising is an important question when considering the notion in

¹⁶ *Church of the New Faith v Commissioner for Pay-roll Tax (Victoria)*, above n 11 at [74].

¹⁷ See for example: *Barralet v Attorney-General* [1980] 3 All ER 918.

¹⁸ Julian Huxley *Religion Without Revelation* (Greenwood Press Reprint, Westport, 1957) at 1: “Religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in the straightforward sense of the word, and of belief in that kernel of revealed religion, a personal god”.

¹⁹ *Church of the New Faith v Commissioner for Pay-roll Tax (Victoria)*, above 11, at [171]: The indicia include a) the collection of beliefs and/or practices involves belief in the supernatural; b) that the ideas relate to man's nature and place in the universe and his relation to things supernatural; c) that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance; d) that the adherents constitute an identifiable group or groups; and e) that the adherents see the collection of ideas and/or practices as constituting a religion.

²⁰ *Ibid*, at [171].

a religious context. This issue is more contentious in regard to religious institutions because their advertising does not have a commercial purpose. The issue becomes visible in the ASA decision of *St Matthew-in-the-City Anglican Church* where the advertiser submitted that “the billboard is not an advertisement of goods or services”.²¹ However, the Advertising Standards Complaints Board (ASCB) refused to accept such a narrow definition of advertising, confirming that the billboard in question comfortably fitted within the broad definition of an advertisement for the purposes of the Advertising Codes of Practice (The Codes). This definition offers an extremely wide ambit by stating that “the word ‘advertisement’ is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity”.²²

One definition of advertising describes it as “the non-personal communication of information usually paid for and usually persuasive in nature about products, services or ideas by identified sponsors through the various medias”.²³ In Jef I. Richards and Catherine M. Curran’s paper, they suggest that there is no widely adopted definition of what constitutes advertising, however, there are “certain recurring elements: (1) paid, (2) nonpersonal (3) identified sponsor, (4) mass media, and (5) persuade or influence”.²⁴ Based on the natural interpretation of this definition it is likely that the *St Matthew-in-the-City* billboard would be considered an advertisement. The existence of key features such as its purposeful public exposure and intention to influence bring it squarely within the scope of such definitions.

For the purpose of evaluating ‘the scope and limits of religious advertising in New Zealand’ the discussion will focus on advertising that the ASA have jurisdiction over. This is because in New Zealand the ASA is the self-regulatory body regulating all advertising within the advertisement industry.²⁵ Consequently an ‘advertisement’ in

²¹ *St Matthew-in-the-City Anglican Church* 10/001 (ASCB, 2 March 2010) at 2: The advertisement in question was a billboard depicting Mary and Joseph in bed titled “God was a hard act to follow”.

²² *Ibid*, at 6 in reference to ASA Code of Practice August 2010.

²³ Bovee, C.L *Contemporary Advertising* (McGraw Hill, Boston, 1992) at 7.

²⁴ Jef I. Richards and Catherine M. Curran “Oracles on Advertising” (2002) 31 JOA 63 at 64.

²⁵ ASA, *Advertising Codes of Practice* (August 2010) at 15: The ASA state “The Codes are developed to cover the entire range of advertising activity”. Furthermore Parliament

this paper will be founded upon what cases the ASA will consider coupled with considerations of the conventional definitions for advertising.

recognised this jurisdiction when in removed the Broadcasting Standards Authority's jurisdiction over broadcast advertisements with the clear understanding that the ASA would assume the role: New Zealand, *Parliamentary Debates*, Vol 80, 1993:15974. This position remains the status quo as evidenced by the monitoring of the ASA's performance by the government on a quarterly basis (Association of New Zealand Advertisers Inc. "A guide to self-regulation of advertisers in New Zealand (Feb 2008) <www.anza.co.nz>)

Chapter 2 - General Advertising Controls

As pronounced by the ASA, their Advertising Codes operate ‘within’ the limits prescribed by the general laws of New Zealand.²⁶ In fact, there are approximately 50 pieces of legislation that impact or restrict advertising in New Zealand in some way.²⁷ This notion is emphasised by the belief of certain academic theorists that it is “crucial that self-regulation operates in the shadow of rules and sanctions provided by the general law”.²⁸ Therefore, to gain a comprehensive appraisal of the legal status of religious advertising in New Zealand the applicable general laws must be investigated.

A. Blasphemy

One control that may limit the scope of religious advertising is the criminal offence of blasphemy.²⁹ However, it is an unlikely restriction given the infrequency of its use in recent judicial history.³⁰ The use of the offence as a cause of action has been further jeopardised in light of international developments, which has seen the United Kingdom abolish the offence through the Criminal Justice and Immigration Act 2008.³¹

A main contention of the offence is its preoccupation with Christianity. In accordance with *Ex parte Choudhury*, the offence only applies to vilifying or degrading Christian concepts.³² This distinction has alienated the offence and arguably provided the

²⁶ Advertising Standards Authority “Bugger... it’s ok!” (2008) at 6. The New Zealand Advertising Codes of Practice began with the principles of the International Code of Advertising Practice as their basis in which it was intended to operate as a reference document within the framework of applicable laws.

²⁷ *Ibid*, at 7.

²⁸ Neil Gunningham and Joseph Rees “Industry Self-Regulation: An Institutional Perspective” (1997) 19 *Law & Policy* 363 at 400.

²⁹ Crimes Act 1961, s123: makes it an offence for any person to publish blasphemous libel s123(1).

³⁰ *R v Glover* [1922] GLR 185. This is the only reported New Zealand case under the offence.

³¹ Criminal Justice and Immigration Act 2008. The abolition took effect from 8 July 2008 after the peers voted for the laws abandonment in March 2008.

³² *Ex parte Choudhury* [1991] 1 QB 429.

catalyst for the eventual abolition of the provision in the United Kingdom.³³ Further limiting the scope of the offence is the New Zealand requirement that blasphemy be confined to written communications,³⁴ which means that in terms of advertising, the only religious communication that blasphemy concerns is Christian orientated proclamations expressed through more traditional methods of intercourse. This is a rather restricted area considering ASA statistics show television as occupying the highest advertising medium for complaints and radio contributing the fourth highest.³⁵

This limited scope for blasphemy established by the courts has led many critics to request the abolition of the offence in New Zealand.³⁶ In fact, as explored by Stephen White, the original Criminal Bill's provision for blasphemous libel was highly 'criticised' from the outset.³⁷ In reality any flirtations with characteristics of blasphemy in the advertising sphere will be dealt with by the ASA. However it is important to recognise that a criminal sanction still exists.

B. Defamation

The relevant conduct to trigger a defamatory statement in the religious sphere is almost indistinguishable from the conduct required for blasphemous libel. This is separate from the fact that defamation also includes defamatory slander.³⁸ The law of defamation in New Zealand purports that "all persons have a right to claim their reputation should not be disparaged by defamatory statements made about them to third persons without lawful justification or excuse".³⁹ The most prevalent justification is the "truth", because the law will not permit a person to recover

³³ The Law Commission report of 1985 entitled *Criminal Law: Offences against Religious and Public Worship* recommended replacing the offence with an offence that was inclusive of all religious feelings. This was compounded by such real life examples as the Salman Rushdie case in which a whole movement developed towards removing the offence; see for example *The International Committee for the Defence of Salman Rushdie and his Publishers*.

³⁴ See: *R v Glover*, above 30.

³⁵ See: *Advertising Standards Authority Annual Report 2011* at 20, that shows television advertisements as the largest source of complaints at 33% and radio as the fourth highest.

³⁶ See for example: Rex Ahdar and Ian Leigh *Religious Freedom in the liberal State* (Oxford: Oxford University Press, 2005) at 395-396.

³⁷ See: Stephen White "Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353 at 370.

³⁸ Defamation Act 1992 Section 2(1).

³⁹ Laws of New Zealand "Defamation" (online ed) at [1].

damages in respect of an injury to a reputation that the person either does not or ought not possess.⁴⁰ The general law applies to religious individuals who are afforded the same protection of their good name and esteem. However, because of the contentious nature of faith, what constitutes such damage and whether that damage is based on truth, becomes extremely ambiguous.

An example of this conflict was the *Eshe Skateboard Co.* case dealt with by the ASA⁴¹ where the advertisement concerned proposed t-shirts featuring various religious leaders, coupled with derogatory statements. For example under the cartoon of Brian Tamaki were the words “Brainwashing Brian”. In the case the ASCB agreed “that the advertiser had used a level of humour and satire in the cartoon images of the four religious leaders, who had been at the centre of controversy at one time or another in the past few years”.⁴² Not only does this illustrate that cases of religious defamation in advertising are naturally dealt with through the ASA, but it also shows that it will be difficult to attain the required level of offensiveness (or damage to the individual’s reputation). This is visible in the *DB Breweries* decision where the billboard read: "Our father in Heaven, Tamaki be your name," followed by the trademark Tui "Yeah, right" slogan.⁴³ While the ASA acknowledged the complainants might have been offended, they held that the wording of the billboard "did not meet the threshold to cause serious or widespread offence".⁴⁴

Recently, on the volition of the Organisation of the Islamic Conference (OIC), a resolution was brought before the United Nations Commission on Human Rights entitled “Defamation of Islam”.⁴⁵ This was transformed to a resolution against the defamation of all religions, which was consequentially accepted by the Commission. Nevertheless, the proposed resolution has been condemned by a number of the

⁴⁰ *M’Pherson v Daniels* (1829) 10 B & C 263 at 272.

⁴¹ *Eshe Skateboard Co* 10/488 (ASCB, 12 October 2010).

⁴² *Ibid*, at 5.

⁴³ *DB Breweries Ltd* 12/382 (ASCB, 10 August 2012).

⁴⁴ *Ibid*, at 1.

⁴⁵ “Combating Defamation of Religion” (E/CN.4/2004/L.5): The resolution concerned combating defamation of religions and was adopted by a roll-call vote of 29 in favour, 16 against, with 7 abstentions. In the resolution, the Commission expressed deep concern at negative stereotyping of religions and manifestations of intolerance in some regions of the world, and the frequent and wrong association of Islam with human rights violations and terrorism.

populace including the Human Rights organisations and Western states. As Sejal Parmar writes “defamation of religious resolutions have dangerous implications for the international protection of freedom of expression”.⁴⁶ Parmar argues that such resolutions have been seen to directly undermine international guarantees on freedom of expression “by protecting religions and potentially lending support to the state suppression of religious or dissenting voices”.⁴⁷ These theoretical roadblocks, in conjunction with the large number of dissenters, mean that the resolutions are not yet relevant considerations for the purpose of this paper.

C. Intellectual Property

Intellectual Property law involves the protection of intangible rights that are the product of human intelligence and creation. This comprises a private law restriction of advertising that in given circumstances will extend into the religious advertising sphere. This overlap is evident in the use of the infamous Tui billboard by the Bethlehem Community Church in Tauranga dubbed “Thou shalt not infringe copyright”.⁴⁸ The Church had used the notorious “yeah right” marketing campaign of DB Breweries when it stated: “Atheists have nothing to worry about... Yeah Right”. The legal representatives of DB Breweries contacted the Church asking them to remove the advertisement stating, “they're using our intellectual property to promote the message of their own organisation”.⁴⁹ The Codes make no provision concerning the use of other advertisers’ intellectual property.⁵⁰ In this sense, unlike the other legal controls explored, the limits imposed by intellectual property laws on religious advertising are completely distinct from the ASA. This means that should religious advertising breach intellectual property laws, civil law remedies are available.

D. Conclusion

⁴⁶ S. Parmar ‘The Challenge of ‘defamation of religion’ to freedom of expression and the international human rights’ (2009) EHRLR 353 at 1.

⁴⁷ Ibid, at 10.

⁴⁸ Jono Hutchinson “Brewery to church: Thou shalt not infringe copyright” (2010) TV3 News <www.3news.co.nz>.

⁴⁹ Ibid, per Tui marketing manager Jarrod Bear.

⁵⁰ See: *Advertising Codes of Practice*, above 25.

Essentially, the foremost fetter against the use of religiously offensive advertising is the media's ability to choose whether or not to communicate the advertisement. The ASA are the first to admit that the clearance of their standards does not compel the media to use the advertisement and some forms of media have pre-screening bodies such as the Television Commercials Approval Bureau (TVCAB). An example of this involved the "There's probably no God" campaign in New Zealand.⁵¹ Even though the ASA adjudicated that the billboard advertisements were acceptable, the New Zealand Bus Authority would not advertise the communication on their buses.⁵²

⁵¹ See: Kelly Burns "'There's probably no God' coming to a bus near you" (2009) Stuff <www.stuff.co.nz>.

⁵² *Humanist Society* 10/400 (ASCB Chair, 28 July 2010). The Chairman of the board ruled that there were no grounds to proceed based on Rule 11 of the ASA Code of Ethics that advertising is "an essential and desirable part of the functioning of a democratic society". The issue is currently before the Human Rights Commission.

Chapter 3 - The Advertising Standards Authority (ASA)

A. Introduction

The principal form of advertising regulation in New Zealand is the ASA. This is a consequence of its best practice approach, which was adopted in accordance with the European Union's Madelin report that discussed Self-Regulation in the EU Advertising Sector.⁵³ The best practice approach has an objective of providing "consumer benefits above legal minimum standards".⁵⁴ The ASA describes the "prime function" of its authority as providing a mechanism to self-regulate advertising in New Zealand,⁵⁵ which means that the regulation of advertising in New Zealand, including the control of advertising concerning religion, is orchestrated by a voluntarily assembled industry body.

