

## FAIRNESS IN ADVERTISING: IN PURSUIT OF THE HIDDEN PERSUADERS

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*[Have technological developments within the media, and the 'advancement' of marketing techniques, rendered present advertising control legislation inadequate in its concentration on the prevention of deception? Artificial product distinctions are created to compensate for the similarities which result from oligopolistic industry structures. In this article, the positive role of the regulator in requiring the incorporation of product information into advertisements is examined in the light of experience in Great Britain and the United States of America. The author also refers to enquiries in Australia in which problems in this area have been considered.]*

### 1. INTRODUCTION

Legal controls over advertising claims have traditionally been confined to the relatively narrow goal of prohibiting statements which are 'misleading' or 'deceptive', characteristics tested in the main by asking of given claims whether they are true or false.<sup>1</sup>

A further limitation which is immediately evident is, in a sense, a product of this approach. It has been recognized that most advertisements operate on two levels. They have an informative content which brings to the attention of the potential buyer the type of commodity or service for sale, its quality, serviceability, usefulness and price. There is, in addition, a persuasive element in the advertising message which is directed to the transformation of latent wants on the part of an individual into effective demand for a good or service and which encourages a decision to purchase.<sup>2</sup> Promises may be made, or messages communicated, at either the informative or the persuasive level. Yet in many jurisdictions

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<sup>1</sup> See, e.g., Trade Practices Act 1974 (Cth) (as amended), ss 52 and 53; Consumer Affairs Act 1972 (Vic.), s. 13; Trade Descriptions Act 1968 (U.K.), ss 1, 11 and 14.

<sup>2</sup> Firestone, *The Economic Implications of Advertising* (1967) 2-3; Cohen, 'Misleading Advertising and the Combines Investigation Act' (1969) 15 *McGill Law*

legal controls operate almost exclusively on the former level.<sup>3</sup> This is at present true of Australian advertising legislation which is for the most part confined to the prohibition of misleading claims relating to such matters as price, quality or availability of a product.<sup>4</sup>

The basic framework for most of the existing legislation relating to advertising was established decades ago. In Victoria, for example, the prohibition of misleading advertising contained in section 13 of the Consumer Affairs Act 1972 owes its origins to the Police Offences (False Advertisements) Act 1932 which in its turn was modelled in part on even earlier legislation. The recent phenomenon of consumerism has not wrought great changes on the substance of these provisions.

There have however been enormous developments in advertising in the supervening years. The advent of broadcasting and television has lent a new intensity and pervasiveness to the advertiser's message, while the development of market research and the behavioural sciences has greatly refined advertising techniques. The Trade Practices Act 1974 (Cth) (as amended) is of course of more recent origins than its counterparts at the State level but, while it is more precise in its control over advertising, it still revolves around the original concept of misleading and deceptive conduct.

The question therefore arises as to whether developments in advertising and marketing methods have outpaced the traditional legal controls.

At one level, the subtleties of television commercials are still controlled by legislation which was originally designed with printed advertisements in view. The distinction between truth and falsity is a device well suited to control of the written word. It is less appropriate for the regulation of a medium which is an amalgamation of spoken word, printed message and visual sequence. It may indeed be a concept which is impossible to apply to the fleeting images generated by television advertising, since the *real* message may in a given case be quite different from, and far more pervasive than, the express verbal and pictorial representations by which it is conveyed.<sup>5</sup> The realm of persuasion in advertising is an area with

*Journal* 622, 626. It should be noted that the distinction is sometimes extremely difficult to apply. It is on occasion hard to determine where the informative element of an advertisement ends and the persuasive begins. It is, however, a useful distinction and will be adopted here as a point of reference.

<sup>3</sup> See n. 1 *supra*.

<sup>4</sup> *E.g.*, Trade Practices Act 1974 (Cth) (as amended), ss 52 and 53; Consumer Affairs Act 1972 (Vic.), s. 13.

<sup>5</sup> A related problem flows from the traditional reliance of misleading advertising legislation on the criminal law. In this respect, there may be few problems in the most blatant cases, but one *can* foresee difficulties in satisfying a court beyond reasonable doubt that, for example, a particular camera angle gave a misleading impression of the size of an advertised product, that a particular shade of lighting gave a misleading impression of the quality of the product, that a particular vocal inflection gave a misleading impression of the nature of the product, or that all or some of these factors in combination constituted a misleading advertising claim.

which the law has as yet barely begun to grapple. It is time that the question was squarely confronted as to whether the law should assume a more active role in this area. Should the regulator be concerned not only with truth in advertising, but also with relevance? Or with indirect image appeals which shape attitudes as well as with explicit misstatements designed to mislead?

On another level, there is considerable evidence that advertising has in recent times assumed a greater role in the formation and maintenance of concentrated industry structures. To the extent that refinements in advertising techniques and modes of communication have increased the opportunities for management of consumer demand, they have enabled producers in some industries to corner substantial shares of the market and to earn high profits, irrespective of the prices which they charge or of the quality of their products. Again, however, the law has to date concerned itself hardly at all with the economic implications of modern advertising. Certainly, the isolated imposition of relatively insignificant penalties for misleading advertising can have little visible impact in the wider areas of competition policy and market efficiency.

It is the aim of this article to examine some of the problems to which modern advertising arguably gives rise and which are at this stage not subject to regulation. In expanding on the problem areas already touched upon, primary concerns will be to separate out those for which regulation might be appropriate, to discuss remedial measures and to describe the limits (if any) which should be set on the extension of regulatory activity over advertising in general.

## 2. THEORIES OF ADVERTISING CONTROL

### (a) *Introduction*

There has in some jurisdictions — most notably the United States — been a move away from the view that the sole function of advertising legislation is the prevention of deception. The theory is gaining acceptance that the aim of advertising should be to provide consumers with product information and that therefore regulation should be directed to ensuring, as far as possible, that this goal is attained.<sup>6</sup>

The two approaches — the prevention of deception and the attainment of a satisfactory level of informative content in advertising — are as formulated complementary but can, in their implications, be quite distinct. The former is directed to the essentially negative function of preventing misleading advertising while the latter envisages the more positive role for regulatory activity of injecting into advertisements data,

<sup>6</sup> See, e.g., Alexander, *Honesty and Competition* (1967); 'Federal Regulation of False Advertising' (1969) 17 *University of Kansas Law Review* 573; Howard and Hulbert, *Advertising and the Public Interest* (Staff Report to the Federal Trade Commission 1973), 5.

previously omitted, which is considered necessary for informed consumer choice. It is proposed to examine each of these approaches in turn.

(b) *Preventing deception*

There has always been a sound theoretical basis for singling out the untruthful claim for censure. Some of the results which can be said to flow from false advertising are as follows. First, it is commercially disruptive in that it lures customers away from truthful producers and perhaps superior products and undermines the proper function of advertising by weakening consumer confidence in products and producers generally. Or, from the point of view of market structure, it encourages a situation where returns to producers are geared not to their efficiency but to their ability to distort the truth. Secondly, with regard specifically to its impact on consumers, it induces transactions premised on false data and burdens consumers with products which do not fulfil their needs.<sup>7</sup> Finally, the moral implications of both lying and propagating half-truths tend, in varying degrees, to separate the untruthful advertising claim from those to which objection might conceivably be made on other grounds.

This last factor however provides a clue to a major shortcoming in the approach. The prevention of deception is, *ex hypothesi*, based on the distinction between truth and falsity. Yet it has been argued that that distinction, at least if applied rigidly, is workable in only the most blatant cases of advertising transgression.<sup>8</sup> The point has been eloquently urged in the following terms:

The broadest of the old distinctions which no longer serve us as they did is the distinction between 'true' and 'false'. Well-meaning critics (including many in the advertising profession) who say the essential problem is false advertising are firing volleys at an obsolete target. Few advertisers are liars. A strong advertising profession has its own earnest ethic. Lies are not so readily diffused through newspapers and magazines, over radio and television. They are not so eagerly believed. The 'evils' of advertising could be easily enough reduced if they came only from lies. The deeper problem is quite different. In some ways it is quite opposite. Advertising befuddles our experience not because advertisers are liars, but precisely because they are not. Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of the Graphic Revolution has put a new elusiveness, iridescence and ambiguity into every-day truth in twentieth-century America.<sup>9</sup>

In many cases, analysis of advertising claims in terms of whether they are true or false is founded on a limited perspective and will gloss over forms of harm whose existence cannot accurately be tested by the application of that distinction. In the first instance, the distinction will work tolerably well when applied to claims made in the informative sector of an advertising message: it is not usually difficult to ascertain

<sup>7</sup> Note, 'Developments in the Law: Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1026.

<sup>8</sup> Buzzi, *Advertising: Its Cultural and Political Effects* (1968) 129 n.

<sup>9</sup> Boorstin, *The Image* (1962) 216-7, quoted in Trebilcock, 'Consumer Protection in the Affluent Society' (1970) 16 *McGill Law Journal* 263, 282.

whether the price at which a product was advertised was in fact the price at which it was sold, or whether the quality of an advertised product corresponds with its quality as advertised. But shortcomings in the distinction come to the surface as the search proceeds for effective remedial measures. Presumably, the more closely the regulator scrutinizes advertising claims, the more adept the copywriter becomes in the creation of slogans which defy meaningful scrutiny on a true/false basis. In some cases, a finding that a claim is misleading or untruthful will result in nothing more than the replacement of one superlative with another,<sup>10</sup> or of an alluring claim with an equally alluring image.<sup>11</sup>

And where efforts are made to impose controls on image advertising, the distinction becomes not only unworkable but irrelevant. In many cases it is simply not possible to assess an image appeal in terms of truth and falsity. More importantly, the problems to which image advertising can be said to give rise are only indirectly connected with the issue of truthfulness. As will shortly be seen, the principal attacks against image advertising are directed against its tendency to distract consumers from other arguably more important issues concerning the product at hand and against those claims which exploit the susceptibilities of the audience to which they are directed. The problem in these cases is not whether the claim is true or false but whether it is disruptive.

It is apparent therefore that if advertising control is to be extended beyond the informative elements of advertising messages, the prevention of deception will be too narrow a goal and the true/false distinction too limited a tool. The question therefore becomes whether the more positive information theory of advertising control provides an acceptable alternative on which to base legislative reform.

<sup>10</sup> Buzzi, *op. cit.* 130 n.: 'we are saved from a few superlatives, but to what end if they are replaced by positive adjectives or equally boring and unhappily chosen nouns?'

