BIZCOMMUNITY

Conflict in provisions of the ASA code and advertising practice?

By Nick Altini

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The advent of the Consumer Protection Act (CPA) 2008 heralds an era of legislated advertising standards. This stands in contrast to the position that had been in place up to 1 April 2011, when the CPA took full force and effect.

Up to this date, consumer complaints in respect of advertising had to be directed to the Advertising Standards Authority (ASA), which is the adjudicative body tasked with ensuring compliance with a voluntary code of self-regulation put in place by marketers and advertisers, the Code of Advertising Practice (the code).

Several overlaps

There are several areas of overlap between the provisions of the CPA that deal with advertising in marketing standards and the code. Both, for example, deal with issues such as dishonesty in advertising, misleading consumers, harmful exaggeration in advertising, failures to correct consumer misapprehensions created by advertisements, particularly with regard to the substantiation of claims made about performance characteristics and ingredients and properties of advertised products.

Other areas of overlap include references to the running of promotional competitions and discriminatory marketing as well as work from home schemes, but these are by no means the only similarities.

The circumstance now exists whereby a consumer that is aggrieved by an advertisement has an option as to whether to refer the complaint arising to the ASA or to the Consumer Commission (the regulatory body established in terms of the CPA in order to enforce its provisions). This is highly undesirable, not least because an advertiser (who may well be innocent of any charge levelled against it) may have to fight the same claim on two fronts.

Ultimately undesirable outcome

This may, in turn, lead to the ultimately undesirable outcome of two different decisions being handed down by the statutory regulator and the self-regulatory body, the ASA.

For all the similarities between provisions of the advertising code and the provisions of the CPA, insofar as they relate to advertising, there are also areas of dissimilarity and disparity when advertisers and marketers may find themselves in an ultimately undesirable position, whereby they are torn between strict compliance with the law and a self-regulatory code to which they have pledged allegiance.

This duality of regulation leads one to the conclusion that one or other regulatory regime should give way to the other.

Considerable experience and expertise

Clearly, the CPA, as a statute of Parliament, trumps the voluntary code. At the same time, the ASA is a body of considerable experience and expertise, which should not go to waste.

The answer, we suggest, lies in the ASA taking advantage of provisions of the CPA, which permit suppliers within an industry to agree upon an industry code of conduct, which can be certified by the National Consumer Commission as an acceptable code of compliance with the CPA.

At the same time, an industry code of conduct may make provision for the certification of an ombud to hear and resolve disputes within that industry, applying the accepted industry code. Clearly, the ASA is ideally placed to step in the role of accredited industry ombudsman for consumer advertising complaints under the CPA.

Future

The future of the ASA and the code, at least where it relates to consumers, surely lies within the willingness of the advertising and marketing industry to seek to bring the code into alignment with the provisions of the CPA, have it accredited as an industry code of conduct and to have the ASA designated as the industry ombud for determination of consumer advertising complaints.

Doubtless, the Consumer Commission would be grateful to have an experienced regulatory in place to deal with the many consumer advertising complaints that are raised each year, rather than having to deal with them itself and this move will also solve the problem of a duplicity of regulatory regimens being in place.

ABOUT NICK ALTINI

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