While the regulatory authority of the ASA is not derived from explicit legislative authority, it still describes itself as the authority that administers "the rules by which all advertisements in all media should comply".⁵⁶ The jurisdiction of the ASA to decide on "all matters relating to the advertising industry", although not formulated by the legislature, has been recognised and accepted by parliament.⁵⁷ This recognition has been further solidified by the courts decision in *Cameron* that assimilates the ASA with the statutorily empowered New Zealand Broadcasting Standards Authority (BSA).⁵⁸ Advertising self-regulation is not a uniquely New Zealand approach⁵⁹ but rather it is a method utilised for its ability to provide flexibility and efficiency in an arena whose existence is reliant upon its integrity.⁶⁰ Therefore for the purpose of this paper the question becomes, what are the consequences of such a framework on religious advertising?

⁵³ EASA "Self-Regulation in the EU Advertising Sector" July 2006.

⁵⁴ Advertising Standards Authority, above 26.

⁵⁵ Advertising Standard Authority "Home" <<http://www.asa.co.nz/>> 22 August 2012

⁵⁶ Ibid.

⁵⁷ See, above n 25; concerning Parliamentary recognition.

⁵⁸ *Electoral Commission v Cameron & Ors* [1997] 2 NZLR 421 (CA).

⁵⁹ Selene Mize "From Goldstein to the Burger King Babes: People Issues in Advertising" in *The Real Deal! Essays in Law and Advertising* 109 at 156: "The vast majority of countries use self-regulation instead of government regulation for advertising". Examples of countries are New Zealand, the United Kingdom, Australia, the United States of America.

⁶⁰ Advertising Standards Authority, above 26, at 12-13.

B. A Descriptive Account of the ASA and Commercial Advertising involving Religious Content

Decisions by the ASA concerning commercial businesses employing religious content are almost always related to the interpretation and application of Rule 5 of The Code of Ethics.⁶¹ Rule 5 is the ethical rule establishing the important advertising restriction against causing offence to society, and states that:

“Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services).”⁶²

This is not an easy rule to apply in regard to concepts of a religious nature. The Advertising Standards Complaints Board (ASCB), the hand from which the ASA hammer falls, must interpret “prevailing community standards” in respect to one of life’s most personal worldviews.⁶³ Additionally, religion in our changing society, is an ambulatory concept with a continually changing reference point.⁶⁴ As a result the ASA case law exploring the matter has often become feckless and confused. The following cases are a summation of the approach, or lack thereof, that the ASA has adopted.

i. The ‘dancing butchers’ and religious minorities

⁶¹ See for example: *DB Breweries Advertisement* 00/194, *Hillcrest Tavern* 00/101, *Lakeside Auto Centre* 00/232, *Throaties* 01/223.

⁶² *Advertising Codes of Practice*, above n 25: The Advertising Code of Ethics at 19.

⁶³ See: [Norman L. Geisler, [William D. Watkins *Worlds apart: A handbook on world views* (Wipf & Stock Pub, New York, 2003): The book explores the seven major world views of our day -- theism, atheism, pantheism, pantheism, deism, finite godism, and polytheism. The authors delineate the varieties within each view, analyse the beliefs of its major representatives, and outline and evaluate its basic tenets.

⁶⁴ Statistics New Zealand *2001 Census of Population and Dwellings* (2001); Statistics New Zealand *2006 Census of Population and Dwellings* (2006). Census data that shows the change from those New Zealanders who consider themselves non religious in 2001 census of 29.6% to 34.7 percent in 2006. Clearly this shows that the meaning of religion for society as a whole is changing.

The case of the ‘dancing butchers’ is an ASA decision that attracted wider media publicity.⁶⁵ The case concerned an advertisement portraying butchers dancing in the streets outside their shop chanting a semblance of a Hare Krishna chant.⁶⁶ It is interesting to note that the original complainant was a non-religious farmer who nonetheless found the advertisement offensive. In the initial decision of the ASCB, the Board found that the advertisement was an imitation of a Krishna religious practice and that this imitation amounted to a breach of Rule 5. In the ASCB’s deliberation, no reference was made to “prevailing community standards”. However, the ASCB did state that the offence was “serious or widespread” based on the large number of claims that had been received.⁶⁷

The absence of detailed rationale concerning these two important limbs of the test means that the case provides little prescriptive information of the ASA’s approach in commercial cases involving religious content. It is clear from decisions such as the *Versatile Building* complaint that advertising that denotes a significant degree of exaggeration will not be upheld by the ASA.⁶⁸ That case involved a depiction of Thor failing to break into a garage, which the complainant described as portraying “one of the Gods of the Aseir in a disrespectful manner”.⁶⁹ The ASA chose to avoid discussing the status of the religion in New Zealand society (arguably an important factor in the consideration of “prevailing community standards”) in favour of the technical advertising exception of puffery.⁷⁰

Later treatment of complaints in the area appear to suggest that the dancing butchers decision represents an enhanced protection for minority religions administered by the ASA. A *Hells Pizza* decision that concerned a complaint about a billboard that read: “How do you know He is listening? At least I deliver – the Guy from Hell” was not

⁶⁵ The decision and complaint process attracted a lot of wider media attention within the industry. See for example: “Dancing butchers waltz into trouble” (2003) straightfurrow.farmonline.co.nz.

⁶⁶ *New Zealand Beef and Lamb Marketing Bureau* 03/20 (ASCB, 11 March 2003); Appeal 03/10 (ASCAB, 28 October 2003).

⁶⁷ *Ibid.*, at 7. There was over 80 complaints received about the advertisement that made it the fourth most complained about advertisement as at 2007.

⁶⁸ *Versatile Building* 05/141 (ASCB Chair, 18 May 2005).

⁶⁹ *Ibid.*, at 2.

⁷⁰ *Ibid.*, at 2: In New Zealand law this amounts to “no reasonable person would”, so it is deemed acceptable.

upheld.⁷¹ In that case the ASCB justified the merits of the advertisement based on its humour and irrelevancy. This conclusion is difficult to reconcile with the determination of the *New Zealand Beef and Lamb Marketing Bureau* deliberation. It essentially advances the proposition that dancing butchers are not of a similar level of comedy, yet the Hare Krishna faith is more likely to cause widespread or serious offence than Christianity given New Zealand community standards.

ii. Offensiveness given an alternate meaning

Another principle that is used by the ASCB to substantiate the dismissal of claims involving religiously offensive material is the universal nature of particular religious language and symbols. For example, in the complaint about the Auckland City Council radio advertisement, the ASCB ruled: “That the phrase [oh my God] had, through frequent use, lost its strictly religious meaning and become generally accepted as part of everyday language.”⁷² On this line of authority the prevalence of some historical religious terms throughout all facets of society is a clear situation that will not breach Rule 5. This is a justification that reflects the mandatory consideration of “prevailing community standards”.

However, what constitutes a term of sufficient universality is also undetermined. The complaint about the GHD styling iron television advertisement that used such language as “GHD – a new religion for hair” and “The gospel according to GHD” was not upheld.⁷³ The ASCB, in one of its rare considerations of its past decisions, referred to decision 05/015 which concerned an advertisement referring to the All Blacks together with the headline “Read the Bible”.⁷⁴ The case decided that a Bible was “a book regarded as authoritative” and it was not a concept that was solely associated with religion.⁷⁵ In comparison, an advertisement like the earlier ‘dancing butchers’ case did not possess the required level of ambiguity to make it equivocal enough to be harmonious with “prevailing community standards”. As Selene Mize

⁷¹ *Hells Pizza* 06/050 (ASCB, 11 April 2006).

⁷² *Auckland City Council Radio Advertisement* 05/193 (ASCB Chair, 20 June 2005).

⁷³ *GHD Styling Irons – Jemella Australia Pty Ltd* 05/345 (ASCB, 30 November 2005).

⁷⁴ *Lion Red Billboard Advertisement* 05/015 (ASCB, 8 March 2005).

⁷⁵ *Ibid*, at 3: The informal definition from the Collins Oxford dictionary.

describes “ambiguous content is a recurring problem for the resolution of complaints about many advertisements”.⁷⁶

iii. An increasingly secular approach

It is arguable that akin to the New Zealand populace, the ASA approach towards the interpretation of Rule 5 is developing in a more secular manner.⁷⁷ This would appear the logical procession based on the Rule 5 threshold of “prevailing community standards”. In the early stages of this century the ASA exercised a stricter approach towards Rule 5, especially when taking into consideration the particular “context, medium, audience and product”.⁷⁸

This is evidenced by decisions that are analogous to the *Hillcrest Tavern* decision.⁷⁹ That particular advertisement related to a flyer distributed by the Hillcrest Tavern in 2000 that advertised “The Last Supper” and referred to “12 disciples” and “2 loaves of bread, 5 fish and a bar tab”.⁸⁰ Of paramount importance in that decision was the timing of the advertisement. The flyer was distributed in the lead up to the Christian holiday of Easter, which the ASCB described as the most important feasts in the Christian calendar and of general significance to the wider community. It followed that the advertisement was in breach of “wider community standards” and the complaint was upheld.

Conversely, recent decisions portray a wider ambit in regard to the offence of religious sensibilities. This is observable from the duplicate circumstances to *Hillcrest Tavern* in the recent *Hell Pizza Billboard Advertisement* of 2011.⁸¹ In that case the advertisement concerned a bun decorated with pentacle symbol that read “For a limited time, a bit like Jesus”. There were 179 complaints about the advertisement, a number that clearly brings its circumstances within the realms of the ‘dancing butchers’ rationale. However, the ASA decided that the advertisement “was within

⁷⁶ Selene Mize, above n 59 at 114.

⁷⁷ Statistics New Zealand, above n 64.

⁷⁸ *Advertising Codes of Practice*, above n 25.

⁷⁹ *Hillcrest Tavern* 00/101 (ASCB, 19 June 2000).

⁸⁰ *Ibid*, at 1.

⁸¹ *Hells Pizza Billboard Advertisement* 11/222 (ASCB, 10 May 2011).

acceptable humour and satire allowable within a tolerant and open society such as New Zealand”.⁸² This is despite the fact that the advertisement was also in the lead up to Easter. The ASA actually went further by stating, “socially provocative and sometimes confrontational advertisements were predictable from this particular advertiser.”⁸³ This seems to set a fairly subjective precedent. A literal interpretation of this rule would conclude that because they are generally offensive they are governed by a different standard. Should there not be one clear standard for all advertisers as to what is serious or widespread offence based on public perception, where the standard only varies based on the context of the advertisement, not the advertiser themselves?

iv. The importance of ‘understanding’

In the *Hells Pizza* decision involving the advertisement for their hot cross buns, the ASCB stated:

“The majority also acknowledged the deep offence the advertisement had caused to some Christians, however, the majority was of the view that the imagery itself on the advertisement was relatively innocuous, and that any possible offence would be caused by people’s understanding of the symbol and the text in the advertisement.”⁸⁴

This seems like an impotent principle considering advertising is a form of persuasion and “persuasion theorists have long maintained that message comprehension is a prerequisite for formation and change of attitudes”.⁸⁵ Consequentially it could be argued that the ASA statement is void of meaning. Based on the requirement of understanding it would appear that in religiously offensive cases there is a distinction to be made between more explicit and more implicit advertisements.

v. Conclusion

⁸² Ibid, at 6.

⁸³ Ibid, at 6.

⁸⁴ Ibid, at 6.

⁸⁵ David Glen Mick “Levels of Subjective Comprehension in Advertising Processing and Their Relations to Ad Perceptions, Attitudes, and Memory” (1992) 18 JOCR 411 at 422.

What is clear from the above analysis is that there are pronounced inconsistencies in the decisions being made under The Codes when applied to commercial businesses using religious content. The immense difficulty in determining “prevailing community standards” in the field of religion is at the heart of this incoherency. However, the lack of clarity provided by the decisions of the ASCB, coupled with the minimal detail provided by their deliberations, fuels this fire. This ‘gasoline’ is seen in the form of their differing treatment for minorities, use of alternate meanings, incorporation of ‘understanding’ and gradual shift towards decisions that seem to promote secularisation.

C. A Descriptive Account of the ASA and the Advertising of Religious Beliefs

The contention that surrounds the advertising of religious beliefs concerns not only their ability to cause offence, but also their alleged aptitude to mislead and deceive. The incorporation of a misleading and deceptive principle in The Codes, stems from the emphasis on such protection by the European Advertising Standards Alliance Code of Advertising Practice.⁸⁶ The requirement of truthful advertising is one of the purest forms of customer protection and ensures the enhanced integrity of ASA.

Like all ASA standards, the misleading and deceptive standard operates under the shadow of the law. The relevant New Zealand statute that concerns misleading and deceptive behaviour is the Fair Trading Act 1986 (FTA).⁸⁷ However, the ASA standards have a wider application because they are not restricted by the “in trade” requirement of the FTA⁸⁸ and the cost effective nature of the process means that the majority of cases involving advertising will be decided by the ASCB.⁸⁹ The restriction is found in Basic Principle 3 of The Code of Ethics, which states:

⁸⁶ EASA, above n 53.