<sup>11</sup> An example in the F.T.C. context is the Geritol episode. In *J.B. Williams Co. v. F.T.C.* 381 F. 2d 884 (6th Cir. 1967), an affirmative disclosure order issued by the Commission against the respondent in respect of advertising claims made for its product, Geritol, was upheld by the Court of Appeals. The advertisement claimed that the condition of tiredness and run-down feeling may be caused by iron deficiency and, if it is, Geritol would give fast relief. In short, Geritol is good for iron deficiency anaemia. It was found that the advertisements created the false impression that iron deficiency anaemia causes most tiredness. Subsequent to this decision, the Geritol copywriters resorted to humour, producing a series of ardent husbands fended off by haggard wives because of their fatigue. Geritol transformations produced women sexily clad in pyjamas and slinky gowns, or cast as mountain nymphs brimming with desire. The accompanying copy included such claims as: 'The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them. . . . But it's a medical fact that many of the millions of people who have iron-poor blood . . . are tired and need Geritol. It could be . . . you're tired'. The new advertisement, in nominally complying with the affirmative disclosure order, did little more than reiterate in subtler form the very claim at which the Commission had taken offence. The Commission reacted and a battle of semantics with the respondent ensued. It was almost a year before proceedings were instituted for violation of the order. (See Keeton and Shapo, *Products and the Consumer: Deceptive Practices* (1972) 586 n.)

(c) *Making advertising informative*

The theory underlying the more positive approach to advertising control is that consumers are entitled to comprehensive and accurate information concerning the products which they intend to purchase. Insufficient information can lead just as readily to unwanted purchases as information which is false. It is therefore the task of producers to ensure that necessary, basic product information is communicated. It does not follow that advertising should be the only vehicle for the provision of information but, to the extent that it is the principal line of communication between buyer and seller and is financed by the buyer, it must shoulder at least some of the responsibility in this regard.<sup>12</sup>

The effective communication of product information is, according to classical economic theory, also important for the efficient functioning of consumer goods industries. Competition is, in a free enterprise system, the major force for regulating market behaviour. Competition depends in its turn on the operation of informed consumer choice between competing products and on the maintenance through exercise of that choice of price and quality distinctions between the various market brands. Where competition of this order is absent, there is little incentive for producers to keep prices down and quality up. The provision of adequate product information is therefore inextricably bound up with competition policy. In promoting advertising as an appropriate vehicle for the communication of product data, the information theory suggests that advertising techniques ought more closely to be scrutinized as potentially restrictive trade practices than has hitherto been the case. If the full implications of the information theory are to be realized, it would seem to demand the introduction of legislation designed to control advertising practices which subvert or displace competition based on quality and price. These considerations will be returned to shortly. However, before engaging in speculation as to the ends to which the theory might be directed, it is necessary to examine its inherent limitations.

It should first be noted that, although it is possible on a theoretical basis to distinguish the information theory from the control of deception in terms of positive and negative functions, the practical difference between them is not so clearcut and becomes further clouded as regulators working under a purely negative mandate extend their activities beyond the patently untrue statement. It can, on the one hand, be said that the excision of a false claim makes an advertisement more informative so that the exercise has positive elements and, on the other, that a require-

<sup>12</sup> See Howard and Hulbert, *loc. cit.* For a detailed discussion of the role of advertising as an information channel, see Wilton-Siegel, 'Advertising, Competition and the Economy: A Survey' in Department of Consumer and Corporate Affairs (Canada), *A Study on Consumer Misleading and Unfair Trade Practices* (1976) ii. 136-44.

ment that a particular advertisement convey more information has negative aspects in that it reduces the likelihood of deception.<sup>13</sup>

The information theory is in a sense a corollary of the view that advertising should not be misleading. But it is in its implications that a distinction becomes apparent. It is based on a number of assumptions which require articulation.

The first and most sweeping assumption is that the aim of advertising is to inform. It might more accurately be stated that the aim of advertising is to persuade or, even less circumspectly, to sell something.<sup>14</sup> There may, as a matter of semantics, be only a slight difference between the goals of informing and informing for the purpose of selling but in functional terms, the goals are almost antithetical — information is supposedly a consumer's tool whereas persuasion is a producer's weapon. Accordingly, making advertising informative in a meaningful sense may prove to be a formidable task. There is a point in every advertisement where the aim of persuasion and the drive for information will conflict.<sup>15</sup>

Attempts to resolve this conflict by demanding further information at the expense of the persuasive function of advertising would be discriminatory and ultimately self-defeating. Advertising is, in a sense, an exercise in advocacy. As such, it shares with other forms of persuasive communication an inability adequately to canvass more than one side of the case in point. To condemn resort to persuasion and polemics in advertising while tolerating the adoption of similar tactics by teachers, preachers and politicians is difficult to justify. Moreover, to attempt by regulation to suppress advocacy in advertising in the name of complete accuracy might well succeed only in frustrating the whole object of the exercise by discouraging producers from advertising at all.<sup>16</sup> Of course, these theoretical difficulties emerge only in the marginal case where the information theory is pushed to its limits. Yet, although they do not compel the total abandonment of the information theory, they do demonstrate that there is a point in each case beyond which positive legal requirements cannot go. The practical difficulty for the regulator will be to identify and adhere to these limits.

The second assumption underlying the information theory is that it is possible to differentiate between statements which are informative and those which are not. It has been suggested that facts important to informed decision-making include the price, other terms of sale, the existence of possible substitute goods and the capabilities and durability

<sup>13</sup> *Alberty v. F.T.C.* 182 F. 2d 36 (D.C. Cir. 1950), cert. denied 340 U.S. 818 (1950).

<sup>14</sup> Cohen, *op. cit.* 2; Firestone, *op. cit.* 5; Wilton-Siegel, *op. cit.* 165.

<sup>15</sup> Howard and Hulbert, *loc. cit.*

<sup>16</sup> Winter, *The Consumer Advocate Versus the Consumer* (1972) 10. For a discussion of the shortcomings of information as a philosophy on which to develop advertising control, see Trebilcock, *op. cit.* 277-86.

of the product.<sup>17</sup> But even if it is conceded that it is the task of advertising to convey this information, the suggestion does nothing more than indicate the data which should be included. It does not address the questions as to whether and in what circumstances statements or appeals should be excluded from an advertisement.<sup>18</sup>

The problem is a real one for it can, on the one hand, be said that the mere offering of information is a persuasive act<sup>19</sup> and, on the other, that even blatantly persuasive advertisements do contain some information — that the product exists, for example, or that a certain test cricketer uses a certain brand of after-shave.<sup>20</sup> In the final analysis, that last statement is as much information as anything else. It may not be desirable or relevant information but, in the absence of criteria for determining desirability and relevance, it cannot be impugned.

The final assumption underlying the theory is that the information which it seeks to inject into advertising would make a difference. It is arguable that the approach takes too little account of personal limitations in the consumer. For one thing, some consumers may be insufficiently educated to understand the data which is thrust at them. This is not a patronizing consideration for as goods and services become more complex, so will the information which is required to explain them.<sup>21</sup> The position has already been reached in some instances where products are so complex that it is not only the uneducated but also those lacking detailed technical expertise who are disadvantaged. There is some truth in the assertion that the only way the consumer can now make a free choice is

to train himself as a mechanical and structural engineer before he buys a car, to carry a spectrograph when he buys home appliances or a Geiger counter when he buys a TV set.<sup>22</sup>

It can, as an approximation, be said that consumers will only search out and utilize information so long as the costs of their search are lower

<sup>17</sup> Keeton and Shapo, *op. cit.* 59.

<sup>18</sup> One attempt has been made at compiling a list of the features which should characterize a desirable advertisement. It is suggested that it should fulfil six requirements: timeliness (*i.e.*, whether the advertisement reaches the consumer in time for him to purchase a particular brand at the moment he needs it); intelligibility; relevance (*i.e.*, the extent to which the advertisement informs the consumer of his desired benefits); completeness (*i.e.*, sufficient information to enable a consumer to choose a particular brand); truthfulness; and ability to reach a target audience: Howard and Hulbert, *op. cit.* 80-7. The application of these standards may assist in sorting out desirable from undesirable claims, but the real testing ground will be in the areas of relevance and completeness. These areas are haunted by the familiar questions as to exactly what the consumer's benefits are, whether they should be dictated to him and what is relevant information.

<sup>19</sup> Firestone, *op. cit.* 5; Buzzzi, *op. cit.* 28 *et seq.*

<sup>20</sup> Keeton and Shapo, *op. cit.* 287; Wilton-Siegel, *op. cit.* 127.

<sup>21</sup> Winter, *op. cit.* 8: '[There] is a conflict between the goal of accuracy and the goal of communication with the consumer. Accuracy pushes toward highly technical language not easily comprehended by a layman . . . while the need to communicate calls for ordinary words which often cannot accurately portray the intended meaning'.

<sup>22</sup> Roseman, *Consumer Beware!* (1974) 223 quoting from an interview with Ralph Nader.



than the savings which they expect to make.<sup>23</sup> Legislation might succeed in increasing the availability of product information in particular cases. It cannot, at least in the short-term, ensure that consumers will take the trouble either to understand or use it.

(d) *A statutory formula*

All of these considerations indicate that if an information theory is to be adopted as the guiding precept for advertising control, it can only be effective if account is taken of its inherent limitations. In some cases this will require forbearance — it cannot be applied to raise the informative or educative content of advertising to a level which, given its present form, it is incapable of sustaining. In other cases it will require positive action. There may, for example, be a need to evolve standards for determining what *is* necessary product information and for the selection of cases in which it would be appropriate to saddle advertisers with the responsibility of providing it. And in all these efforts the overriding considerations should be whether consumers *want* particular sorts of information, whether they will be able to understand it and apply it in their purchasing decisions and whether it might not be more practicable to create sources of product information as alternatives or supplements to the advertising message.

If a limited positive role of this nature is envisaged for advertising regulation, it will be necessary to supplement the traditional legislative proscription of misleading advertising with terminology which more accurately reflects the wider considerations at issue.

The format which immediately springs to mind would involve a statutory prohibition of 'unfair' advertising techniques.

'Fairness' is a term which is being employed with increasing frequency in consumer legislation. Division 1 of Part V of the Trade Practices Act 1974 (Cth) (as amended) is headed 'Unfair Practices'. Section 34 of the United Kingdom Fair Trading Act 1973 embodies procedures aimed at eliminating business conduct which

- (a) is detrimental to the interests of consumers in the United Kingdom, whether those interests are economic interests or interests in respect of health, safety or other matters, and
- (b) in accordance with the following provisions of this section is to be regarded as unfair to consumers.

Section 5(a)(1) of the United States Federal Trade Commission Act provides that

Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful.<sup>24</sup>

However, it is to date only in the United States that the concept of fairness in advertising has actively been employed in furtherance of a

<sup>23</sup> Wilton-Siegel, *op. cit.* 136-7.