⁸⁷ Fair Trading Act 1986, whose long title states: It is designed to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services, and to promote product safety.

⁸⁸ Ibid, section 2(1): definition of “trade”.

⁸⁹ Advertising Standards Authority, above n 26: that argues one of the key advantages of self-regulation is that a Code of Practice can be a useful adjunct, or alternative even, to legislation. It can provide a positive marketing approach to satisfy the customer rather than just the legal standard, which proceeds generally from a negative basis.

“No advertisement should be misleading or deceptive or likely to mislead or deceive the customer.”⁹⁰

The words used duplicate those of the FTA.⁹¹ The practical application of this principle is embodied within Rules 2 and 3 of The Code of Ethics, which concern “Truthful Presentation” and “Research, Tests and Surveys”.⁹² From the very derivation of the terms an advertisement does not have the ability to mislead or deceive if it is a representation of the truth. The problem in regard to the advertising of religious beliefs is how can a representation be proved true or false when it is based on the premise of faith? An element of faith in the Josef Pieper’s description of the two vital elements of faith is the acceptance “on the ground of testimony and not of verification by one’s own perception or demonstration”.⁹³ In consideration of this interpretive obstacle, the next section discusses how the ASA have dealt with these issues.

i. What is ‘misleading and deceptive’?

As Mize observes, “adjudication of complaints requires a careful balancing of interests”.⁹⁴ On the one hand, there is the concern to protect members of the audience from being misled or offended, which must be weighed up against the right of advertisers to “promote their products, services and messages to the public”.⁹⁵ In New Zealand religion receives no specific mention in the standards set, so the same conflict of interest exists with advertising religious beliefs. The United Kingdom’s ASA (UKASA) have outlined their general approach to the issue in their background briefing for religion.⁹⁶ The UKASA states: “With regards to this type of statement in religious/atheist ads the Advertising Standards Authority does not arbitrate between conflicting ideologies and, if marketers are obviously expressing opinions about their

⁹⁰ *Advertising Codes of Practice*, above n 25 at 19.

⁹¹ Fair Trading Act, above n 87 at section 9.

⁹² *Advertising Codes of Practice*, above n 25 at 19.

⁹³ Josef Piper *Belief and Faith* (Faber & Faber, London, 1964) at 106.

⁹⁴ Selene Mize, above n 59 at 111.

⁹⁵ *Ibid*, at 111.

⁹⁶ United Kingdom Advertising Standard Authority “Background Briefing Religion” 2012 <www.asa.org.uk>.

beliefs, the ASA is unlikely to intervene”.⁹⁷ The essential directive of this statement was aimed as a response to the Atheist bus campaign of 2008 when the UKASA was caught in the middle of a debate about the existence of God.⁹⁸

An example of a group of cases that have been found to violate Basic Principle 3 are those involving the advertisement of religious medical treatment. A recent case that attracted significant media attention on this point was the *Equippers Church Advertisement* decision.⁹⁹ The decision concerned a billboard advertisement placed outside the Equippers Church of Hawkes Bay that read “Jesus Heals Cancer”, followed by the words “Church but not as you know it”. One of standards that the ASCB applied to the deliberation was Rule 2 of The Code of Ethics concerning truthful representations. The Equippers Church response argued that “truth in advertising” cannot and should not apply to faith based or religious advertising.¹⁰⁰ The ASCB refrained from making this exception. Instead, the ASCB noted that the billboard made its statement as a “strong absolute statement of fact” when it should be stated as a belief of the church.¹⁰¹ Furthermore, the billboard had the potential to cause confusion for some people as “it could be interpreted as meaning the Equippers Church was able to offer something that other churches could not”.¹⁰² This illustrates the willingness of the ASA to judge that a religious message does have the capability to mislead and deceive.

By comparison, when the religious belief advocated does not appear to attract such drastic consequences the ASA appears to follow the United Kingdom approach by abstaining from giving consideration to the debate. In *St Matthew-in-the-City* the complainant alleged that the advertisement, which depicted Joseph failing to satisfy Mary in the bedroom, was “misleading and deceptive as it does not reflect the Christian message of Christianity”.¹⁰³ However, the ASA did not even consider the applicable provisions that govern misleading and deceptive conduct. Instead it chose

⁹⁷ Ibid.

⁹⁸ See: Mark Sweney “ASA clears Atheist Bus Campaign ads” (2009) The Guardian <www.guardian.co.uk>.

⁹⁹ *Equippers Church Advertisement* 12/100 (ASCB, 10 April 2012).

¹⁰⁰ Ibid, at 4.

¹⁰¹ Ibid, at 6.

¹⁰² Ibid, at 7.

¹⁰³ *St Matthew-in-the-City Anglican Church*, above n 21 at 1.

to consider the complaint under the provisions relating to decency, social responsibility and offensiveness.

ii. Limit to medical cases or an incoherent approach?

The juxtaposition of the *Equippers Church* case and the *St Matthew-in-the-City* case would appear to show that the ASA will refrain from considering the truth of religious beliefs advocated through advertising, unless that claim to the supernatural has possible consequences to the safety of the wider public. However, there are cases that are arguably inconsistent with this conclusion.

The *His Way Church* television advertisement regarded a complaint surrounding medical claims of religious healing that the ASA did not uphold.¹⁰⁴ The advertisement was centred upon a man removing his neck brace that claimed; “Jesus healed me today”.¹⁰⁵ The complainant was of the view that the advertisement was not socially responsible as it “claimed to show a ‘miracle in progress’”.¹⁰⁶ His argument was that the combination of the danger in removing medically prescribed treatments, and the untruthfulness of the religious claim, meant that the advertisement was misleading and posed a danger to society. The analysis by the ASA of whether the advertisement was likely to mislead was very limited. The Chairman was satisfied that the message “would not be likely to mislead the viewer” and that was the extent of the consideration given to that point.¹⁰⁷

The decision above was made prior to the *Equippers Church* case. Nonetheless, the lack of reference to any precedent cases by the ASA show that either of these differing approaches could be followed in similar future deliberations. The question is whether *His Way Church* can be distinguished to show the boundary for when medical claim cases become acceptable or whether the public stage that the media

¹⁰⁴ *His Way Church* 08/107 (ASCB Chair, 11 March 2008).

¹⁰⁵ *Ibid*, at 1.

¹⁰⁶ *Ibid*, at 1.

¹⁰⁷ *Ibid*, at 1.

attention provided the ‘Jesus Heals Cancer’ case influenced the decision of the ASA.¹⁰⁸

iii. Fact or opinion

The FTA makes a distinction between representation of facts and opinions when the issue concerned is misleading conduct. If an opinion is held in good faith and is honestly believed by the maker of the advertisement, without reckless indifference to the truth, then that opinion will not be held misleading or deceptive.¹⁰⁹ The ASA make a similar distinction in their approach towards the advertising of religious beliefs which is consistent with the religious and expressive rights preserved in the NZBORA.¹¹⁰ This is illustrated by the ASA statement in *Church of Jesus Christ of Latter Day Saints Television Advertisement* that The Codes provide for the presentation of a point of view from named and identified organisations, saying it was “an essential and desirable part of the functioning of a democratic society”.¹¹¹

A clear example of an advertisement that misled on a factual premise is the *Churches Education Commission Flyer and Website Advertisements*¹¹² where the ASCB noted the difficulties in the industry of advertising accurate information, but still found that the claimed Ministry of Education endorsement was in breach of Rule 2. This was based on the fact that the Churches Education Commission was required to provide up to date information through their newsletter, so the endorsement seventeen years earlier in 1990, that was yet to be revoked, was not relevant. Conversely, there are clear cases of opinion where the ASA will not get involved. One such example is the

¹⁰⁸ See for example: Interview with Lyle Peninsula, Pastor of Equippers Church Hawkes Bay (Mihingarangi Forbes, Campbell Live, TV3 27 February 2012); Corey Charlton “‘Jesus heals cancer’? The ASA to decide” (2012) The New Zealand Herald <www.nzherald.co.nz>: that are television and newspaper articles, which interestingly took place before the ASA deliberation. It is difficult to see how this would not influence the ASCB’s decision.

¹⁰⁹ *TV3 Network Ltd v Television New Zealand Ltd* (High Court, Auckland, CP 929/91, 18 December 1992, Temm J) at 20.

¹¹⁰ There are a number of sections that protect freedom of religion and freedom of expression in the NZBORA. These sections include: Section 13 ‘Freedom of thought, conscience, and religion’, Section 14 ‘Freedom of expression’. Section 15 ‘Manifestation of religion and belief’, and Section 19 ‘Freedom from discrimination’.

¹¹¹ *Church of Jesus Christ of Latter Day Saints Television Advertisement* 09/246 (ASCB Chair, 20 April 2009) at 1.

¹¹² *Churches Education Commission Flyer and Website Advertisements* 07/033 (ASCB, 6 March 2007).

Church of Jesus Christ of Later Day Saints deliberation where the claim that Jesus was the “Lamb of God” was a clear statement of opinion about the identity of Jesus Christ.¹¹³

However, this distinction is not always so clear. In many situations where those of devout faith are concerned, a proposition expressed through advertising may blur the line between opinion and a purported affirmation of fact. This triggers the fragile question of truth in the purported message, as discussed in the *misleading and deceptive* section. An example of this is the *Equippers Church* decision where the complainant asserted that “the purpose of this statement is to express a message of hope and life in Jesus Christ. It is a statement that is made in accordance with our basic Christian beliefs as contained within the Bible”.¹¹⁴ However, the ASCB rejected this claim stating that: “it did not consider that personal religious belief was enough to substantiate such an absolute claim”.¹¹⁵ An interesting comparison arises when this advertisement is compared with the Atheist bus campaigns from the United Kingdom and the comparative New Zealand billboard advertisement of the New Zealand Humanist Society.¹¹⁶ In both those cases the relevant complaints were not upheld. In the United Kingdom example the inclusion of ‘probably’ in the phrase ‘There’s probably no god’ proved definitive.¹¹⁷ This was not the justification taken by the New Zealand ASA in the comparative New Zealand example where the ASA choose to justify the statement on the grounds of Rule 11 of the Code of Ethics concerning advocacy advertising.¹¹⁸ Nonetheless, it may have been a factor weighing on the mind of the individual members of the ASCB. It is likely that the ASA will take a lenient approach towards religious expression because it involves beliefs that generally resemble opinions as oppose to facts. However, as discussed the ASA will draw the line in given circumstances.

iv. The relationship with advocacy advertising

¹¹³ *Church of Jesus Christ of Later Day Saints Television Advertisement*, above n 111 at 1

¹¹⁴ *Equippers Church Advertisement*, above n 99 at 3.

¹¹⁵ *Ibid*, at 7.

¹¹⁶ *Humanist Socieity Billboard Advertisement*, above n 52.

¹¹⁷ UKASA “Atheist bus campaign is not in breach of the Advertising Code” (2009) UKASA <www.asa.org.uk>.

¹¹⁸ *Humanist Socieity Billboard Advertisement*, above n 52.

Rule 11 of The Code of Ethics is a positive standard for the protection of the expression of an opinion. This sits consistently with the approach taken by the ASA in the section above. The rule states;

“Expression of an opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information”.¹¹⁹

This rule provides an important restriction to the preceding Rules of The Code of Ethics, in order to protect the advertiser’s ability to communicate. Essentially, it is the manifestation of the right to freedom of expression contained in the NZBORA. However, the ASA has abstained from making direct reference to the protected right, which would erode the flexibility the ASA maintains in applying the rule.¹²⁰

There are many examples of the rule that prove to be decisive in dismissing complaints and the advertising of religious beliefs is no exception. In *Church of Jesus Christ of Later Day Saints* the Chairman utilised Rule 11 to take a “robust” approach and find against the advertisement crossing the threshold to becoming misleading and deceptive.¹²¹ The same conclusion was reached in the complaint about the *Humanist Society* advertisement where the Chairman noted that there was no grounds to proceed in the case because Rule 11 applied to ensure that “there was no apparent breach of the Advertising Codes”.¹²² The *St Matthew-in-the-City* advertiser believed that Rule 11 should be invoked to protect all matters of religious expression, claiming; “In matters of faith, all such statements are opinions. If we were able to rely on verifiable fact to support our position, it probably would no longer be a matter of faith.”¹²³ However, based on the cases that have been decided against the advertising of

¹¹⁹ *Advertising Codes of Practice*, above n 25 at 19.

¹²⁰ The New Zealand Bill of Rights Act 1990, section 14: establishes the right to Freedom of Expression. It states that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”.

¹²¹ *Church of Jesus Christ of Later Day Saints Television Advertisement*, above n 111 at 1.

¹²² *Humanist Society*, above n 52 at 1.

¹²³ *St Matthew-in-the-City Anglican Church*, above n 21 at 4.

religious beliefs it is apparent that the ASA do not stringently implement this interpretation.¹²⁴

In other circumstances, the existence of Rule 11 is not used as a justification for expressions of religious belief, which is highlighted by the *Equippers Church* billboard advertisement. The rule requires that “opinion should be clearly distinguishable from factual information”; therefore the distinguishing factor for the ASA becomes the factual content of what is being expressed.¹²⁵ In the *Equippers Church* example the ASCB outlines that the manner in which “Jesus Heals Cancer” was expressed “denoted a strong absolute statement of fact when it more accurately may be expressed as a statement of belief”. The ASCB believed that the further substantiation of the statement in referring to the six people cured, emphasised this factual nature and removed the billboard from the scope of Rule 11.

v. Conclusion

The ASA appear to have a more structured approach to the resolution of issues arising from advertising religious beliefs, in contrast to their application of the standards to commercial advertising cases incorporating religious content. However, whether this more formalised approach is the right one becomes a topic for further discussion in the critique of the ASA position. The paramount considerations seem to follow the FTA by distinguishing between facts and opinions and truths and falsities. The question therefore becomes whether the ASA has the experience to justify its authority to rule on such issues?

¹²⁴ See for example: *Equippers Church Advertisement*, above n 99.

¹²⁵ *Advertising Codes of Practice*, above n 25 at 19.

Chapter 4 - A Critique of the ASA and Commercial Advertising involving Religious

Content

A. Introduction

‘Chapter 3 Section B’ was a descriptive analysis of the ASA method of interpreting the Advertising Standards (Rule 5 of The Code of Ethics) in regard to businesses advocating their products and services using concepts of religious significance. What was evident from the discussion was that the uncertainties encompassing the notion “prevailing community standards”, posed real difficulties in establishing the semblance of a coherent line of authority. The following critique attempts to highlight the various strengths and weaknesses of the current legal position and suggest possible improvements that could remedy the shortcomings of the system.

B. The current test and its relationship to legal principles

The rule of law, in accordance with the principles provided by Robert Summers, in its most basic form “is the principle that no one is above the law”.¹²⁶ The description goes on to say that “the rule follows logically from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will”.¹²⁷ This is the pure existence of the law from which the positivist jurisprudential theory naturally flows because, according to H.L.A Hart:

“If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognise as law could exist.”¹²⁸

The ASA approach towards the interpretation and application of Rule 5 to commercial advertising involving religious concepts illustrates only a limited

¹²⁶ See for example: Robert Summers "The Principles of the Rule of Law" (1999) 74 Notre Dame Law Review 1691 at 1693-95.

¹²⁷ Ibid.

¹²⁸ H.L.A Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1994) at 124.

connection to this fundamental requirement of the law. It is necessary to evaluate whether this current relationship is satisfactory. Could, as Mize argues, decisions sometimes “be clearer and more thorough in providing underlying reasons for conclusions reached”?¹²⁹ Or would this compromise the increased efficiency and reduced costs that Virginia Haufler advocates as the consequence of self-regulation in *A Public Role for the Private Sector*.¹³⁰

What was clear from an analysis of the cases in this area was the lack of utilisation of the doctrine of precedent. The cases of *New Zealand Beef and Lamb Marketing Bureau*, *Versatile Buildings*, *Auckland City Council Radio Advertisement*, and *Hells Pizza Billboard* are all examples of decisions that failed to make reference to similar cases despite many of them concerning similar points and analogous factual scenarios.¹³¹ In fact, the ASA proclaims on its own volition that it is not constrained by the same recognition that past authorities exercised within the public judicial process, stating that only “some decisions set precedents” and that many of these “exemplify the tests for whether advertisements might cause widespread or serious offence”.¹³² Based on the differing results of the above decisions, the offence caused by religious advertising in the commercial sphere does not seem to be one of these examples, and consideration of the ASA’s objectives shows that this is not necessarily a deficiency. In regard to the BSA, *Freedom and Fetters: Broadcasting Standards in New Zealand* explains that it is hard to set codes that can be applied mechanically as community standards are currently changing¹³³ and based on the census information mentioned earlier, religious community standards would be no exception. Changing community standards and the flexible approach taken toward their interpretation is

¹²⁹ Selene Mize, above n 159

¹³⁰ Virginia Haufler *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace Maryland) 2001.

¹³¹ *New Zealand Beef and Lamb Marketing Bureau* 03/20 (ASCB, 11 March 2003); Appeal 03/10 (ASCAB, 28 October 2003), *Versatile Building* 05/141 (ASCB Chair, 18 May 2005), *Auckland City Council Radio Advertisement* 05/193 (ASCB Chair, 20 June 2005), *Hell Pizza* 06/050 (ASCB, 11 April 2006).

¹³² Advertising Standards Authority, above n 26 at 15.

¹³³ BSA, *Freedom and Fetters: Broadcasting Standards in New Zealand* (May 2006) <<http://www.bsa.govt.nz/publications-pages/freedomfettters.php>> at 28 November 2007 at 9.

more consistent with John Hasnas belief that the law is always open to interpretation.¹³⁴

However, even though the standards created by the ASA “fit within the current framework of the law” and provide minimum standards of best practice, their objective is still essentially to regulate the industry.¹³⁵ Accordingly, it seems obligatory that this regulation must embody some of the components of the more formal types of regulation it is trying to mimic. This does not appear arduous in light of the benefits it will provide, arguably even increasing the efficiency and cost factors that provide the reason for such a framework. This is evident by the use of precedent in the *GHD Styling Irons* case.¹³⁶ Legal counsel for the advertiser raised a number of similar cases, which they proceeded to distinguish or draw analogies to for the purpose of displaying that the GHD reference to religious terms such as “gospel” was far more innocuous than some of the advertisement’s former counterparts.¹³⁷ In the end the decision was based on a previous decision of the ASA concerning the alternate meaning of the same religious concepts,¹³⁸ essentially establishing the principle that religious terms of universal meaning were acceptable methods of advertising when given that alternate meaning. Lord Woolf believes that the utility of the doctrine of precedent is not limited by the certainty it provides, but also the flexibility that is available from its natural evolution.¹³⁹ This flexibility would be more prevalent in the ASA, which does not consider itself bound by its past decisions.

A characteristic adopted by the ASA from the rule of law is the promotion of enhanced access to its complaint resolution process and the consequential decisions

¹³⁴ John Hasnas “The Myth of the Rule of Law” (1999) 227 Wisconsin Law Review 199: John Hasnas is an associate professor of business at Georgetown's McDonough School of Business and a visiting associate professor of law at Georgetown University Law Center in Washington, DC, where he teaches courses in ethics and law. The article advances three main propositions: 1) there is no such thing as a government of law and not people, 2) the belief that there is serves to maintain public support for society’s power structure, and 3) the establishment of a truly free society requires the abandonment of the myth of the rule of law.

¹³⁵ Advertising Standards Authority, above n 26 at 6.

¹³⁶ *GHD Styling Irons – Jemella Australia Pty Ltd*, above n 73.

¹³⁷ *Ibid*, at 6-9: *DB Breweries Advertisement* 00/194, *Hillcrest Tavern* 00/101, *Lakeside Auto Centre* 00/232, *Throaties* 01/223.

¹³⁸ *Ibid*, at 13: The Complaints Board referred to *Lion Red Advertisement* 05/015 which concerned an advertisement referring to the All Blacks together with the headline “Read the Bible”. See: above n.

¹³⁹ *R v Simpson* [2003] EWCA Crim 1499 at [27]. [2004] Q.B. 118 (Lord Woolf CJ).

being made readily available to the wider public.¹⁴⁰ A report commissioned by the ASA included a UMR Research Ltd survey illustrating that “87 percent of New Zealanders are aware they can formally complain about advertisements”.¹⁴¹ This evidence is directly traceable to public awareness of the ASA decisions and the recourse available to individual members of the public. Furthermore, all decisions about advertising complaints are released to the public and the media via the ASA website, where all decisions since 2000 are included in the searchable decisions database.¹⁴² This public usability has clearly benefited members of the community who hold religious beliefs and is exemplified by the ‘dancing butchers’ case that ranked fourth out of all ASA advertisements prior to 2007 on the basis of most complaints received.¹⁴³

Ultimately, The Codes are reviewed and updated as needed following consultation with the public and experts.¹⁴⁴ As Streeck and Schmitter point out: “industry associations are always dependent on community values and cohesion (that is, they must reflect current social concerns), are kept in check by economic and political market forces, and are subject to hierarchical controls, political design and the potential of direct state intervention”.¹⁴⁵ Consequentially, if enough contradictory and perceivably erroneous decisions are being made by the ASA, reform will occur through public consultation and pressure. This was visible in the ASA appeal process involving a Toyota RAV car advertising campaign where the initial complaint was upheld.¹⁴⁶ The complaint involved the issue of safety that stemmed from a man and woman fighting over a new car in an edgy manner. The appeal by Toyota, including new polling showing that many members of the public found the advertisement acceptable, was allowed, and the advertisement could resume screening after 8.30pm.

C. If more a more rule-based approach is taken what should the rules consist of?

¹⁴⁰ Robert S. Summers, above n 126: discusses the general nature and formal character of the basic principles of the rule of law that he suggests are rule-like, clear, public and generally prospective.

¹⁴¹ Advertising Standards Authority, above n 26 at 2.

¹⁴² Advertising Standards Authority, above n 26 at 2.

¹⁴³ Advertising Standards Authority, above n 26 at 11.

¹⁴⁴ ANZA, *Guide to Self-Regulation of Advertising in New Zealand* (May 2006).

¹⁴⁵ Wolfgang Streeck and Phillippe C Schmitter “Private Interest Government: Beyond Market and State” (Sage, Bristol, 1985) at 103.

¹⁴⁶ *Toyota New Zealand Rav 4 06/015* (ASCAB, 21 July 2006).

If it is necessary to take a more formal approach towards the interpretation of Rule 5 of The Code of Ethics in relation to the use of religious content in commercial advertising, then the question becomes, what form should these rules take? To assess this the proposed approach should consider the general laws protecting against religious offence, the approach of the United Kingdom and Australia, and its relationship with the objectives of the current self-regulatory framework.

i. The protection of religious sensibilities

New Zealand does not have a comparative statute to the Racial and Religious Hatred Act of the United Kingdom.¹⁴⁷ Furthermore, as discussed in Chapter 2 of this paper, the criminal offence of blasphemy is all but redundant and the UN proposed Bill for a religious defamation law appears to be a sinking ship. As a result, the residual battleground for the protection of religious feelings is the NZBORA and Human Rights legislation.¹⁴⁸

This has undiscovered consequences for the ASA and its approach towards the issue because it is “an open question whether BORA applies to advertising regulation”.¹⁴⁹ The confusion with this application concerns the gateway provision to the NZBORA that is presented in section 3 of the Act.¹⁵⁰ The relevant paragraph for the purposes of the coverage of the NZBORA over the ASA is section 3(b), which states that NZBORA applies to any “body in the performance of any public function, power, or duty conferred imposed... by or pursuant to law”.¹⁵¹ Therefore in order for the ASA’s actions to be bound by the NZBORA, it must be found that the ASA exercises a public function and this practice is habituated in conference or pursuant to law.

¹⁴⁷ Racial and Religious Hatred Act 2006: which creates an offence in England and Wales of inciting hatred against a person on the grounds of their religion.

¹⁴⁸ The Human Rights Act 1993: protects people in New Zealand from discrimination in a number of areas of life. Discrimination occurs when a person is treated unfairly or less favourably than another person in the same or similar circumstances.

¹⁴⁹ Selene Mize, above n 59 at 111.

¹⁵⁰ The New Zealand Bill of Rights Act 1990, s3: that states, “This Bill of Rights applies only to acts done (a) by the legislature, executive, or judicial branches of the Government of New Zealand, or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law”.

¹⁵¹ Ibid.

ii. Public function

In accordance with Randerson J's judgment in *Ransfield v The Radio Network Ltd* the focal point of the 'public function' test concerns the power that the entity has, rather than the nature of the entity itself.¹⁵² The United Kingdom courts have found that the term "public" is a term of "uncertain import" whose meaning is derived based on the statutory context.¹⁵³ Unfortunately, in advertising regulation there is no such legislative framework to aid interpretation, which becomes evident from the New Zealand Justice Department's guidelines which observe that "at present the scope of section 3(b) is not completely certain, because the courts have not settled the precise margins of the 'public function' test".¹⁵⁴ The fact that the ASA is a voluntarily assembled private industry body does not necessarily mean that it is never performing a public function.¹⁵⁵ Reinforcing this is the decision of *Electoral Commission v Cameron & Ors* where a privately funded, non-statutory self-regulating authority was found to be exercising a public function.¹⁵⁶

What is noticeable from the commentary on this point is that a public function does not equate with a governmental function.¹⁵⁷ In consideration of this it is likely that the power the ASA administers will be considered 'public' for the purposes of the NZBORA. The formal brother of the ASA, the BSA, is bound by the NZBORA, which clearly means it is considered to be exercising a public function.¹⁵⁸ It would seem wholly unreasonable for the courts to distinguish the function provided by the ASA from that provided by the BSA. This is evident by the judicial view of the ASA that "the Board is exercising a power synonymous with the BSA and that, in carrying out its public regulatory role of creating the Advertising Codes of Practice, in

¹⁵² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 at [58].

¹⁵³ *Aston Cantlow PCC v Wallbank* [2004] 1 AC 543; [2003] 3 All ER 1213 (HL) at [6].

¹⁵⁴ The Ministry of Justice 'The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector' (2004) <www.justice.govt.nz>.

¹⁵⁵ See: Monica Carss-Frisk "Public Authorities: The Developing Definition" (2002) *European Human Rights Law Review* 3 at 319-326.