<sup>24</sup> Federal Trade Commission Act 15 U.S.C. s. 45(a) (1970).

perceived information theory. So far as the Australian Trade Practices Act is concerned, the term 'unfair' in the heading to Division 1 of Part V is not taken up in the ensuing provisions. Sections 52 and 53 of the Act, the central provisions relating to advertising, are confined to the prohibition of conduct and representations which are either false, misleading or deceptive.

Subsections (2) and (3) of section 34 of the United Kingdom Act contain a relatively narrow definition of unfairness. Basically, they provide that unfair conduct comprises contraventions of enactments which impose duties, prohibitions or restrictions enforceable by criminal proceedings or activities undertaken in breach of a duty (other than a contractual duty) owed to any person by virtue of any enactment or rule of law which is enforceable by civil proceedings. Since it is only in these limited circumstances that proceedings may be instituted for court orders restraining the conduct in issue,<sup>25</sup> this aspect of the Fair Trading Act is, despite the adoption of the term 'unfair' not much wider than the scheme implemented by its Australian counterpart.

On the other hand, there are provisions elsewhere in the Act which are clearly based on a wider perception of the role of information in consumer transactions. Section 3 creates a body known as the Consumer Protection Advisory Committee. Section 14(1) empowers the Secretary of State, any other Minister or the Director General of Fair Trading (a post created by section 1) to refer to the Committee questions as to whether a consumer trade practice<sup>26</sup> 'adversely affects the economic interests of consumers in the United Kingdom'. This brief is on its face extremely broad. It appears to extend regulatory activity beyond the control of misleading or illegal trade practices into the largely uncharted realms of 'unfairness'.

The scope of section 14 is, however, circumscribed by succeeding provisions. The Act does not provide for the direct imposition of sanctions on individual traders who have been found by the Committee to have engaged in practices which adversely affect the economic interests of

<sup>25</sup> Fair Trading Act 1973 (U.K.), s. 37.

<sup>26</sup> 'Consumer trade practice' is defined in s. 13 as 'any practice which is for the time being carried on in connection with the supply of goods (whether by sale or otherwise) to consumers or in connection with the supply of services for consumers and which relates—

- (a) to the terms or conditions (whether as to price or otherwise) on or subject to which goods or services are or are sought to be supplied, or
- (b) to the manner in which those terms or conditions are communicated to persons to whom goods are or are sought to be supplied or for whom services are or are sought to be supplied, or
- (c) to promotion (by advertising, labelling, or marking of goods, canvassing or otherwise) of the supply of goods or of the supply of services, or
- (d) to methods of salesmanship employed in dealing with consumers, or
- (e) to the way in which goods are packed or otherwise got up for the purpose of being supplied, or
- (f) to methods of demanding or securing payment for goods or services supplied.

consumers. Rather, the scheme revolves around a limited regulation-making power. The key figure in the scheme is clearly the Director General, but he does not himself have power to promulgate regulations prohibiting or modifying a particular practice. At its widest, the Director's function is limited to one of recommending to the Secretary of State the promulgation of regulations;<sup>27</sup> and even where the recommendation is acted upon, the Secretary's decision is subject to the overriding veto of Parliament.<sup>28</sup> Moreover, the Director General does not have a power of recommendation in every case, but only in references made, pursuant to section 14, in respect of practices which appear to the Director General to have the effect

- (a) of misleading consumers as to, or withholding from them adequate information as to, or an adequate record of, their rights and obligations under relevant consumer transactions; or
- (b) of otherwise misleading or confusing consumers with respect to any matter in connection with relevant consumer transactions; or
- (c) of subjecting consumers to undue pressure to enter into relevant consumer transactions; or
- (d) of causing the terms or conditions, on or subject to which consumers enter into relevant consumer transactions, to be so adverse to them as to be inequitable. . . .<sup>29</sup>

The sixth schedule to the Act lists the sort of recommendations which the Director might typically make in order to deal with the abuses described in section 17(2).<sup>30</sup> When section 17(2) is read in the light of the sixth schedule, it becomes clear that the primary concern of the Act is not to impose an information theory on market behaviour, but simply to create an efficient mechanism for dealing with particular abuses — with isolated forms of consumer exploitation — as they come to light.

In so far as section 14 confers on the Director (among others) the power to make references (without recommendations) in respect of practices which fall outside the terms of section 17, it seems that a secondary aim of the scheme is to furnish a medium for the communication to Parliament of wider consumer and economic issues. In this respect it might therefore be said that although the Act stops short of implementing a defined information theory in the regulation of trade

<sup>27</sup> Ss 17, 22.

<sup>28</sup> Ss 22(4), 134(1).

<sup>29</sup> S. 17(2).

<sup>30</sup> The list of recommendations in the sixth schedule is as follows:

1. Prohibition of the specified consumer trade practice either generally or in relation to specified consumer transactions.
2. Prohibition of specified consumer transactions unless carried out at specified times or at a place of a specified description.
3. Prohibition of the inclusion in specified consumer transactions of terms or conditions purporting to exclude or limit the liability of a party to such a transaction in respect of specified matters.
4. A requirement that contracts relating to specified consumer transactions shall include specified terms or conditions.
5. A requirement that contracts or other documents relating to specified consumer transactions shall comply with specified provisions as to lettering (whether as to size, type, colouring or otherwise).
6. A requirement that specified information shall be given to parties to specified consumer transactions.

practices and advertising, it does not foreclose — and in fact encourages — responsible debate on the wider questions. It is this aspect of the United Kingdom Act, together with the flexibility and expediency inherent in the rule-making process, which most markedly distinguishes it from the Australian Trade Practices Act. Beyond these features, however, the consumer protection provisions of the Fair Trading Act are hardly more radical in their *conception* than is the Australian legislation.

The history of advertising control in the United States, however, presents a quite different picture. There, the Federal Trade Commission has seized upon the proscription in its enabling statute of 'unfair or deceptive acts or practices in commerce' and has, in recent years, with varying degrees of success attempted to extend the concept of unfairness to its outer reaches.

These are, however, very recent developments. Despite the 1938 amendment to section 5 of the Federal Trade Commission Act, which included the epithet 'unfair',<sup>31</sup> the efforts of the Commission were, until the early 1970s, confined almost exclusively to the prevention of *deceptive* advertising. But within that limited area, the Commission assumed an expansive approach to the problem of defining and applying the criterion of deception.

In the first place, the Commission very early adopted the view that the proscription in section 5 was not confined to actual deception and that it was sufficient if an advertisement had a capacity or tendency to deceive. Proof of actual deception is therefore not required in Commission proceedings under the Act. This approach received judicial ratification in *Charles of the Ritz Distributors Corp. v. F.T.C.*<sup>32</sup> In the same case it was held that in assessing the capacity of an advertisement to deceive the appropriate point of reference is not that of the reasonable man. On the contrary:

[the] law was not 'made for the protection of experts, but for the public — the vast multitude which includes the ignorant, the unthinking and the credulous' . . . [T]here remains 'that vast multitude' of others who, like Ponce de Leon, still seek a perpetual fountain of youth. . . . It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements . . . and should have the discretion, undisturbed by the courts, to insist, if it chooses, upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein'.<sup>33</sup>

<sup>31</sup> The phrase was added in 1938 as part of the Wheeler-Lea amendments (52 Stat. III (1938)). It was designed to overcome the ruling in *F.T.C. v. Raladam & Co.* 283 U.S. 643 (1931) where it was held that the Commission only has authority to regulate deceptive acts or practices which affect competition. Moreover, prior to the amendments, the Act prohibited only unfair methods of competition and deceptive acts or practices. The amendments added the epithet 'unfair' to the latter part of that phrase: see Note, 'Developments in the Law: Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005, 1019-20; MacIntyre and Volhard, 'The Federal Trade Commission and Incipient Unfairness' (1973) 14 *George Washington Law Review* 407, 430-2; Thain, 'Consumer Protection: Advertising: The F.T.C. Response' (1972) 27 *Business Lawyer* 891, 897-8.

<sup>32</sup> 143 F. (2d) 676 (2d Cir. 1944).

<sup>33</sup> *Ibid.* 679-80, quoting in part from *Aronberg v. F.T.C.* 132 F. (2d) 165, 167 (7th Cir. 1942).

In analyzing an advertisement for its capacity to deceive, account is taken not of the literal truth or otherwise of statements assessed in isolation, but of the general impression conveyed by the advertisement when read as a whole.<sup>34</sup> In applying these broad standards, the Commission has attacked among other things statements which, while literally true, make false implications, are ambiguous or omit material facts which qualify the meaning of claims expressly asserted. The range of claims which have been impugned over the years is wide: it includes deceptive statements as to the nature of products sold, to the origin or source of the product and to price and to deception arising out of testimonials, labelling and promotional gimmicks.<sup>35</sup>

There is no longer anything particularly startling about these aspects of Commission doctrine. Most of them appear to have been foreshadowed by the provisions in Division 1 of Part V of the Australian Trade Practices Act. In the first place, it is to be noted of the above sample of claims found to have been deceptive that they can all be characterized as involving factual statements and, as such, fall within the informative (as opposed to the persuasive) aspect of advertising messages. Sections 52 and 53 of the Trade Practices Act are clearly wide enough to embrace most misstatements of this nature. Secondly, the word 'misleading' has been interpreted in Australia in terms notably similar to those employed in *Charles of the Ritz*. In *CRW Pty Ltd v. Sneddon*,<sup>36</sup> in the course of an analysis of the term 'misleading statement' in section 32 of the New South Wales Consumer Protection Act 1969, it was noted that:

We would preface our view on these questions by emphasizing that an advertisement published in a newspaper is not selective as to its readers. The bread is cast on very wide waters. The advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more wary readers.<sup>37</sup>

There is every reason to suppose that the corresponding provisions of the Trade Practices Act will receive a similarly broad interpretation.<sup>38</sup>

However, recent developments in the United States have broadened the theory of advertising control and it is now evident that the Commission is moving in a new direction in its activities under section 5. In *F.T.C. v. Sperry & Hutchinson Co.*<sup>39</sup> the United States Supreme Court reaffirmed the power of the Commission to define and regulate unfair

<sup>34</sup> *Ibid.* 679.

<sup>35</sup> For a full discussion of F.T.C. decisions prior to 1970, see Note, 'Developments in the Law: Deceptive Advertising' (1967) 80 *Harvard Law Review* 1005; Alexander, *op. cit.*; Millstein, 'The Federal Trade Commission and False Advertising' (1964) 64 *Columbia Law Review* 439.

<sup>36</sup> [1972] L.R. (N.S.W.) 17.