¹⁵⁶ *Electoral Commission v Cameron & Ors*, above n 58.

¹⁵⁷ See: A Butler & P Butler, *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2006) para 5.7.12.

¹⁵⁸ *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 at [35].

accordance with powers conferred by a private organisation, is exercising public power, which is reviewable on public law principles”.¹⁵⁹ This is reinforced by the Ministry of Justice guidelines that propose that because of the ASA administration of a public welfare regulatory framework it will be considered a public function.¹⁶⁰

iii. ‘Conferred or pursuant to law’?

Nevertheless, it is more contentious whether this function is conferred or arises pursuant to the law. The Ministry of Justice guidelines on the controversy declare that even though there is limited judicial consideration of the matter, it is clear that the phrase encompasses a broader range of activities than those merely prescribed by legislation.¹⁶¹ However, the guidelines go on to state that: “section 3(b) applies where a body voluntarily assumes obligations under a set of legal rules as well as an organisation that operates under legal rules conferred or imposed on it”.¹⁶² The following references allude to concepts of co-regulation that is described as the: “[f]ormulation and adoption of rules and regulations done in consultation with stakeholders, negotiated within prescribed boundaries”.¹⁶³ In comparison the structure of the ASA is more consistent with the first category of self-regulation of voluntary self-regulation.¹⁶⁴ This shows that rule making and enforcement are both carried out privately by the firm or industry itself, independent of direct government involvement.¹⁶⁵

The crux of the ambiguity as to whether the power of the ASA is conferred or arises pursuant to law is the recognition of the jurisdiction of the ASA by Parliament despite the absence of direct authority. In 1993, there was a formal removal of the BSA’s jurisdiction over broadcast advertising, with the mutual understanding of all parties concerned being that the ASA would assume authority for this category of

¹⁵⁹ *Electoral Commission v Cameron*, above n 58.

¹⁶⁰ Ministry of Justice, above 161.

¹⁶¹ *Ibid*, at ‘Conferred or imposed pursuant by law’.

¹⁶² *Ibid*, at ‘Conferred or imposed pursuant by law’.

¹⁶³ Australian Manufacturing Council *The Environmental Challenge: Best Practice Environmental Regulation* (Canberra: Australian Manufacturing Council, 1993).

¹⁶⁴ Neil Gunningham and Joseph Rees, above n 28 at 367.

¹⁶⁵ *Ibid*, This forms the picture that rule making and enforcement are both carried out privately by the firm or industry itself, independent of direct government involvement.

decisions.¹⁶⁶ This clearly illustrates Parliament’s intention to leave the regulation of the advertising industry to the ASA and thereby stands as a vote of confidence in their favour. However, recognition does not equate to direct conferment of authority on the ASA. There is an absence of empowering legislation and New Zealand’s example of an Advertising Authority amounts to the pure form of self-regulation on the “continuum” of self-regulation expounded by Gunningham and Joseph.¹⁶⁷

Accordingly, it would appear to be a fairly strained interpretation of the words of section 3(b) NZBORA to find that the ASA’s authority was conferred or pursuant to law. However, should the issue ever be raised in a Court of law, it would appear that based on the eminently public nature of the ASA’s function, departure from a literal interpretation of section 3(b) could occur.

iv. Does the ASA believe itself to be constrained by the NZBORA?

The importance of whether the ASA is indeed governed by the NZBORA is less relevant if the ASA believes it comes within the scope of the Act. Firstly, it is necessary to note that there is no direct reference in The Codes to any of the provisions of the NZBORA or the rights contained within those provisions. Nevertheless there are aspects of the Principles and Rules contained within The Codes that assimilate the protection afforded to rights within the NZBORA.¹⁶⁸

A more valuable indication of the ASA’s conformity to the principles of the NZBORA is through an empirical analysis of the decisions of the ASCB, as oppose to a regulatory analysis of their specific codes. In *St Matthew-in-the-City* the ASCB iterated that in the regulation of advertising in New Zealand, it exercised a public power, “equivalent in part to that of the statutory Broadcasting Standards

¹⁶⁶ Broadcasting Amendments Act 1993 s 5. See New Zealand, *Parliamentary Debates*, Vol 80, 1993:15974.

¹⁶⁷ Neil Gunningham and Joseph Rees, above n 28 at 405: They explain that there is a continuum with pure forms of self-regulation and government regulation at opposite ends of the spectrum.

¹⁶⁸ For example see: ASA, *Advertising Codes of Practice* (August 2010) Code of Ethics Rule 11 that outlines a Rule for ‘Advocacy Advertising’. This Rule closely assimilates to the Right to Freedom of Expression under s14 NZBORA.

Authority”.¹⁶⁹ This claim was made in response to the advertiser’s denial of ASA jurisdiction. However, it appears contradictory that they should be able to claim the use of public power in certain circumstances and not abide by it in others.

Furthermore, the ASA has explicitly “recognised the importance of freedom of expression”.¹⁷⁰ In *Tongue*, which involved a complaint about sexual material in an Auckland billboard advertisement, the ASCB stated it was “obliged to weigh up the right to free speech against fetters provided in the Codes. The Board does this on every occasion that they adjudicate on a complaint”.¹⁷¹ From these statements it is evident that the ASA believes it is exercising a public function from which consideration must be given to the legislatively enshrined rights and freedoms.

v. Religious sensibilities and the current ASA approach

Following the above conclusions on the applicability of the NZBORA to the ASA and whether its conduct is in fact influenced, it is necessary to contrast the approach of the NZBORA toward religiously offensive content, with the interpretive approach currently taken by the ASA under Rule 5.

The question of the NZBORA method regarding the protection of religion concerns the extent to which the state is willing to intervene to uphold these rights. For example, in the context of advertising of religious content by commercial entities the question ultimately involves the balancing of two different freedoms. The issue is the right to put certain views and material before the public (and the right of individuals to receive those views), versus the right of other individuals to the freedom of thought, conscience and religion.

Inspiration for an approach to determining a solution for this balancing act has been sought from the European approach to their comparative Human Right charters. “The principles developed in Strasbourg on the meaning and the scope of rights and freedoms under the European Convention on Human Rights have been regularly

¹⁶⁹ *Electoral Commission v Cameron* [1997] 2 NZLR 421,424 as cited in *St Matthew-in-the-City Anglican Church* 10/001 (ASCB, 2 March 2010) at p 6.

¹⁷⁰ Selene Mize, above n 59 at 111.

¹⁷¹ *Tongue* 05/405 (ASCB, 30 November 2005) at 5.

drawn upon by the New Zealand courts” when dealing with claims under the NZBORA.¹⁷² The underlying problem with establishing a formal test is outlined in *Otto-Preminger Institut*¹⁷³ where the Court held that it was “not possible to arrive at a comprehensive definition of what constitutes a permissible interference”¹⁷⁴ because of the fact there is no “uniform conception” of religion’s significance across Europe where “even within a single country conceptions may vary”.¹⁷⁵ This is the same problem that the ASA struggled to grapple with in their interpretation of “community standards” under limited understanding about the status of religion in New Zealand and the fact that this status is in continual flux because of the constantly increasing diversity of the public.¹⁷⁶

The test that the European Court of Human Rights (ECHR) eventually settle upon involves a narrow scope for the protection of religious sensibilities in favour of promoting freedom of expression. This is consistent with Andrew Geddis’ view of the European Court of Human Rights, which he believes affords governments a “wide margin of appreciation” when it comes to regulating religious speech.¹⁷⁷ As Rex Ahdar summarises, the European position is that while “protection of religious feelings has occurred in fact, it is not pursuant to a general right of protection of such feelings”.¹⁷⁸ However, the European Court has made provision for two exceptions to this general position. In *Otto-Preminger Institut* the Court recognises that, although there is no general prohibition against the offence of religious feelings, there are restricted circumstances where protection may be necessitated. Such instances are identified as being where there is a gratuitous intrusion upon individuals and where

¹⁷² Rex Ahdar ‘The Right to Protection of Religious Feelings’ (2008) 11 Otago L Rev 629 at 632.

¹⁷³ *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34.

¹⁷⁴ *Ibid*, at [50].

¹⁷⁵ *Ibid*, at [50].

¹⁷⁶ *Murphy v Ireland* Application no. 44179/98 (10 July 2003) where it was described that substantial offence will vary especially in ever growing array of faiths and denominations.

¹⁷⁷ Andrew Geddis “You can’t say ‘God’ on the radio: freedom of expression, religious advertising and the broadcast media after *Murphy v Ireland*” (2004) 9 EHRLR 181 at 182: The context of the article involves a comparison of the different approaches taken by the European Court in regard to freedom of expression and freedom of religion.

¹⁷⁸ Rex Ahdar, above n 172 at 638: which explored the decisions of the European Human Rights Court on the point to draw this conclusion.

those who hold a belief are inhibited from exercising their freedom to hold and express such belief.¹⁷⁹

Mendelsohn v Attorney-General is an example of the New Zealand court drawing upon European principles.¹⁸⁰ It essentially adopts the European Court's test for religious offence in New Zealand. The case expressed that the statutes concerning religion "simply [did] not support a general positive duty to protect freedom of religion".¹⁸¹ Furthermore, the two exceptions to the general prohibition against the restriction of religious offence have been recognised in New Zealand. In *Mendelsohn* the Court noted, "that the state had always made it an offence to disturb congregations in public places or assembled for public worship".¹⁸² Then in *Popetown*, the BSA set the standard of offence in a similar fashion to that of gratuitous offence by outlining that the broadcast would have to move towards the realm of hate speech or vitriol before the threshold would be crossed.¹⁸³ An example of such offence would be in *Triangle Television* where a Muslim man condemned homosexuals for causing AIDS.¹⁸⁴ This is important for our purposes as the BSA performs a function very similar to the ASA and has a Code that is no more comprehensive than the standards that the ASA administer.¹⁸⁵

The justification for this stance is that free speech is the best defence in an open society where there is diversity of religion.¹⁸⁶ The point is that unless the adjudicators want to make other societal divisions susceptible to offence subject to heightened legal protection then there is no point in isolating religious beliefs. This is also consistent with Ronald Dworkin's democratic theory that freedom of expression is a pre-condition of legitimate government.¹⁸⁷ In Ahdar's view "part and parcel to having

¹⁷⁹ *Otto-Preminger Institut v Austria*, above n 173 at [47].

¹⁸⁰ *Mendelsohn v Attorney-General* [1999] 2 NZLR 268.

¹⁸¹ *Ibid*, at [21].

¹⁸² *Ibid*, at [18] (citing the Summary Offences Act 1981, s37).

¹⁸³ *Popetown* BSA Decision No 2005-112 (4 May 2006) at [107].

¹⁸⁴ *Triangle Television* BSA Decision No 2004-01 (26 February 2004) at [6].

¹⁸⁵ Selene Mize, above n at 152.

¹⁸⁶ Rex Ahdar and Ian Leigh, above n 36 at 395-396.

¹⁸⁷ Ronald Dworkin "The Right to Ridicule" 53(5) *New York Review of Books*, 23 March 2006. <http://www.nybooks.com/articles/article-preview?article_id=18811>.

the right of religious liberty is acceptance of the fact that not everyone will appreciate one's religion and some may criticise one's most cherish of religious belief".¹⁸⁸ However, there are examples of specific areas being targeted for increased protection in advertising, such as sexism that is identified by Mize.¹⁸⁹

It is necessary to consider what influence this would have on the ASA approach to the interpretation of Rule 5. An example of a religiously offensive case that was upheld was the deliberation concerning the 'dancing butchers' case. It is interesting to analyse the result of this case in light of the settled law regarding the offence of religious sensibilities. Clearly the advertisement did not prohibit members of the Hare Krishna from exercising their religious beliefs and the degree of satire and humour involved means it would be unlikely to constitute "hate speech or vitriol" under the test set out in *Popetown*.¹⁹⁰ This is also likely to apply to the *Hillcrest Tavern* decision. However as described by Ahdar, "in these 'ambush' situations, the individual may truly be caught by surprise and suffer genuine, unavoidable distress".¹⁹¹

In conclusion, the near absolute jurisdiction that the ASA exercises over the regulation of the advertising industry means that these interpretive techniques are no more than a general yardstick against which to measure the ASA's own approach. The ASA obviously considers itself to be bound by some form of consideration of individuals' fundamental rights; however, in the end one of the three constitutional objectives of the ASA is "to establish and promote an effective system of voluntary self-regulation in respect to advertising standards".¹⁹² This involves maintaining the integrity of the advertising industry, which cannot be superimposed with the purposes of the NZBORA.

vi. An international comparison

¹⁸⁸ Rex Ahdar, above n 172 at 637.

¹⁸⁹ Selene Mize, above n 59 at 109: In reference to *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 at 493 where it was suggested that a distinct change had occurred in public and professional attitudes towards sexiest advertising.

¹⁹⁰ *Popetown*, above n 183 at [85].

¹⁹¹ Rex Ahdar, above n 172 at 653.

¹⁹² *Advertising Codes of Practice*, above 25 at 15.

New Zealand is not unique in its movement towards self-regulation of the advertising industry. The past twenty years has seen a surge in self-regulatory regimes in the United States, Europe, and other advanced economies.¹⁹³ Two of the international jurisdictions that have structured their advertising regulation in a similar manner to New Zealand are the United Kingdom and Australia, and therefore the strengths and weaknesses of their systems can be used as possible areas of improvement or areas of warning for New Zealand.

One difference to note is the structure of the legal framework in which some of the international advertising authorities operate. The United Kingdom has two separate standards created by two different bodies for non-broadcast and broadcast advertising.¹⁹⁴ This approach also differs in the sense that the creation and administration of the standards are not vested in one governing authority like in New Zealand. The UKASA simply executes the codes through the complaint process but is not directly involved in the formulation of the Rules and Principles that they implement. The separation of the broadcasting and non-broadcasting branches of United Kingdom advertising regulation also includes an alteration of government involvement. Historically, broadcast advertising was separately regulated by the Office of Communication (Ofcom). However, “better regulation principles that were included in the Communications Act 2003 placed a duty upon Ofcom to pursue alternative forms of regulation where practical”.¹⁹⁵ Ofcom took advantage of this provision and established a co-regulatory partnership with the UKASA in 2004.¹⁹⁶ A

¹⁹³ See for example: Eugene Bardach and Robert A. Kagan *Going by the book* (Temple University Press, Philadelphia, 1982), R S Karmel Securities “Industry Self-regulation -- Tested by the Crash” (1988) 45 Washington and Lee Law Review 1297, Gunther Teubner, Lindsay Farmer, Declan Murphy *Environmental law and ecological responsibility : the concept and practice of ecological self-organization* (Wiley, New York, 1994), Ian Bartle and Peter Vass *Self-regulation and the regulatory state – A survey of policy and practice* (University of Bath, Bath, 2007).

¹⁹⁴ The Committees of Advertising Practice (CAP) write and maintain the UK Advertising Codes for non-broadcast advertising, which are administered by the Advertising Standards Authority. Conversely, the Broadcasting Committees of Advertising Practice (BCAP) write and maintain the UK Advertising Codes that relate to broadcast advertising, which are also administered by the Advertising Standards Authority.

¹⁹⁵ Advertising Standards Authority “Co-regulation of broadcast advertising” (2012) Advertising Standards Authority UK <www.asa.org.uk>: The UK passed its Communications Act and created Ofcom in 2003, introducing sweeping changes to the regulation of media and communications. The Communications Act requires Ofcom to balance broad and sometimes conflicting economic and cultural policy considerations.

¹⁹⁶ *Ibid.*

system of co-regulation may provide the fullness required to avoid many of the perceived shortcomings of the self-regulatory system. As Webb & Morrison argue self-regulation commonly lacks many of the virtues of conventional state regulation:¹⁹⁷ therefore a combination of the two could provide the best of both worlds.

The most obvious difference between the United Kingdom and Australian approaches toward the regulation of religiously offensive advertising is their Codes' inclusion of specific reference to the protection of religious feelings of 'any communication',¹⁹⁸ rather than the New Zealand Codes that only refer to religion with regard to the advertisement of people.¹⁹⁹ In consequence, the decisions of both these Authorities appear to provide additional protection from religiously vilifying material when contrasted with the New Zealand approach, further distancing their decisions from the position taken under Human Rights laws. An example of this is *Jemella Ltd* where, the advertisement was the same as the *GHD Styling Irons* case in which the ASCB found that the advertisement did not breach Rule 5 in New Zealand.²⁰⁰ While the same analogies were drawn between GHD as a religion and the GHD rules as constituting a gospel, the UKASA, in contradiction to the conclusion reached in New Zealand, upheld the complaint on the grounds they were likely to cause serious offence. This divergence is further emphasised by the decision of the Australian Standards Bureau (ASB) in the *Betta Electrical* case²⁰¹ where a claim concerning a suggestion that a Betta product was a better gift for Jesus than those given by the

¹⁹⁷ Kernaghan Webb and Andrew Morrison (1996) "The Legal Aspects of Voluntary Codes." Draft paper presented to the Voluntary Codes Symposium, Office of Consumer Affairs, Industry Canada and Regulatory Affairs, Treasury Board, Ottawa, 12-13 September. Included in Cohen & Webb forthcoming 1998.

¹⁹⁸ AANA Code of Ethics 2012 Clause 2.2, that states: "Advertising or Marketing Communications 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, gender, age, sexual preference, religion, disability, mental illness or political belief". The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing Edition 12 Rule 4.1, that states "Marketing communications must not contain anything that is likely to cause serious or widespread offence. Particular care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age. Compliance will be judged on the context, medium, audience, product and prevailing standards".

¹⁹⁹ *Advertising Codes of Practice* August 2010, Code for People in Advertising, Basic Principle 3.

²⁰⁰ *Jemella Ltd* 45068 (ASAUK, 12 March 2008).

²⁰¹ *Betta Electrical* 448/07 (ASB, 18 January 2008).

three wise men during the nativity was upheld. This seems extremely innocuous when compared to the *Hells Pizza* advertisement that stated the product was only available for a limited time only, like Jesus.²⁰² Furthermore, both the Australian and United Kingdom Advertising Authorities have authored summary determinations of their respective treatment towards religiously discriminating advertising²⁰³ that provide an easily accessible guide for advertisers. The prescriptive nature of the summaries means that advertisers are able to alter their conduct in advance.

Akin to the self-regulatory nature of the New Zealand ASA, the United Kingdom and Australian Authorities often fail to uphold the fundamental legal notions of certainty and consistency. The United Kingdom and Australia both display bizarre cases of inconsistency. An example of this is the juxtaposition of the decisions by the ASB in *Betta Electrical* and *Red Bull*.²⁰⁴ Both advertisements involved a re-creation of the nativity scene where the gimmick was the addition of a product-related fourth gift proposed to be of greater utility than the gifts of the three wise men. However, in the later *Red Bull* case, unlike the *Betta Electrical* result observed above, the ASB dismissed the claim stating that most members of the public would find the use of the Christian scene as “light-hearted”.²⁰⁵ It is difficult to see how the two cases can be distinguished.

The approach of the two corresponding jurisdictions illustrates a few points with regard to the treatment of commercial businesses using religious content in their advertising. Firstly, is there a basis for co-regulation that can provide more conventional authority to deal with breaches in the area? Furthermore, with regard to the specific provisions implemented by these two bodies, should New Zealand follow suit and implement its own personalised rule for the protection against religious offence? It is important to weigh these notions against the objectives of self-regulation, which consist of reducing costs and increasing efficiency. The discussed amendments are likely to be inconsistent with these qualities and represent a shift in

²⁰² *Hells Pizza*, above n 81.

²⁰³ United Kingdom Advertising Standard Authority “Background Briefing Religion” 2012 <www.asa.org.uk>, Australian Advertising Standards Bureau “Advertising Bureau Treatment of Discrimination and Vilification” 2012 <www.adstandards.com.au>.

²⁰⁴ See: *Betta Electrical*, above n 201 and *Red Bull* (4 wise men) 39/09 (ASB, 11 February 2009).

²⁰⁵ *Red Bull* (4 wise men), above n 204 at 2.

the standards towards further protection for religious sensitivities. This appears erroneous given that the ASA position is already stricter than the current thresholds provided by the NZBORA. Therefore, for the purposes of upholding a system that seems to be operating to a publicly satisfactory level this appears unnecessary.

D. Conclusion

Currently our codes represent flexible standards that provide the ASA with a significant amount of discretion to treat cases on religiously offensive advertising on a case-by-case basis. Consequently, the distinct position taken under the NZBORA and our lack of direct reference to religious discrimination seem to suit our pragmatic nature. However, as discussed above, a greater recognition of legal principles could promote certainty without compromising the ASA's objectives.

Chapter 5 - A Critique of the ASA and the Advertising of Religious Beliefs

A. Introduction

The structure of the ASA is not particularly conducive to providing clear and authoritative guidelines for advertisers communicating their religious beliefs. The advertisers of the beliefs are often religious institutions. Therefore, the issue is not only limited to the subject matter of the advertisement and the ASA's capability to make a determination, but also the authority to make and enforce such decisions over organisations that are predominantly non-commercial in nature. The critique of the ASA's approach will evaluate the authority of the ASA to make deliberations on the issue, in addition to the merits of the decisions made.

B. Jurisdiction

The ASA claim that they have jurisdiction over nearly all advertising in New Zealand with the exception of some specific areas of advertising that require individualised governmental attention,²⁰⁶ which is supported by the government recognition provided in 1993.²⁰⁷ However, as noted in previous sections this falls short of direct Parliamentary authority. Not only does this cause ambiguity about the applicability of the NZBORA, but it also spawns confusion about the scope of the ASA's jurisdiction. This means that cases closer to the border of the ASA's jurisdiction are contentious, the governance of religious institutions being one of these circumstances. This is further intensified by the historical notions of church and state division, which advance that it is beyond the authority of the Courts to adjudicate on matters of faith.²⁰⁸

²⁰⁶ See: Electoral Act 1993, Part 6AA "Electoral Advertising": The board has no authority to make rulings in relation to advertisements of the Electoral Commission published in the exercise of its statutory public awareness functions, and which do not promote the interest of any person, product or service.

²⁰⁷ See: above n 25, concerning Parliament's recognition.

²⁰⁸ See for example: *Khaira v. Shergill* [2012] EWCA Civ 893: The Court of Appeal has clarified the importance of judicial restraint when invited to adjudicate upon disputes amongst faith communities which involve matters of doctrine or religious belief.

Interestingly in many of the deliberations concerning religious beliefs in advertising the jurisdictional issue has not been raised, but has instead been asserted by the ASA as a finality, which has been accepted by the various communicators.²⁰⁹ Furthermore, when the issue has been raised the ASA have simply continued to exercise their authority with no explanation of where this authority is derived from. However, illustrations of this internal conflict are evident in some decisions. In particular, the issue came to a head in the decision of *St Matthew-in-the-City* where both diametrically opposed positions were argued.

The advertiser based its argument on the jurisdictional argument of membership and in responding to the complaint stated that “the church has not agreed to be bound by decisions of the Authority or the Advertising Standards Complaints Board, and does not accept that the Authority has any jurisdiction over what the church says on its own property - whether orally in a sermon, on a billboard, or otherwise”.²¹⁰ This argument is centred on the premise that the ASA is a ‘voluntary’ body made of affiliates who elect to be bound by their terms and pay the appropriate levies. Saint Matthews Church submitted that because they were a not-for-profit organisation, not involved in the consultation process and with no representation on the ASCB, they were immune from the Board’s rulings.²¹¹ Furthermore, the church disputed the ASA’s jurisdiction from a theological standpoint:

“Even if the Authority did have jurisdiction to deal with a complaint about our billboard (which is not the case), the billboard is not an advertisement of goods or services or political issues and the Authority is not well equipped to

²⁰⁹ See for example: *His Way Church*, above n 104; *Church of Jesus Christ of Later Day Saints Television Advertisement*, above n 111; *Churches Education Commission Flyer and Website Advertisements*, above n 112.

²¹⁰ *St Matthews-in-the-City Anglican Church*, above 21 at 2.

²¹¹ According to Advertising Standards Authority, above 26 at 7: the ASA consults with the Ministries of Health, Consumer Affairs, Culture and Heritage, Te Puni Kokiri, and the Commerce Commission and Securities Commission for Board appointments, as well as advertising publicly. Note that this contains no input from religious authorities/bodies. Furthermore the composition of the ASCB contains no direct representative of religious interests. See: Advertising Standards Authority “Advertising Standards Complaint Board” 2012 <www.asa.co.nz>.

try to resolve differences in theology - an invidious task even for experts in theology”.²¹²

In a rare instance the ASA chose to explain the grounds of their jurisdiction and assertion of decision-making power.²¹³ This argument was based on the conduct of Saint Matthews Church rather than the type of organisation that they were. The crux of this argument focused on the medium for communication used by St Matthews Church rather than their status under the ASA. The ASA “confirmed that it was able to receive and consider complaints about all advertisements published and/or broadcast in New Zealand, regardless of who the advertiser was”.²¹⁴

The ASA insist upon wielding a power akin to the BSA, which means they have the same approach to jurisdiction as the BSA, who exercise absolute jurisdiction over their respective area.²¹⁵ This is supplemented by the broad definition of advertising used by the ASA. The result is that any individual or group whose communication comes within the wide definition specified by the ASA is brought within the scope of the Code regardless of the content of that message. This appears consistent with a literal interpretation of the role of the ASA. Furthermore, based on the decision of *R (johns) v derby city council*, the ‘medium approach’ fits consistently with the method applied by the Courts.²¹⁶ Based on the current approach, the ASA will deliberate over any form of advertising no matter what the status of the advertiser is, with limited exceptions for specific areas such as political advertising. Does this breadth of jurisdiction reflect the requirements of the ASA within the law?

²¹² *St Matthew-in-the-City Anglican Church*, above 21 at 2.

²¹³ *Ibid*, represented the first real challenge to the authority of the ASA over faith based advertising and due to the media exposure it was important for the ASA to ensure they provided a comprehensive answer to establish jurisdiction for similar cases in the future.

²¹⁴ *Ibid*, at 6.

²¹⁵ See: Broadcasting Act 1989, s21; See also: *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654 (HC) at [20]: where Wild J describes the inability of the Courts to reassess the substantive nature of the BSA’s decisions.