<sup>37</sup> *Ibid.* 28.

<sup>38</sup> See generally, Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (1974) 183-5.

<sup>39</sup> 405 U.S. 233 (1972).

methods of competition. With regard to the first limb of section 5, it was held that the Commission's jurisdiction over unfair methods of competition is not limited by any requirement that the particular practice in issue infringe either the letter or the spirit of existing anti-trust laws. With regard to the second limb, it was held that the Commission was empowered to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive acts or their effect on competition. The decision also had the important effect of separating the element of unfairness from that of deception. Unfairness is now a distinct and self-sufficient ground of complaint. The court noted that

the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated, standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.<sup>40</sup>

The court cited with approval factors which the Commission might take into account in determining whether a particular practice is unfair:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by the statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers. . . .<sup>41</sup>

There is as a result of the decision in *Sperry & Hutchinson* a growing number of cases in which the specific allegation is not that an advertising claim was deceptive, but that it was unfair. Some of these cases will be discussed below.

These then are the principal statutory contexts in which the criterion of 'fairness' has been employed in recent times. They range from the passing reference in the Australian Trade Practices Act, through the cautious adoption of the term in the substantive provisions of the United Kingdom Fair Trading Act, to the broad and unqualified prohibition in section 5 of the United States Federal Trade Commission Act.

The breadth of the American provision seems, on the casual observations of an outsider, to be both its greatest asset and (potentially) its greatest failing. On the one hand, it is extremely flexible and can therefore be employed in furtherance of almost any regulatory policy. On the other hand, it is startlingly vague. It is clear from the decision in *Sperry & Hutchinson* that the prohibition is not limited to deceptive practices nor confined to activities with anti-trust or other economic implications. What then *are* its limits? In its lack of definition it runs the danger of becoming a rallying point for an almost infinite variety of causes. Unreasoned application of the standard might ultimately either erode the effectiveness of regulatory activity or threaten the survival of the activity regulated.

<sup>40</sup> *Ibid.* 244.

<sup>41</sup> *Ibid.* n. 5.

It is proposed in what follows to examine in the light of the information theory of advertising control outlined above some of the criticisms most frequently made against advertising and to isolate from these the areas (if any) to which a fairness standard might appropriately be applied; or, to frame the terms of reference in another way, the aim will be to determine whether there are any types of advertising abuse which are not caught by the traditional prohibition of misleading and deceptive conduct and, if so, whether legislative intervention would be desirable and practicable. The criticisms will be grouped into three broad categories dealing, respectively, with the psychological, the economic and the social impact of advertising. The American experience will be frequently referred to, both because the endeavours of the Federal Trade Commission assist in identifying the areas of concern and because Commission experience provides a number of object lessons as to what regulators should and should not be doing in this area.

### 3. CATEGORIES OF UNFAIR ADVERTISING

#### (a) *Unfairness and the psychological impact of advertising*

(i) *Persuasion.* The means by which advertising influences consumption patterns have been depicted as insidious forces preying on the consumer's psyche. Advertising, which superficially plays an informative role, is seen in fact as a manipulative device which creates a scheme of wants in the consumer by rearranging his motives. Purchases are induced not by the presentation of products which will satisfy existing needs in the consumer, but by appealing to his susceptibilities and subconscious drives. The process reveals the two principal characters in the marketing drama as, on the one hand, the consumer endowed with the comic features of a Thurberian caricature and, on the other, the advertiser enjoying all the pervasive influence of Orwell's Big Brother.<sup>42</sup> The depiction owes much to Packard's writings on motivational research in the 1950s and has been an underlying theme of many of the attacks mounted against advertising since that time.

However, the absence of detailed research leaves the view open to question. Packard's depiction of managerial infallibility has recently been dismissed as a folk-myth. It has been pointed out that market research data is incomplete and that advertisers do not know how to reach a given audience with any degree of accuracy.<sup>43</sup>

<sup>42</sup> Packard, *The Hidden Persuaders* (1957) 4-5.

<sup>43</sup> Howard and Hulbert, *op. cit.* 30. Packard himself catalogues criticisms which indicate the fallibility of motivational research and some of the errors committed in the course of its application: the tendency to regard it as panacea for all marketing problems, the unquestioned borrowing from clinical psychiatry and application of such flimsy diagnostic tools as the Rorschach test and the tendency to draw too hastily conclusions about mass behaviour from small samplings of test results (*ibid.* 247).

A broader criticism of the line taken by Packard (among others) is that it assumes the inferiority of non-economic influences in purchasing decisions to purely economic factors such as the price, quality and usefulness of products. Purchases motivated by less tangible concerns are dismissed as being 'irrational'.

It has been argued that this line of reasoning is based on a rigid and paternalistic preconception of the nature of human values. It has been pointed out that even values which are perceptibly fictitious are capable of real enjoyment.<sup>44</sup> Advertising, for its part, does not simply sell a product; it is, in the images which it creates, an integral part of the product.<sup>45</sup> The purchase of a car may well be motivated by its promotion as a status symbol; but if that symbol works for the individual consumer, then he has no cause for complaint. Much less do others have the right to deride his reasons for buying. There is, in other words, no objective basis for regarding the quest for images evoked by advertising as being any less acceptable, in an affluent society, than the pursuit of less ephemeral goals.

Furthermore, it must be acknowledged that even if image appeals in advertising were to be replaced by factual data, the reform would ring few changes. For facts themselves are not value-free — they are symbols shaped by the individual's preconceptions and can evoke images just as potent as those created by the more intensive methods of persuasion.<sup>46</sup> Whatever the external changes wrought on advertising content, people would still continue to be influenced by their perception of consumer items as symbols of status, sex, learning and sophistication. It might thus be concluded that the success of manipulative devices in advertising must at least partially be attributed to the consumer's innate willingness to respond to them. To that extent they lie beyond the reach of both critic and regulator.

Yet this conclusion does not altogether dispose of the issue. Even if it is accepted that image appeals are not inherently undesirable, or at least are not wholly avoidable, the question remains as to whether *some* limits should be imposed on their use.

It might be asked in this regard whether they can be subjected to the same restrictions as are applicable to statements made in the informative sector of advertising messages. A recent report prepared for the Federal Trade Commission<sup>47</sup> argues that this assimilation should be made — that there is no rational basis for distinguishing between misleading or unfair claims going to externals (such as product performance or price) and misleading or unfair claims as to product image.

<sup>44</sup> Trebilcock, *op. cit.* 279, n. 31.

<sup>45</sup> Leff, 'The Cultural and Social Impact of Society on American Advertising' [1970] *Law and the Social Order* 397, 400.

<sup>46</sup> Buzzi, *op. cit.* 33-4.

<sup>47</sup> Howard and Hulbert, *op. cit.*



The argument is presented in the form of an analysis which attributes four basic modes of communication to the advertiser. There is, first, appeal to *personal* attitudes in the consumer toward a particular brand. A consumer preference for, say, a particular brand of coffee because it tastes better is a personal attitude. *Interpersonal* attitudes are in evidence where the consumer is influenced in his purchase decision by (for example) his need to impress family and friends. Appeals to *intra-personal* attitudes play on the consumer's perception of himself. If, for example, he perceives himself as a good housekeeper a claim that the purchase of a particular brand of coffee is consistent with, or will enhance, that perception operates on the intrapersonal level. Finally, there are *impersonal* attitudes, which are susceptible to appeals such as convenience — that the local store stocks the particular brand, for example.<sup>48</sup> Put more succinctly, the distinction is that personal attitudes describe the relationship of products to goals, impersonal with the relationship of conditions to goals, intrapersonal with the relationship of self to ideal self and interpersonal with the relationship of self to others.<sup>49</sup>

Claims directed to such matters as product performance, price and availability are subsumed under the personal or impersonal categories. Legal controls are, traditionally, concentrated on these categories. Image appeals most frequently play on the consumer's self-concept and fall, therefore, within the inter- and intrapersonal categories.<sup>50</sup> The argument is that whether the advertiser's appeal in making the claim is to personal attitudes or self-concept, the basic issue remains the same and that is whether the benefits delivered by the product do in fact match the expectations given to the consumer by the advertising.<sup>51</sup> A claim which causes changes in brand comprehension or attitude, while lacking a substantial basis for so doing, operates against the goal of an informed market place. It is unfair and should be prohibited.<sup>52</sup> A claim that a brand of toothpaste will make the user more popular or more sexually appealing should, according to the analysis, be treated no differently from a claim that it makes teeth 25 *per cent* whiter than any other brand or that it will prevent cavities.

The analysis advocates consistency in the treatment of all forms of advertising appeal and is to that extent appealing. However, it is not free from criticism. Indeed, it seems to threaten a misplaced emphasis for regulatory activity. It relies heavily on the proposition that inaccurate or incomplete product information and unfounded image appeals share the common element of untruthfulness. This may be so, but there is also the equally pivotal factor of the potential of the claim to mislead. It

<sup>48</sup> *Ibid.* 39.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* 53.

<sup>51</sup> *Ibid.* 53-4.

<sup>52</sup> *Ibid.*

might be argued that there is a functional distinction between the two types of claim — that as a general rule image appeals, even if untrue, are less likely to deceive than is misinformation. Despite the advertising claims to the contrary, Ultra-brite is probably incapable, in the normal run of things of having any perceptible impact on the love life of the user. Yet the claims can hardly be regarded as misleading. Most consumers have a sufficiently technical grasp of the facts of life not to be affected by the literal untruths propagated by the campaign.

If the crucial question is, as the analysis asserts, whether the expectations generated by the advertisement are fulfilled by the product, the formidable problem arises of determining in each case the extent to which the expectation is actively prompted by the advertising message and that to which it is a creature of the consumer's own perception of the message, a perception which will be shaded by his own fantasies, drives and experience.

It must therefore be concluded that persuasive appeals cannot be treated on precisely the same footing as factual statements. As has already been seen, the true/false distinction which is applicable to the latter is unworkable in the case of the former. It is therefore necessary to search elsewhere for the disruptive potential in image appeals. What sort of harm *might* be inflicted on consumers by persuasive advertising?

(ii) *Artificial product differentiation.* According to the analysis in the report to the Federal Trade Commission, the species of harm sought to be prevented is the disruption of an informed market place.<sup>53</sup> The goal envisaged is, in other words, the preservation of informed consumer choice as the foundation of competition. All advertising claims, including self-concept appeals, are disruptive if they work against this goal. With these points emphasized, the analysis can be seen as directly attuned to the information theory of advertising control.