²¹⁶ *Johns & Anor, R (on the application of) v Derby City Council & Anor* [2011] EWHC 375 (Admin) at [41] - [45]: Where the Court stated that “a secular judge must be wary of straying across the well-recognised divide between church and state”. However, that it is just as well understood that the divide [between church and state] is crossed “when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts”.

The quasi-governmental nature of the authority also calls into the picture questions of review. Currently, the ASA exercise absolute control over the whole advertising adjudication process.²¹⁷ The next stage of the process involves an independent review, which is nevertheless conducted by the ASA through the Advertising Standards Complaints Appeal Board (ASCAB). The ASCAB are considered “the final arbiters of the interpretation of the Codes”.²¹⁸ This seems to suggest that judicial review is not an available function for administering justice according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process.²¹⁹ The exercise of power is reviewable if it is “in substance public” or has “important public consequences”.²²⁰ As evaluated under the applicability of NZBORA to the ASA it is extremely likely that the Courts would consider the power exercised by the ASA to be sufficiently public in nature and therefore its decisions do appear to be prima facie judicially reviewable.

However, regardless of this position, it is likely that because of the self-sufficient nature of the ASA process judicial review would be declined by the High Court. In contrast to the BSA, whose appeal process reverts immediately to judicial review by the High Court, the ASA outline the appeal process to comprise independent review by the ASCAB.²²¹ This situation is compounded by the fact that similar principles of natural justice that trigger the initiation of judicial review are the required conditions to commence appeal proceedings in the ASA.²²² Therefore it is likely that the High

²¹⁷ Advertising Standards Authority, above n 26 at 4: The complaints process starts with a letter of complaint (it only takes one complaint to initiate the process) which is followed by a decision that the complaint is upheld or not upheld. There is then an ASA appeal process available by the separate ASCAB. In order to appeal the appellant must sign a waiver that they will not seek alternate redress.

²¹⁸ *Advertising Code of Practice*, above n 25 at 18: The main grounds for appeal are new evidence, the rules of natural justice were not followed or the Decision was against the weight of evidence.

²¹⁹ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 416.

²²⁰ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11.

²²¹ Broadcasting Standards Authority “Can I appeal the BSA’s decision?” (2012) BSA <www.bsa.govt.nz>.

²²² The various grounds of judicial review tend to overlap. Judicial review is available where a decision-making body: a) exceeds its powers (*ultra vires*); b) commits an error of law; c) commits a breach of natural justice; d) reaches a decision that no reasonable decision-maker could have reached, or e) abuses its powers. See, for example, *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832; *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA); *Peters v Davison* [1999] 2 NZLR 164 (CA)

Court would not see itself as providing a necessary role unless there was a substantial miscarriage of justice at the appeal process level that triggered widespread public pressure. Even if the High Court did accept jurisdiction over the matter it is equally unlikely that the particular decision would be overturned. In the *South Park* case, concerning the BSA, the High Court repeatedly emphasised the difficult task appellants face in overturning the decisions of an expert tribunal such as the BSA.²²³ Obviously this has relevance to the ASA because it is an expert tribunal in the advertising industry. As with the BSA, Parliament had established the ASA as the prime arbiter of acceptable expression in advertising, and therefore it is unlikely that the courts will go to any real lengths to frustrate this purpose.

Definitively, the ASA have contractually ensured that their appeal process remains the final course of redress for the advertiser or complainant. In accordance with The Codes complaints procedure the appellant must accept that “in lodging a complaint with the complaints board the complainant accepts that he/she will not pursue the complaint in any other forum and is required to sign a waiver to this effect”.²²⁴ Although this appears dubious as it amounts to contracting out of the review of a public function,²²⁵ it is unlikely that the courts would overturn the agreement and allow a judicial review, especially in light of the preceding points.

C. Sanctions

Due to the fact that the ASA appear to have unrivalled authority over the area of advertising with little existence of external recourse, the authority to enforce these decisions becomes of supreme importance. As Haufler describes “industry self-regulation may be one way to raise standards, but because those standards are voluntary and unenforceable, they lack credibility”.²²⁶ Obviously this perceived flaw is more prevalent in regard to advertisers of religious beliefs who refute the jurisdiction of the ASA in the first place.

at 180.

²²³ *Browne v CanWest TV Works Ltd*, above 223 at [20].

²²⁴ *Advertising Code of Practice*, above n 25 at 7 (‘Complaints procedure’ Point 4).

²²⁵ See: Argument under Part 5 ‘Public function’.

²²⁶ Virginia Haufler, above n 130 at 2.

The current position states that provided “a complaint is upheld by the Board the advertiser, in accordance with self-regulatory principles, is requested to voluntarily immediately withdraw the advertisement”.²²⁷ This is described as the minimum sanction of the ASA. The media are similarly requested not to publish or broadcast an advertisement that is held to be in breach of the Codes. There are no penalties available and the sanctions do not possess the quality of legal enforceability. However, based on an empirical analysis of advertisers responses, “decisions are invariably followed”.²²⁸ As described in *Industry Self-Regulation*: “All too often, self-regulation is dismissed as a symbolic sham, or as inherently feeble and ineffective”.²²⁹ The results in New Zealand are evidence to the contrary, at least with regard to the effectiveness of the sanctions in practice.

Max Weber in his ‘Theory of Authority’ summarises the three types of legitimacy as traditional, charismatic, and legal-rational authority.²³⁰ The authority exercised by the ASA is most akin to traditional authority by the fact that the authority is legitimised by the sanctity of tradition. It is customary that the ASA are the adjudicators of the advertising industry and consequently their decisions have the backing of traditional force. Furthermore, “most people and organisations behave themselves because they want the esteem of other members of society, they fear losing markets, they are threatened by the long arm of the law and/or they want to lessen uncertainty about their rivals behaviour”.²³¹ The compulsory nature of the rulings of the ASA are arguably ensured by the financial backings of the members and response of the rest of the advertising community. The basic reason is simple: “it becomes harder for a member company to reject a norm after treating it seriously and at length in industry deliberations”.²³²

However, based on the lack of enforceability of the formal sanctions and the

²²⁷ *Advertising Code of Practice*, above n 25 at 7 (‘Complaints procedure’ Point 5).

²²⁸ Advertising Standards Authority, above n 26 at 14 in reference to Advertising Standards Authority, *Annual Report* (2006) 3.

²²⁹ Neil Gunningham and Joseph Rees, above n 28 at 363.

²³⁰ Max Weber “The three types legitimate rule” (1958) – of essay. Summarised in Sam Whimster *Essential Weber: A Reader* (Routledge, Oxford, 2003) at 133: pioneered a path towards understanding how authority is legitimated as a belief system.

²³¹ Jean J. Boddewyn “Advertising Self-Regulation: True Purpose and Limits” (1989) 18 JOA 19 at 20.

²³² Neil Gunningham and Joseph Rees, above n 28 at 379.

commercial nature of the informal sanctions, it is possible that the usefulness of such measures are futile to advertisers of religious beliefs such as religious institutions. Industrial morality carries an expectation of obedience and stems from “consent in the formation of an industry code of practice”, thus industry players are involved in the development process and consulted with for key issues.²³³ As mentioned in preceding sections, there is no consultation with any form of religious body and there is no provision for the direct representation of faith-based organisations on the ASCB or ASCAB making it unlikely that religious institutions abide by the same standard of industry morality. In fact boycotting the decisions of the ASA could arguably have positive public connotations for religious institutions that are judged by their dedication and unwavering beliefs. It would be interesting to see the next step for the ASA should an advertiser such as the Equippers Church refuse to take their advertisement down.

It is possible that this uncertainty could be remedied by certain amendments to the current framework of sanctions available to the ASA. For example one possible area for improvement is the addition of penal sanctions to provide harsher redress in areas of continual or blatant breaches. As Mize suggests, “given that some advertising campaigns are scheduled to run only for a short period of time, it is conceivable that an advertiser could fail to comply with the advertising codes deliberately in order to generate publicity”.²³⁴ An advertising example that could warrant such treatment is the United Kingdom’s *Antonia Fedici* cases.²³⁵ The first advertisement by the ice-cream manufacturer depicted a heavily pregnant woman dressed as a nun standing in a church holding a tub of ice cream.²³⁶ This was followed a few months later by an advertisement depicting two priests in full robes who looked as though they were about to kiss.²³⁷ The implications of both advertisements were almost exactly the same and both were defaming Christian religious concepts. After the first case the UKASA warned them not to make such advertisements in the future; however, later in the year the second case arrived involving the same religious theme. Without the

²³³ Ibid, at 379.

²³⁴ Selene Mize, above n 59 at 154.

²³⁵ *Antonia Fedici* 127867 (ASAUK, 15 September 2010); *Antonia Fedici* 133120 (ASAUK, 27 October 2010).

²³⁶ *Antonia Fedici* 127867 (ASAUK, 15 September 2010).

²³⁷ *Antonia Fedici* 133120 (ASAUK, 27 October 2010).

availability of penalties Antonia Fedici merely received a repeat of the warning.

Punitive measures seem to be one way to counteract this problem. However, as the Executive Director of the Association of New Zealand Advertisers Inc argues, penalties may not be the best alternative.²³⁸ The very nature of punitive financial sanctions could undermine the legitimacy of the self-regulatory position and lead to a “culture of resistance”.²³⁹ It seems unnecessary to implement such changes until a problem does arise in which the available sanctions are no longer appropriate. Conversely, the UKASA is able to refer advertisers who refuse to work with them and persistently make misleading claims to the Office of Fair Trading (OFT) for legal action.²⁴⁰ The consumer protection equivalent in New Zealand is the FTA and the Commerce Commission.²⁴¹ For our purposes there is contention as to whether religious institutions, the primary advertisers of religious beliefs, fit within the definition of ‘in trade’ required in order to come under the application of the misleading and deceptive provisions.²⁴² The case law identifies that there is no requirement for the term ‘in trade’ to be of a commercial nature.²⁴³ Nonetheless, it is unlikely that solely faith-based institutions would come within the scope of section 9 FTA.

In 2007, despite the increased number of complaints, the average time taken to process them was 25 working days, the same as 2005.²⁴⁴ Regardless of the comparatively low adjudication times, the question is whether the time lag in the settlement of disputes nonetheless makes the ASA process a blunt instrument?²⁴⁵ This

²³⁸ Selene Mize, above n 59 at 156 citing The Executive Director of the Association of New Zealand Advertisers Inc.

²³⁹ Ibid.

²⁴⁰ Advertising Standards Authority. “About regulation” (2012) Advertising Standards Authority < <http://www.asa.org.uk/About-ASA/About-regulation.aspx>>.

²⁴¹ Fair Trading Act 1986: It is designed to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services, and to promote product safety: Fair Trading Act 1986, s 1(2).

²⁴² Ibid, s9 which states: No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

²⁴³ See for example: *Malayan Breweries Ltd v Lion Corp Ltd* (1988) 4 NZCLC 64,344; *Desmone Ltd v University of Auckland Senior Common Room Inc* (2002) 7 NZBLC 103,580.

²⁴⁴ Advertising Standards Authority, above n 26 at 6.

²⁴⁵ This comparison is between similar regulatory authorities such as the BSA where the average complaint resolution time in 2004 was 97 days (Jeremy J Irwin, *Submission for the*

raises the issue of whether there is the possibility of issuing injunctions in order to halt pending ASA proceedings. The codes of the ASA do not outline the ability of the Board to prohibit specific advertisements before a decision has been made.

Furthermore, such action would be difficult considering it is initial public exposure that usually leads to the complaints. As a matter of principle, the remedy of injunction is available to the judiciary whenever required by justice,²⁴⁶ but this is a hard standard to apply to the advocating of religious beliefs through the advertising medium.

Regardless, the ASCB “can expedite its adjudication to avoid delay”.²⁴⁷ In addition, once a decision has been made the appropriate sanction will be implemented unconcerned with any possible appeal that may be forthcoming. An additional factor of potential injunctive action is likely to confuse the simplicity of the process beyond the possible benefits it is able to provide.

Gordon argues that nonbinding agreements (such as industry self-regulatory commitments) have an important role to play in experimenting with new rules and creating consensus for eventual public regulation.²⁴⁸ However, the absolute compliance requirement with the decisions of the ASA shows that the critics’ view of the sanctions of the ASA lacking credibility is not evident in practice. Accordingly, it is not necessary to fix an approach that is not broken. Future use of injunctions may be a possible addition to the codes if consultation with the industry and public suggests that this is needed. The basis of self-regulation is communication. Moreover, from a normative perspective, rather than emphasising punishment and obedience, it would be better to think of industry self-regulation in terms of “morality of cooperation”²⁴⁹ or “moralising social control”.²⁵⁰ A commitment to dialogue, persuasion, and cooperative problem solving is the preferred method of exercising authority because cooperation for shared values and goals, not punitive social control,

Review of the Regulation of Alcohol Advertising (October 2006) Association of New Zealand Advertisers Inc (ANZA) <<http://www.anza.co.nz/>> at 17 September 2007, 2).

²⁴⁶ *TV3 Network Ltd v Eveready NZ Ltd* [1993] 3 NZLR 435 (CA).

²⁴⁷ Selene Mize, above 59 at 155: Giving ASCB case examples of *Burger King* 07/209 (ASCB, 16 May 2007); *CanWest RadioWorks Ltd – The Edge* (ASCB, 14 September 2004).

²⁴⁸ See: Gordon, D “Private property’s philosopher” (1999) 5 *The Mises Review* 1.

²⁴⁹ See: Phillip Selznick *The moral commonwealth: social theory and the promise of community* University of California Press, Berkeley, 1992).

²⁵⁰ John Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989) at 9-11.

appears to be the main cultural orientation of most industry self-regulation.²⁵¹

D. Misleading and deceptive

In addition to the administrative issues that relate to the advertising of religious beliefs it is necessary to critique the substantive approach to the issue that the ASA takes. This paper's descriptive analysis suggests that the central focus is the misleading and deceptive principle and the supplementary rules that give the principle practical value. The ASA approach illustrated a difference in results between cases based on the fact and opinion distinction. The critique of the approach concentrates on the ability of the ASA to draw this distinction and contrasts this with the international Authorities' methods.

i. Ability to adjudicate on the supernatural

The authority for the self-regulation of the advertising industry is centred upon the "collective wisdom and experience" the adjudicators are said to possess.²⁵² This justification is diluted for an essentially commercial based authority ruling upon deep theological debates. How is it possible to question whether or not Jesus did in fact heal cancer?²⁵³ Is it not a fact to some people that Jesus either directly heals cancer or has indirectly influenced the health policy and procedures that treat life's illnesses on a daily basis? This is a crucial issue in the legitimacy of the ASA decisions concerning the advertising of religious beliefs.²⁵⁴

Peter W. Edge defines the underlying problem of adjudicating on such matters as

²⁵¹ Neil Gunningham and Joseph Rees, above n 29 at 388.

²⁵² *New Zealand Wine and Spirits and The Rum Company* 03/269 (ASCB 24 November 2003).

²⁵³ *Equippers Church Advertisement*, above n 103 at 3: With respect to the offending statement "Jesus Heals Cancer" we assert that the purpose of this statement is to express a message of hope and life in Jesus Christ. It is a statement that is made in accordance with our basic Christian beliefs as contained within the Bible. We recognise the Bible as the authoritative and reliable source of information and principles of belief and throughout the Bible there are numerous accounts of Jesus healing people.

²⁵⁴ Bradney observes that the courts encounter difficulties when faced with arguments that are wholly faith based: A Bradney, "Religion and Law in Great Britain at the End of the Second Christian Millennium," in P.W. Edge and G. Harvey *Law and Religion in contemporary Society: Communities, Individualism and the State* (Aldershot, Ashgate, 2000) at 27.

being based on “two opposing tensions”.²⁵⁵ The opposing tensions are that the adjudicator cannot exclude itself from the matter without compromising the judicial function, conflicting with the effect of “impoverishing pluralism by the development of a state orthodoxy” at the expense of the advertiser’s religious interests.²⁵⁶ The ASA as a private body arguably has more discretion in the matter considering its commitment to best practice standards; however, as discussed, the ASA is essentially exercising a ‘public’ function so this conflict is a key consideration in assessing their aptitude on such matters.

The historical approach was illustrated by Justice Denman in *Penny v Hanson*.²⁵⁷ Justice Denman described the supernatural claims made by the defendant as “nonsense” and advanced that in this era of scientific knowledge (that has certainly only advanced since the time of the decision) it was ludicrous to make such claims without reference to evidence.²⁵⁸ The New Zealand courts have not been so absolute in their rulings stating in *Ngawha Geothermal Resource Company Ltd v Northland Regional Council* that “none of us has been persuaded for herself or himself that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison”.²⁵⁹ This was in response to a claim by local Maori that the creation of a prison would disturb the existence of a Taniwha. The decision represents an avoidance of the issue by the New Zealand courts who preferred to avoid ruling on the existence of the Taniwha. Instead, deciding that the limited effect of the prison on the Taniwha did not warrant a successful argument. This would be similar to the ASA ruling that the effect of the ‘Jesus heals cancer billboard’ was offensive (as it in fact was), without finding that the billboard was misleading and deceptive.

The argument against the legitimacy of the ASA’s decision making power on such issues is epitomised by Pastor Lyle Peninsula’s (*Equippers Church*) statement that

²⁵⁵ Peter Edge, “Naturalism and Neutrality: Trying Miraculous Claims Fairly in English Courts” (2002) *Journal of Church and State* 521 at 522.

²⁵⁶ *Ibid* at 522.

²⁵⁷ *Penny v Hanson* (1887) 18 Q.B.D. 478 118.

²⁵⁸ *Ibid*, at [527].

²⁵⁹ *Ngawha Geothermal Resource Company Ltd v Northland Regional Council* A117/2006 [2006] NZEnvC 290 at [439].

"religious advertising and freedom of speech are vital components of a free and democratic society and to try and rule against this form of advertising using the measure 'truth in advertising' cannot and should not apply for faith based or religious advertising."²⁶⁰ This point is reiterated in *St Matthew-in-the-City* where the advertiser strongly contended "the Authority should not seek to appoint itself as an arbiter in this area". This is supported by past authorities such as *Monck v Hilton* in which Baron Cleasby described the authenticity of spiritualism as a subject that would be a very improper argument and decision in the Court of law.²⁶¹

It is unlikely that the ASA will be persuaded by any of the tentative positions established by the courts as its decisions are based on the maintenance of integrity within the advertising industry. The UKASA has made a more definitive statement in asserting that they will not get involved in the debate as to the existence of God.²⁶² However, the content of its code ensures this is an easier alternative, as is discussed below. The current position of the New Zealand Courts would appear to be enunciated in *Mahuta v Waikato Regional Council*²⁶³ where the court favours more secular reasoning stating the "perceptions which are not represented by tangible effects do not deserve such weight as to prevail over the proposal and defeat it".²⁶⁴ This is essentially the line of reasoning followed by the ASCB in *Equippers Church*. The ASCB chose to uphold more scientific methods of medical treatment to the detriment of the faith-based arguments of the religious believers. The solution to this problem for advertisers of religious beliefs is simple and was demonstrated in the Atheist Bus Campaign example where the advertisers inserted the word "probably" to illustrate a more opinionated position. This addition of 'probably' removes the contention surrounding the existence of the supernatural and supports a technical position that the ASA are not likely to concern itself with.

²⁶⁰ Hayley Hannan "Jesus heals cancer' billboard taken down" The New Zealand Herald (New Zealand, 7 March 2012).

²⁶¹ See: *Monck v Hilton* 46 LJMC 167.

²⁶² United Kingdom Advertising Standards Authority, above n 96.

²⁶³ *Mahuta v Waikato Regional Council*, Environment Court, A 91/98, 29 July 1998.

²⁶⁴ *Ibid*, in the case local Maori testified that the discharge of treated dairy wastewater would constitute an abuse of their ancestors, desecrate the 'spiritual power, sacredness and standing of the river' and 'damage the mana of Waikato-Tainui and their special relationship with the river.

ii. International comparison

The difference between New Zealand's approach to religious beliefs in the advertising field and that of the United Kingdom and Australia is that the overseas jurisdictions, especially the United Kingdom, provide more comprehensive codes to resolve a significant amount of ambiguity in the area and they provide additional guidance that is lacking in New Zealand.

In the United Kingdom, the approach to regulation is set out in their religion 'Background Briefing'.²⁶⁵ This recognises the sensitivity incorporated in the concept and illustrates the intention of the ASA to refrain from intervention in expressions of beliefs.²⁶⁶ Additional guidance comprised in this briefing makes particular circumstances clearer, such as television advertisements not expounding doctrines or beliefs, although exceptions are made for specialist religious broadcasters.²⁶⁷ Like New Zealand the situation in which this contention manifests itself more vividly is the treatment of illnesses. However, pursuant to Rule 50.3 (CAP) and 11.2 (BCAP), the UKASA has an alternative tool for dealing with the problem instead of concerning itself with factual considerations of the belief proclaimed.²⁶⁸ The rules make it a breach of the respective Codes to offer medical treatment contrary to recognised scientific methods.²⁶⁹ This would essentially include cases such as the *Equippers Church* case and would avoid the ASA having to conduct theological debate.

Nonetheless, there are examples of faith based medical claims in advertising where the ASA (UK) have persisted to treat cases as misleading and deceptive, even with the availability of Rule 50.3. In the *God heals* case (UK) it was acknowledged that the advertisement concerned a belief but the ASA said it was still misleading and

²⁶⁵ United Kingdom Advertising Standards Authority, above n 96.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ BCAP: Advertisements must not discourage essential treatment for conditions for which medical supervision should be sought. CAP: Advertisements must not discourage essential treatment for conditions for which medical supervision should be sought.

²⁶⁹ UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing Edition 12 Rule 50.3; The UK Code of Broadcast Advertising Edition 1, Rule 11.2.

provided false hope.²⁷⁰ This contention was based on a factual analysis, particularly of the accompanying words "you have nothing to lose, except your sickness".²⁷¹ Hanne Stinson of the BHA has suggested that if the ASA rule on such complaints, "then the ASA will be ruling on whether God exists".²⁷²

E. Conclusion

The advertising of religious beliefs has some fundamental administrative law issues that fortunately for the ASA have not been met with the resilience that faith can often invoke. This conundrum emanates from the 'soft' law nature of the self-regulatory framework, coupled with the legal anomaly that are religious institutions. While the status quo is working for now, more definitive backing may have to be employed by Parliament should that faith based resilience transpire. From a substantive viewpoint, the advertising of religious beliefs calls into question the standing of adjudicators to rule on the issue. Once again the ambiguity of this situation is compounded by the quasi-governmental nature of the ASA. Ultimately the ASA in New Zealand has wide discretionary powers to regulate the area so decisions, as inconsistent as they can sometimes be, will nevertheless be followed through with.

²⁷⁰ *Healing on the Streets-Bath* A11-158433 (ASAUK, 13 June 2012): The case involved a leaflet stated "NEED HEALING? GOD CAN HEAL TODAY! Do you suffer from Back Pain, Arthritis, MS, Addiction ... Ulcers, Depression, Allergies, Fibromyalgia, Asthma, Paralysis, Crippling Disease, Phobias, Sleeping disorders or any other sickness? We'd love to pray for your healing right now! We're Christians from churches in Bath and we pray in the name of Jesus. We believe that God loves you and can heal you from any sickness".

²⁷¹ *Ibid.*

²⁷² Martin Beckford "Atheist bus adverts could lead to watchdog ruling on God's existence" *The Telegraph* (United Kingdom, 8 January 2009).

Conclusion

The dominant observation that can be deduced from the preceding discussion is that in New Zealand, the regulation and governance of religious advertising is conducted by a self-regulatory industry body, which does not have the formal sponsorship of Parliament. Self-regulation “supports a legislative framework: it deals with legitimate, mainstream advertisers while authorities are freed up to deal with rogue traders”.²⁷³ This context of best practice and efficiency is the backdrop against which the religious advertising cases of New Zealand are dealt. As a result, a reasonably flexible approach is required that advances the ASA’s objective to maintain the integrity of the industry in addition to reflecting the general principles of the law.

The prevailing theme from the ASA’s approach to the use of religious content in commercial advertising is the correlativity of the approach with the increasingly pluralistic nature of a society constantly diversifying. Robert Audi describes “the principle of secular rationale... is that ‘citizens in a free democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct.’”²⁷⁴ On this basis the offensiveness of religious advertising cannot be defended upon religious grounds alone. In reference to cases such as, the allegedly offensive Hells Pizza billboards²⁷⁵ or the purportedly offensive GHD styling advertisement,²⁷⁶ it is clear that the offending of religious sensibilities alone does not constitute an actionable breach under the advertising standards. The current position of the ASA represents a halfway house between the more stringent line of comparative international authorities and the libertarian approach of the courts under the NZBORA. Nevertheless, it would be a great help to advertisers and future adjudicators alike if the ASA were to promote an elevated degree of consistency so that cases such as the ‘dancing butchers’ could be distinguished, rather than represent an anomaly.

²⁷³ Responsible Advertising and Children “Some facts about advertising self-regulation” (2012) Responsible Advertising & Children Programme <<http://www.responsible-advertising.org>>.

²⁷⁴ See Robert Audi, “The Separation of Church and State and the Obligations of Citizenship,” (1989) 18 *Philosophy & Public Affairs* 259 at 262.

²⁷⁵ *Hells Pizza Billboard Advertisement*, above n 81.

²⁷⁶ *GHD Styling Irons – Jemella Australia Pty Ltd*, above n 73.

A further issue of arguably greater societal consequence concerns the ability of the ASA to rule on matters of theology and spirituality. The manifestation of this conundrum is evident in the ASA's treatment of the advertising of religious beliefs. What is clear from the study is that, like the courts, the ASA would prefer to remain neutral on such matters. In order to aid this pursuit of neutrality it would be sensible for the New Zealand ASA to bring its policies and procedures in line with the United Kingdom, whose approach is testament to a position of less conflict. This would involve developing a code that dealt with non-scientific medical claims (analogous to Rule 50.3 of the CAP code) and the creation of determination summaries to describe to religious institutions the importance of drafting their religious claims in a manner that illustrates an opinion.

The whole validity of the ASA stands on the grounds of consultation and communication. Therefore the ASA must provide advertisers with more prescriptive certainty regarding religion. In order to censor God, the ASA must communicate to God what it requires of it.

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