A coherent thesis thus begins to take shape. Self-concept or image appeals cannot realistically be treated in a vacuum. They ought not to be proscribed simply because they operate in the area of persuasion rather than in the realm of information. Nor should they be assessed solely by reference to the criterion of literal truthfulness for they may, while being literally untrue, be incredible and therefore incapable of misleading. However, like certain types of factual statement they can be — and frequently are — employed to disguise the functional identity of a particular product with competing brands. This is the essence of artificial product differentiation, a phenomenon closely associated with markets which are oligopolistic in structure. The implications of this phenomenon will be explored in more detail shortly, but for now it might briefly be noted that it has the effect of distracting consumers from price and

<sup>53</sup> *Ibid.* 50-1, 53.

quality considerations in favour of illusory distinctions between competing brands which are created by intensive advertising. The cost of the process is transferred to the consumer in the form of inflated prices. To the extent that the process adversely affects the economic interests of consumers and disrupts the proper functioning of the market, a case can be made for the view that it should be controlled by regulation.

If there is any difference, in the context of artificial product differentiation, between factual and imaginative appeals, it is one of degree rather than of substance. Image appeals are a particularly potent device for the creation of artificial distinctions for two reasons. First, they are inherently ambiguous and ambiguity facilitates over-interpretation; since it is difficult to ascertain their meaning, they can be endowed by consumers with a significance beyond that of the express statements of which they are composed.<sup>54</sup> Secondly, they frequently have a greater emotional impact than claims expressly asserted; emotional appeals can swamp other relevant considerations associated with the purchase of a particular product.<sup>55</sup>

The thrust of the argument here is, then, that the manipulative tendency of image appeals does not of itself afford acceptable *moral* grounds for the imposition of controls. But its regulation *can* be justified on *economic* grounds to the extent that it represents potentially the most effective means of distorting competitive influences in the market by fostering artificial product differentiation.

If taken to extremes, however, this conclusion is open to a charge of hair-splitting, for it might be regarded as achieving nothing beyond the substitution of one ground for proscribing image advertising (the economic factor) for another (the moral factor). If the result in either case is the total abolition of persuasive advertising, it hardly matters what theoretical postulates are advanced by way of support. The difficulty arises because the very purpose — the inevitable effect — of all persuasive advertising is to encourage consumers to purchase the advertised product in preference to others. Yet persuasive appeals by definition relate to factors which are extraneous to the physical characteristics of the product being advertised. Accordingly, nearly all persuasive advertising is to some extent directed to the creation of artificial distinctions between competing products. This is the function of most modern advertising.<sup>56</sup>

If image advertising is to be preserved at all, some limits must be set on its economic regulation. The only feasible way of doing this would be to focus regulatory activity on those industries where artificial differentiation was most prevalent and most disruptive. The prime targets on

<sup>54</sup> Alexander, 'Federal Regulation of False Advertising' (1969) 17 *University of Kansas Law Review* 573, 583.

<sup>55</sup> *Ibid.*

<sup>56</sup> Travers, 'Forward to a Symposium on the Federal Trade Commission' (1969) 17 *University of Kansas Law Review* 551.

this formula would be tightly oligopolistic industries in which extensive brand proliferation and intensive advertising activity were evident. There are formidable difficulties confronting the regulator both in identifying the problem areas and in devising workable solutions. These will be canvassed in the discussion shortly to follow of the economic impact of advertising.

(iii) *Exploitation*. The conclusion so far is that the species of harm flowing from persuasive appeals in certain situations is economic in nature. It remains to consider whether image advertising can inflict other forms of injury on consumers to an extent which would justify the imposition of restrictions on its use. It will be instructive at this point to take up the categories of unfairness developed by the Federal Trade Commission pursuant to the broad terms of its enabling statute.

In *ITT Continental Baking Co.*<sup>57</sup> the prosecution alleged (*inter alia*) that in advertising its product Wonder Bread, the respondents had engaged in practices which were both deceptive and unfair. It was charged that the advertisements which were aimed primarily at children and which, in an animated sequence, showed a child visibly growing as he ate the respondent's product, tended to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying the bread as an extraordinary source of nutrients. The advertisements were also said to be deceptive and unfair in that they exploited the emotional concern of parents for the healthy growth and development of their children. In issuing its final order, the majority of the Commission found the advertisements to be deceptive on the ground that Wonder Bread was not an extraordinary source of nutrients nor was it the optimum contribution a parent could make to his child's nutrition during the formative years. It dismissed the charge of unfairness, but was careful to stress that its ruling did not mean that unfairness could never be a ground of complaint against advertising of this nature. The basis for the dismissal was a technical one: the complaint as framed, instead of alleging unfairness as a ground independent of deception, in effect asserted that the claims were unfair because they were false. In reaching its decision, the Commission simply indicated that a charge of unfairness must be supported on grounds additional to, and independent of, deception. There remains, therefore, the very real possibility that the concept of unfairness will be extended to cover psychological exploitation in advertising claims.

In *J.B. Williams Co. Inc.*<sup>58</sup> the complaint alleged in part that the respondent's advertising for its non-prescription stimulant, Vivarin,

<sup>57</sup> 3 Trade Reg. Rep. s. 20,464 at 20,372 (F.T.C. 1973); reconsidered 3 Trade Reg. Rep. s. 20,495 at 20,421 (F.T.C. 1973).

<sup>58</sup> [1970-73 Transfer Binder] Trade Reg. Rep. s. 19,671 at 21,720 (F.T.C. 1971) (proposed complaint); [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,039 at 22,024 (F.T.C. 1972) (consent order accepted).

falsely claimed that Vivarin would make one more exciting and attractive, improve one's personality, marriage and sex life and solve other marital and personal problems. Vivarin's primary stimulative ingredient was caffeine and it produced about the same effect as drinking two cups of coffee. The actual grounds of the complaint are not altogether clear. It seems that the allegation was that the claims were deceptive rather than that they were unfair (the complaint was actually lodged prior to the Supreme Court decision in *Sperry & Hutchinson*). On the other hand, the complaint did not expressly allege that the challenged claims were untrue — that taking Vivarin or drinking two cups of coffee would not produce (at least in some cases) some of the effects claimed. It seems that the principal thrust of the complaint was against the exploitation of emotional problems commonly suffered by women.<sup>59</sup> The respondent accepted a consent order, with the result that the precise implications of the complaint were never worked out by the full Commission. However, on the basis of the majority opinion in *ITT Continental Baking Co.*, it is quite possible that the concept of unfairness would today support a similar complaint.

Both *ITT Continental Baking Co.* and *J.B. Williams Co. Inc.*, in so far as they can be regarded as impliedly extending the concept of unfairness to psychological appeals, raise the theoretical difficulties referred to earlier. There must be some limits imposed on the proscription of image advertising if only for the reason that otherwise advertising control would be tainted by an undesirable degree of paternalism. It has been suggested that the likelihood of economic prejudice to consumers as a result of advertising claims should be a necessary pre-requisite to intervention. Yet economic factors were not a major consideration in either of these cases. The harm allegedly inflicted on consumers by the challenged claims was psychological.

The advertising claims in issue here can be distinguished in at least one respect from the normal type of image appeal. They did not simply play on consumer fantasies, but were directed at specific audiences with peculiar susceptibilities which they actively exploited. To that extent they might be regarded as valid exceptions to the general proposition that image appeals — psychological advertising — should not be regulated solely on the basis that they *are* imaginative rather than informative. The difficulty lies not in recognizing the exception in isolated areas, such as children's advertising, but in setting limits on its application to other cases. In many instances it may simply not be possible to draw a workable distinction between exploitative claims and other forms of image appeal. The *J.B. Williams* determination illustrates that the case against certain forms of children's advertising and that against the exploitation

<sup>59</sup> Isaacs, 'Psychological Advertising: A New Area of F.T.C. Regulation' [1972] *Wisconsin Law Review* 1097, 1103-4.

of certain forms of neurosis are virtually indistinguishable. There are, according to *ITT Continental Baking Co.*, grounds for protecting the emotional concerns of parents on the same footing as the susceptibilities of their children. It could, with very little ingenuity, plausibly be argued that most image appeals are exploitative and that therefore the exception constitutes the rule. Without necessarily decrying the case for intensive regulation in special areas such as children's advertising, the point might be made that, in the absence of objective criteria for drawing the distinction, the extension of the concept of unfairness into psychological advertising which does not have direct economic implications could well lead the regulator onto dangerous ground.

(b) *Unfairness and the economic impact of advertising*

(i) *Reasonable basis for product claims.* Of the cases in which the Federal Trade Commission has seized upon the newly defined concept of unfairness, the most important to date is a group of determinations which have held that it is an unfair practice for an advertiser to make affirmative product claims for which he lacks a reasonable basis.<sup>60</sup> Typically in issue in such cases are claims involving incomplete and unsubstantiated comparisons (such as Firestone's Safety Champion Tire 'stops 25% quicker'),<sup>61</sup> unsubstantiated superlatives (such as 'Vega is the best-handling passenger car ever built in the United States')<sup>62</sup> and glowing descriptions of product characteristics which are possessed by most competing brands (such as 'RESERVE Cooling Power — only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days').<sup>63</sup>

In *Pfizer Inc.*<sup>64</sup> the Commission explained why such claims were considered unfair. It stressed the fact that the consumer is at a distinct disadvantage, compared to the producer, in assessing the reliability of product claims. In most cases the costs involved for the consumer in

<sup>60</sup> E.g., *Pfizer Inc.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,056 at 22,029 (F.T.C. 1972); *Firestone Tire & Rubber Co.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,112 at 22,069 (F.T.C. 1972) (final order to cease and desist); *Benton & Bowles Inc.* 3 Trade Reg. Rep. s. 20,346 at 20,213 (F.T.C. 1973) (final acceptance of consent order).

<sup>61</sup> *Firestone Tire & Rubber Co.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,112 at 22,069 (F.T.C. 1973) (final order to cease and desist); affirmed *Firestone Tire & Rubber Co. v. F.T.C.* 481 F. 2d 246 (6th Cir. 1973).

<sup>62</sup> *General Motors Corp. et al.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,120 at 22,102 (F.T.C. 1972) (proposed complaint); 3 Trade Reg. Rep. s. 20,747 at 20,600 (F.T.C. 1974) (consent order accepted).

<sup>63</sup> *Fedders Corp.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,120 at 22,102 (F.T.C. 1972) (proposed complaint); 3 Trade Reg. Rep. s. 20,825 at 20,691 (F.T.C. 1975) (final order to cease and desist).

<sup>64</sup> [1970-73 Transfer Binder] Trade Reg. Rep. s. 20,056 at 22,029 (F.T.C. 1972). It is to be noted that the Australian Trade Practices Commission has expressed the view that unsubstantiated product claims may contravene the prohibition of misleading and deceptive conduct in s. 52 of the Trade Practices Act 1974-77 (Cth). The argument has, however, not yet received judicial sanction: Trade Practices Commission, *Advertising Guidelines* (Commission Information Circular No. 10, 20 June 1975), ss 1.4, 5.4, 5.9; *Motor Vehicle Fuel Consumption Claims* (Commission Information Circular, 20 February 1976).

obtaining the necessary information are out of all proportion to the price of the item in issue. In the case of complex products, the cost of obtaining the information is disproportionate to its value. Given the imbalance of knowledge and resources between consumer and producer it is economically more rational to require the producer to supply the information on which his claim is based than to leave the consumer to seek it out for himself. In short, unfairness in this context is founded on economic considerations.

It is clear that the approach finds its rationale in the information theory — that access to material product information is essential both for effective consumer choice and for the proper functioning of a competitive market. It should also be noted that the approach does not overstep the limits set by the information theory. It stipulates not that advertisers must disclose the basis for their claims in the advertising message — a requirement which, if imposed, might achieve little beyond cluttering the advertisement with highly technical and barely intelligible data — but simply that they must not make unsubstantiated claims. The approach only becomes a vehicle for the provision of information when it is coupled with the Commission's advertising substantiation programme.

Under the substantiation programme, the Commission requires selected advertisers to submit on demand such tests, studies or other data concerning advertising claims which they had in their possession prior to the time when the claims were made and which purport to substantiate those claims.<sup>65</sup> Data thus submitted is made available for public inspection. The aim of the programme is basically twofold: first, to provide consumers with a source of detailed product information separate from, but complementary with, the advertising message and secondly, to assist the Commission in detecting unsubstantiated claims. The failure of a producer to submit to the Commission adequate test data in support of claims made in his advertising exposes him to the charge that his advertising is unfair and, as such, is in breach of section 5 of the Federal Trade Commission Act.<sup>66</sup>

<sup>65</sup> Federal Trade Commission, *Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure thereof by the Commission in Connection with a Public Investigation* 2 Trade Reg. Rep. s. 7,573 at 12,181 (F.T.C. 1971). See generally Note, 'The F.T.C. Ad Substantiation Program' (1973) 61 *Georgetown Law Journal* 1427; Consumer Subcommittee of the Committee on Commerce, *Staff Report to the Federal Trade Commission on the Ad Substantiation Program* (1972); Campbell and Phears, 'Federal Trade Commission: Developments in Advertising Regulation and Antitrust Policies' (1973) 41 *George Washington Law Review* 880.

<sup>66</sup> There have been a number of decisions handed down against advertisers on this ground, e.g., *Fedders Corp.* 3 Trade Reg. Rep. s. 20,825 at 20,691 (F.T.C. 1975) (final order to cease and desist); *City Investing Co. et al.* (Rheem) 3 Trade Reg. Rep. s. 20,451 at 20,352 (F.T.C. 1973) (consent order accepted); *Whirlpool Corp. et al.* 3 Trade Reg. Rep. s. 20,570 at 20,483 (F.T.C. 1974) (consent order accepted); *General Motors Corp. et al.* 3 Trade Reg. Rep. s. 20,747 at 20,600 (F.T.C. 1974) (consent order accepted); *Volvo of America Corp.* 3 Trade Reg. Rep. s. 20,390 at 20,271 (F.T.C. 1973) (consent order accepted); *K-Mart Enterprises Inc.* 3 Trade Reg. Rep. s. 20,661 at 20,542 (F.T.C. 1974) (consent order accepted).

Despite some drawbacks which became evident very early in the development of the programme,<sup>67</sup> it does appear to have been successful as an aid to prosecution. This is partly because one of its effects is to reverse the onus of proof in formal proceedings against an advertiser.<sup>68</sup> Complaints will be sustained against advertisers unless they can establish, in documentation submitted in response to Commission orders, that the claims in issue were supported by competent and reliable scientific tests. In this way, the programme has directly applied pressure on advertisers to ascertain in advance the accuracy of affirmative claims which they make. This has the result of heightening the reliability of advertising itself as a source of information and thus of reducing both the need for an alternative source and the dependency of the substantiation programme on the willingness of consumers to seek out the information for themselves.

It is clear that the blanket immunity traditionally conferred by the common law on statements classifiable as 'puffing' is inconsistent with the information theory of advertising control. Such statements, even if not actively misleading, may, under certain conditions,<sup>69</sup> be distractive. Vague claims of superiority which are unsupported by adequate testing can induce purchases based on inaccurate, incomplete or even non-existent information. As such, they adversely affect the interests both of consumers and of those of the advertiser's competitors who have not adopted similar tactics. The evolution of the advertising substantiation programme represents an interesting experiment in the application of the information theory to the economic distortions caused by unsubstantiated product claims.

(ii) *Artificial product differentiation.* Concern has in recent years been voiced with increasing frequency at the trend towards oligopoly and the threat which it poses to the maintenance of competitive market structures. The position has already been reached where it is generally acknowledged

<sup>67</sup> The most serious difficulty was caused by the fact that almost 30% of the material submitted was so technical in nature that it required special expertise beyond the capacity of either the Commission or the average consumer to evaluate. An additional complicating factor was the wide divergence in testing methods used by different manufacturers to substantiate similar product claims. Even where information was comprehensible it was, in those cases where comparative evaluation was impossible, of minimal value. Perhaps partly as a result of these factors, very few consumers sought access to the material during the period when it was on the public record (see Consumer Subcommittee of the Committee on Commerce, *op. cit.* 2,11). In an attempt to overcome these drawbacks, the Commission announced in December 1972 that in future orders it would require advertisers to submit plain language summaries of their substantiating materials: (F.T.C. Release, December 14 1972 2 Trade Reg. Rep. s. 7,573 at 12,181-2).

<sup>68</sup> Rosden and Rosden, *The Law of Advertising* (1973) I, 35.06, 35.14.

<sup>69</sup> It is to be noted that the Commission has been selective in its application of the programme. The factors of which it takes account in issuing orders requiring substantiation include: the advertising dollar volume of a particular industry; advertising-to-sales ratios; industry size; the degree of concentration within the industry; the extent of consumer vulnerability to the type of claims being made; and the retail price of the product in issue: Consumer Subcommittee of the Committee on Commerce, *op. cit.* 4.



that structural oligopoly is the rule rather than the exception in consumer goods industries.<sup>70</sup>

The principal features which have been identified as characteristic of tight-knit oligopoly behaviour are first, pricing interdependence and second, the erection of substantial barriers to entry into the market. Both features have detrimental effects on competition.<sup>71</sup>

Pricing interdependence is facilitated by the large market shares enjoyed by the relatively small number of sellers in the typical oligopoly. The fewer the sellers, the greater will be the degree of interdependence. This interdependence discourages sellers in an oligopoly from raising or lowering prices. For an oligopolist to lower his prices is irrational since the reduction will automatically be matched by his competitors with detrimental results to them all, for each will retain his market share, but with reduced profits. On the other hand, a decision by one firm to increase prices will normally not be taken unless it is likely that the other firms will follow suit. Accordingly, increases usually occur uniformly and across the board in quasi-collusive response to initiatives taken by the price-leader. It is these factors which explain the suppression of price competition in the tight-knit oligopoly situation and which enable oligopolists to reap excessive profits from their sales.<sup>72</sup>

However, pricing interdependence can be maintained only so long as there is a sufficient deterrent to the entry of new firms into the market. In the absence of barriers to entry, excessive oligopoly prices would attract new firms whose entry into the industry would (at least theoretically) drive the market price down to a competitive level.<sup>73</sup> Accordingly, oligopolists seeking to maintain their position must establish barriers to entry.

This is where advertising assumes importance for the oligopolist, for intensive advertising campaigns, designed to foster brand loyalty by highlighting illusory differences between the advertiser's product and those of his competitors (actual or potential) is one of the most effective means of discouraging new entrants into the market.<sup>74</sup> Where advertising is effectively employed to this end, the only way in which a prospective

<sup>70</sup> See, e.g., Scala, 'Advertising and Shared Monopoly in Consumer Goods Industries' (1973) 9 *Columbia Journal of Law and Social Problems* 241; Cunningham, *The Fair Trading Act 1973* (1974) 93-4; Wilton-Siegel, *op. cit.* 153-4.

<sup>71</sup> Scala, *op. cit.* 247-50.

<sup>72</sup> *Ibid.* See also Wilson, 'The F.T.C.'s Deconcentration Case Against The Breakfast Cereal Industry: A New "Ballgame" in Antitrust?' (1971) 4 *Antitrust Law and Economics Review* 57, 61.

<sup>73</sup> Scala, *op. cit.* 249.

<sup>74</sup> Artificial differentiation through intensive advertising is not the only way of erecting barriers to entry. Others include: (1) the control of superior production processes through patents, the ownership of superior raw materials or lower interest costs, all factors which may confer absolute cost advantages on established firms; (2) the achievement of economies of scale where the product requires large-scale production and distribution in order to obtain lower costs. However, advertising is the device which is most prevalent in consumer goods industries: *ibid.* 250.

entrant can overcome brand loyalty for the products of established firms is by mounting an intensive advertising campaign. In many cases, these promotional costs will be prohibitive from the outset. In others, it will be open to established sellers to heighten the disincentive by intensifying their own promotional activity whenever they are faced with the threat of a new entrant.<sup>75</sup>

The principal explanation for promotional intensity in the tight-knit oligopoly is, therefore, that it maintains the oligopoly structure and protects the dominance of the market by its established participants by operating as a barrier to entry. However, in fulfilling this role, advertising exhibits other features which also work against the interests of consumers.

First, to the extent that the trend toward oligopoly is as yet imperfect, resort to intensive advertising assists in the tendency away from price competition and alleviates pressures to innovate in the areas of technological progress and product improvement. This is because the economic risks involved in promotional rivalry are usually lower than in the case of price competition and product innovation. Where promotional rivalry is adopted, the price and quality of competing brands will remain relatively constant *inter se*, differences occurring only in the intensity and ingenuity of the advertising campaigns launched by the various producers.<sup>76</sup>

Secondly, promotional rivalry can add still further to the inflated prices which are common in oligopolistic industries. Advertising costs are normally passed on to the consumer in the form of higher prices. The more intensive the advertising, the more expensive will the products advertised usually be. And the trend here is in the form of an upward spiral, because promotional rivalry in a structural oligopoly is self-generating — a successful advertising campaign by one producer begets more intensive advertising efforts on the part of his rivals. As advertising further intensifies, so do prices increase.<sup>77</sup>

Moreover, consumers secure scant return on the increased prices which they are thus forced to pay, for the advertising is more often persuasive

<sup>75</sup> *Ibid.* 250-1; Wilton-Siegel, *op. cit.* 157-8; Wilson, *loc. cit.*; Areeda, *Antitrust Analysis* (2nd ed., 1974) 22-3.

<sup>76</sup> See United Kingdom, *Report of the Monopolies Commission on the Supply of Household Detergents* (1966); Wilton-Siegel, *op. cit.* 156; Cunningham, *op. cit.* 94; Areeda, *op. cit.* 229.

<sup>77</sup> See Roseman, *op. cit.* 128: (the world can be made to beat a path even to the door of an advertiser who has not built a better mousetrap): 'Note that often the product itself doesn't change. Only the ad claims do. Once the ad war starts, it's like an arms race that everyone wants to stop, but no one knows how. While the price of the mousetrap goes up, the mousetrap often stays exactly the same. The mousetrap buyer subsidizes the advertising, but gets nothing in return for it — just a bunch of inflated and meaningless claims'. See also the analysis of the household detergent market in United Kingdom, *op. cit.* paras. 91, 94, 116. In para. 91 it is noted that the manufacturers' selling costs accounted for nearly a quarter of what the consumer paid for the product, the greater part of these costs representing expenditure on advertising, promotion and market research. See further, Wilton-Siegel, *op. cit.* 157; Scala, *op. cit.* 256.

than it is informative, comprised of image appeals rather than of objectively verifiable product data. It transgresses the information theory since it deprives consumers of any realistic choice between competing products and obscures material product information by bombarding consumers with trivialities and irrelevancies:

Even minor qualities of unimportant commodities are enlarged upon with a solemnity which would not be unbecoming in an announcement of the combined return of Christ and all the apostles. More important services, such as the advantages of whiter laundry, are treated with proportionately greater gravity.<sup>78</sup>

In this context, however, it is necessary to recall conclusions already tentatively arrived at. Image advertising (that is advertising which is persuasive rather than informative) cannot be dismissed as bad *per se*. On the contrary, there is considerable evidence that consumers actively seek out imaginary appeals; where advertising does not provide them, they create their own. To dismiss such processes as irrational is paternalistic. To attempt to regulate them is unjustifiably intrusive.<sup>79</sup>

There must, however, come a point where the sluggish rates of progress, heavy costs and inflated prices which are inbuilt features of the tight-knit oligopoly, can no longer be justified by reference to considerations such as these. It is at this point that a case can be made for the regulation of the advertising levels and techniques employed by oligopolists, on the ground that they are contrary to the interests both of aspiring competitors and of consumers generally and hence are unfair.<sup>80</sup>

<sup>78</sup> Galbraith, *The New Industrial State* (2nd ed. 1971) 209. Buzzi makes the point rather more apocalyptically: 'The most serious contradiction, the one that really puts the technocrat on trial, is that while his lyrical exaltation of scientific knowledge should induce him to be extremely concrete, particularly regarding the goods he produces, distributes and consumes, he moves instead amid only abstractions and the ashes of myths' (*op. cit.* 7-8).

<sup>79</sup> Areeda, *op. cit.* 23, 684-5.

<sup>80</sup> It should be noted that the adverse consequences attributed to advertising in the oligopoly context are not universally accepted. Posner, for example, argues that advertising does not create barriers to entry. Even where the new entrant is faced with high advertising costs, the existing firms are themselves forced to incur heavy costs in order to maintain their position. Moreover, the new entrant gets a 'free ride' on the advertising of existing firms which has already secured public acceptance for the product. In any event, the new firm always has the option of advertising less and underpricing the existing firms, while relying on the retailer to publicize the availability of the new, low-priced substitute (*Economic Analysis of Law* (1972), 126-7). The preponderance of economic opinion appears, however, to be the other way. Secondly, it is sometimes argued that intensive advertising contributes to lower prices by stimulating economies of scale in production and distribution (see Wilton-Siegel, *op. cit.* 163). There is, however, little evidence for this. On the contrary, it seems that many firms exhaust economies of scale in production and distribution long before they exhaust economies of scale in advertising. Moreover, it is difficult to press the concept of economies of scale too far into a multi-dimensional world in which most firms and plants manufacture a range of products (*ibid.*; Scala, *loc. cit.*). Finally, it is possible, if one accepts Galbraith's perception of the new industrial state, to regard the intensive use of persuasive advertising as desirable overall, in that it furnishes a vehicle for the manipulation of consumer demand, thereby facilitating production planning and reducing the risk of misallocated expenditure (Galbraith, *op. cit.*). However, the desirability or otherwise of this function of advertising depends ultimately on the outcome of the continuing economic debate regarding the market structure most likely to yield optimal research and innovation (Wilton-Siegel, *op. cit.* 164).

Despite the widespread recognition that structural oligopoly results in non-competitive performance, existing trade practices laws make little attempt to grapple with the problems outlined above. The thrust of legal regulation at present is to control not firm size *per se*, but simply steps taken by firms to increase their size or sphere of influence.<sup>81</sup> The law attacks predatory tactics by which 'bigness' can be achieved but does little to mitigate the incidents of 'bigness' once attained. As one commentator has noted:

Much of what the law forbids today, the modern would-be monopolist doesn't need to practise anyway. And what he *does* need in order to ply his trade, the law often allows. The point, of course, is that, in many areas, the law has seized the shadow and missed the substance of the problem at hand. While it chases a menagerie of relatively insignificant business 'practices', new oligopolies are being perfected and more consumers are being forced to pay prices that are higher and higher above the level that would have prevailed had competition remained effective in those industries.<sup>82</sup>

However, in a number of jurisdictions (including Australia) there have recently been signs of a movement towards countering the less desirable features evinced by selected oligopolies. Although these efforts have to date been isolated, it is possible to see in them the germ of an entirely new concept in trade practices regulation, in which the emphasis is on market *structure* rather than on behaviour and in which firms will not only be prohibited, as at present, from engaging in anti-competitive conduct, but will actively be forced by the regulator into competing. These are ambitious goals and it will be instructive to refer to the regulatory experiments already attempted in order to see whether they are attainable.

In *Kellogg Co. et al.*,<sup>83</sup> the Federal Trade Commission issued a complaint under section 5 of the Federal Trade Commission Act against four of the largest manufacturers of ready-to-eat breakfast cereals in the United States. The complaint alleges that the respondents have introduced into the market a profusion of cereal brands and that they have employed intensive advertising, aimed particularly at children, designed to conceal the true nature of the products and to create artificial distinctions between them. It claims that in furtherance of these ends the respondents have steadily increased the level of their advertising expenditure, increasing the retail prices of their respective products and creating high barriers to entry into the cereal market. The principal ground of the complaint is that the respondents' advertising practices amount to unfair methods of competition or deceptive acts or practices in commerce in that they have the capacity to mislead consumers, and particularly children, into the mistaken belief that real differences exist between the various cereals. Over four years have elapsed since the complaint was issued, but the matter has still not yet been heard by the Commission. However, in denying a motion by General Mills Inc., one of the respondents, for

<sup>81</sup> Scala, *op. cit.* 241-3.

<sup>82</sup> Wilson, *op. cit.* 70-1.

<sup>83</sup> [1970-73 Transfer Binder] Trade Reg. Rep. s. 19,898 at 21,915 (F.T.C. 1972).

summary dismissal of the complaint,<sup>84</sup> an administrative law judge of the Commission relied heavily on the Supreme Court ruling in *Sperry & Hutchinson Co.* If the complaint is sustained, one result may be the extension of the concept of unfairness to regulation of the tendency toward oligopoly and of the advertising practices which are endemic to highly concentrated industries.

Similar criticisms were made by the British Monopolies Commission of the advertising practices of Procter & Gamble and Unilever, the two largest manufacturers of household detergents in the United Kingdom. The Commission noted, in its report on the detergent industry, that

competition in advertising and promotion has tended to displace price competition. The effects of this are not only to increase prices to the extent that the additional expenditure in this field is wasteful, but also . . . to keep new entrants out of the market, to weaken other competitive restraints on prices and profits, and to create a situation in which even the less successful of the two principal competitors can earn extremely comfortable profits, while those of the more successful are outstandingly high.<sup>85</sup>

The Commission reaffirmed its concern with structural oligopolies in a subsequent report on the supply of ready-cooked breakfast cereals in the United Kingdom.<sup>86</sup>

In Australia, the Commonwealth Parliamentary Joint Committee on Prices issued a report in 1974 on the household soaps and detergents industry, the findings of which correspond with those of the British Monopolies Commission.<sup>87</sup> The Committee's findings were reaffirmed by the Industries Assistance Commission in a draft report on the detergents industry released in September 1976.<sup>88</sup>

It is, however, one thing to isolate the evils associated with the pricing and advertising processes of the typical oligopoly. It is an entirely different thing to devise a workable cure. The problem is a formidable one because, while intensive advertising is normally the most visible characteristic of the oligopoly, it is only a symptom. The root cause of the problem is structural. Remedial measures, to be effective, would presumably need to be directed toward substantial reorganization of the market in question rather than simply to eradication of identified advertising abuses.<sup>89</sup>

There is implicit recognition of this point in the Federal Trade Commission's complaint in *Kellogg*. The complaint includes a proposed order which envisages the imposition of one or more of the following forms of relief:

<sup>84</sup> *Kellogg Co. et al.* 3 Trade Reg. Rep. s. 20,529 at 20,460 (F.T.C. 1974).

<sup>85</sup> United Kingdom, *op. cit.* para. 116.

<sup>86</sup> United Kingdom, *Report of the Monopolies Commission on the Supply of Ready Cooked Breakfast Cereal Foods* (1973) paras 72 *et seq.*

<sup>87</sup> Australia, *Report of the Joint Committee on Prices of Household Soaps and Detergents* (1974) paras 74, 84, 93, 103, 129, 130-1 (hereinafter referred to as the *Joint Committee on Prices Report*).

<sup>88</sup> Industries Assistance Commission, *Draft Report on Soaps and Detergents* (1976) 2, 21, 34, 39-40.

<sup>89</sup> Wilton-Siegel, *op. cit.* 152 *et seq.*; Scala, *op. cit.* 262-3; Wilson, *op. cit.* 73-4.

- (1) Divestiture of respondents' assets, with a view to the formation of new corporate entities to engage in the manufacture, sale and distribution of ready-to-eat cereals.
- (2) The implementation of a licensing scheme over existing trademarks to prevent the further proliferation of brands in the market.
- (3) Prohibition of mergers in the industry.
- (4) Prohibition of any practices found to be anti-competitive, including shelf-space services or use of particular methods of selling or advertising.
- (5) Any other measures which may later appear to be necessary to counter and remedy the effects of the respondents' anti-competitive practices.

Corporate divestiture is a remedy to which American courts have frequently resorted in the more traditional type of anti-trust case.<sup>90</sup> It is the immediately obvious — and a superficially attractive — solution to the oligopoly problem.

On the other hand, resort to divestiture as a means of restoring competitive influences in a market has been criticized on many grounds. First, there is the formidable difficulty of finding a buyer for the divested firm who is strong enough and independent enough to restore competition in the market. This difficulty is compounded by the need to disqualify any buyer who is himself a potential entrant, because such a purchase would not alter the total number of firm members and potential entrants.<sup>91</sup> Secondly, even if an apparently suitable buyer can be found, there would remain a need for ongoing scrutiny of the industry to ensure that the firms were in fact competing and that new participants had not succumbed to predatory tactics or other anti-competitive influences.<sup>92</sup> Thirdly, and perhaps most critically, divestiture is inevitably a politically controversial measure:

The nation has an enormous reservoir of faith in the superiority of competition over monopoly (both single-firm and collective), but this pool shows immediate signs of running dry: the moment some 'radical' proposes a wholesale breaking-up of the country's great monopolies. Divestiture is considered by many too 'harsh' a solution to the problem.<sup>93</sup>

The general consensus in the United States seems, for these reasons, to be away from structural solutions to oligopoly problems in favour of less politically volatile measures.<sup>94</sup> If political considerations have such weight in the American context, they are likely to prove even more

<sup>90</sup> *Scala, op. cit.* 267.

<sup>91</sup> *Ibid.* 271-2.

<sup>92</sup> *Cunningham, op. cit.* 188-9.

<sup>93</sup> *Mueller, 'The New Anti-trust: A "Structural" Approach' (1967) 1 Antitrust Law and Economics Review 87, 129.*

<sup>94</sup> *Ibid.*; *Scala, op. cit.* 273; *Note, 'Annual Style Change in the Automobile Industry as an Unfair Method of Competition' (1971) 80 Yale Law Journal 567, 610.*

compelling in jurisdictions where attitudes to expansive trade practices regulation are somewhat less developed.

This prognosis is supported by the solutions proposed by the British Monopolies Commission to the problems afflicting the detergent market in that country. The Commission's recommendations were aimed at dealing with oligopolistic structure through the regulation of advertising and the imposition of price controls. They included:

- (1) the imposition of an order requiring substantial reductions in the wholesale selling prices of both Procter & Gamble and Unilever;
- (2) the institution of negotiations between the Board of Trade and the two companies with a view to securing a 40 *per cent* reduction in the selling expenses of their respective products;
- (3) (tentatively) the introduction of a measure under which selling expenses in excess of an approved percentage of net wholesale turnover would be disallowed as an expense for taxation purposes.<sup>95</sup>

However, even these recommendations proved politically unacceptable. They were never adopted by the Board of Trade. Instead, negotiations were entered into between the Board of Trade and the companies concerned as a result of which the companies agreed voluntarily to make fully available an alternative range of top quality soap powders at a price 20 *per cent* lower than that of existing products; the companies also undertook to keep prices pegged in respect of those detergents covered by the Commission's report.<sup>96</sup> The agreement broke down within twelve months due, apparently, to mistrust by each of the companies concerned as to the competitive intentions of the other.<sup>97</sup>

In its subsequent report on the breakfast cereal industry, the Commission was notably subdued. It confessed an inability to formulate practical measures for restructuring the market and recommended only that the profit margins of the firms involved be kept under review.<sup>98</sup>

The Joint Committee on Prices proposed a number of measures to combat the problems affecting the soap and detergent industry in Australia. They included:

- (1) Government sponsored moves to urge the firms involved (Colgate and Unilever) to reach a voluntary agreement on advertising intensity and promotional techniques similar to that struck by Procter & Gamble and Unilever in the United Kingdom;<sup>99</sup>

<sup>95</sup> United Kingdom, *Report of the Monopolies Commission on the Supply of Household Detergents* (1966) paras 125-6.

<sup>96</sup> Farmer, *Tribunals and Government* (1974) 34-5.

<sup>97</sup> Industries Assistance Commission, *op. cit.* 43.

<sup>98</sup> United Kingdom, *Report of the Monopolies Commission on the Supply of Ready Cooked Breakfast Cereal Foods* (1973) para. 102.

<sup>99</sup> *Joint Committee on Prices Report*, para. 108.

- (2) Scrutiny by the Prices Justification Tribunal of advertising expenditure whenever applications are made by the firms in question for justification of proposed price increases;<sup>1</sup>
- (3) Prosecution by the Trade Practices Commission of misleading advertising and unsubstantiated claims which were found to be prevalent in the industry;<sup>2</sup>
- (4) The implementation of an advertising substantiation programme to furnish consumers with better information about the claims made and to facilitate comparative shopping;<sup>3</sup>
- (5) The establishment of industry standards for the ingredients of soap and detergents products;<sup>4</sup>
- (6) Abolition by the Industries Assistance Commission of tariff protection for the domestic industry.<sup>5</sup>

Closer analysis of these proposals reveals, however, that there are formidable difficulties — quite apart from the likelihood of political opposition to governmental intrusion in these areas — involved in devising regulatory solutions to the oligopoly problem.

For instance, the principal recommendation of the Joint Committee was for the drafting of a voluntary agreement between Colgate and Unilever to limit advertising expenditure. But as the Industries Assistance Commission indicated, the British experiment clearly demonstrates the impracticability of such measures; mistrust as to competitive intentions and motives makes the breakdown of such agreements all but inevitable.<sup>6</sup>

The difficulty with requiring the Prices Justification Tribunal to take greater account in its determinations of advertising expenditure is that the Tribunal has hitherto been concerned with the pricing policies not of industries as a whole but of individual applicants within industries.<sup>7</sup> While there is an obvious correlation between pricing and competition policy, restrictions on the Tribunal's terms of reference inhibit the immediate impact of its determinations on market structure. In fact, the Tribunal has in a number of past determinations made reference to the problem of excessive advertising and has taken promotional expenditure into account in calculating the size of justifiable price increases.<sup>8</sup> However, as the Tribunal pointed out in *Lever and Kitchen Proprietary Limited*:

<sup>1</sup> *Ibid.* para. 109.

<sup>2</sup> *Ibid.* paras 141, 143.

<sup>3</sup> *Ibid.* para. 142.

<sup>4</sup> *Ibid.* para. 145.

<sup>5</sup> *Ibid.* para. 151.

<sup>6</sup> Industries Assistance Commission, *op. cit.* 43.

<sup>7</sup> Prices Justification Act 1973 (Cth) (as amended), ss 16, 18; Commissioner of Trade Practices, *Sixth Annual Report* (1973) para. 1.13.

<sup>8</sup> See, e.g., *Lever & Kitchen Proprietary Limited* [1973-74] Public Inquiry Reports 16; *Kellogg (Aust.) Pty Ltd* [1973-74] Public Inquiry Reports 16; *W.D. & H.O. Wills (Australia) Limited* [1974-75] Public Inquiry Reports 164, 178-80; *Colgate-Palmolive Pty Limited* [1974-75] Public Inquiry Reports 347, 357-9.



One of the difficulties encountered in a consideration of this subject is that no one company can with safety elect to reduce advertising whilst others in the field continue to maintain forceful campaigns. It would appear that unless the industry as such resolved to exercise restraint, a single company may suffer some competitive disadvantage.<sup>9</sup>

The control of advertising expenditure requires that account be taken of industry-wide factors and that determinations be enforced over the entire industry rather than against individual participants. Attempts by the Tribunal, in inquiries less far-reaching than this, to reduce the advertising of a particular applicant may be both unfair and (at least in the short-term) ineffectual.

Nor can the solution to the oligopoly problem lie, as the Joint Committee recommended, in the increased prosecution of misleading advertising. Such an approach would affect not advertising *intensity* but simply advertising *content*. Its impact on the structure of the industry would be negligible. Moreover, even the changes which it wrought on advertising content may be slight. For example, to penalize Colgate for its claim that Fab is 'lemon charged' may result in no more than a rewording of the claim or its replacement with an image elusive enough to foreclose proof in criminal proceedings of its untruthfulness. These matters have already been touched upon.<sup>10</sup>

The Joint Committee's proposals for an advertising substantiation programme and for the establishment of industry standards have more to commend them. As has already been seen, measures such as these can increase the product information available to those consumers who want it, can facilitate comparative shopping and can provide some deterrent against resort by advertisers to meaningless and unsupported claims in their commercial messages. In other words, they increase the return on consumer dollars spent on advertising by reducing the level of persuasive claims and image appeals in favour of additional product data. On the other hand, the impact of such proposals on market structure would probably not be significant. Once again, they are designed not to reduce advertising intensity but simply to alter its content. The measures do not of themselves give the consumer the option of paying lower prices in return for less advertising.<sup>11</sup>

Finally, the abolition of protective tariffs would in many cases not restore price competition to the market. This point was recognized by the Industries Assistance Commission which found, in relation to the deter-

<sup>9</sup> [1973-74] Public Inquiry Reports 14-5.

<sup>10</sup> See n. 11 *supra* and accompanying text.

<sup>11</sup> It is theoretically possible that if a sufficient number of consumers were to utilize the information made available by measures such as these, a breakdown could occur in artificial differentiation; consumer demand for cheaper or better quality products might encourage advertising emphasizing those factors at the expense of image appeals. In fact, however, the number of consumers who are both capable of utilizing and prepared to utilize comparative product data is probably too low to cause changes of this order. The sole justification for the measures is that they provide the information for those who *want* it.

gents industry, that advertising levels were so high that an importer would have to promote his products to an extent which would offset any cost advantages he might otherwise have gained from removal of the tariff.<sup>12</sup>

It seems that the only viable solution to the oligopoly problem lies in the direct supervision of prices and costs within consumer goods industries and regulatory intervention setting ceilings on prices, selling expenses or both in cases where oligopolistic practices were most marked. This was the crux of the British Monopolies Commission's recommendations in respect of the detergent industry. There are, apart from the political factor, a number of difficulties in this approach.

In the first place, the Monopolies Commission's recommendations were criticized as failing adequately to take account of the problems involved in determining just when the prices and costs within a particular industry can be regarded as excessive.<sup>13</sup> On the other hand, both the Industries Assistance Commission and the Prices Justification Tribunal in Australia have for a number of years been engaged in precisely that exercise. The methods employed by these bodies could usefully be adopted in any scrutiny of oligopoly behaviour which might be undertaken in the future.<sup>14</sup>

The second difficulty lies in isolating the most troublesome oligopolies: of identifying those industries in which regulatory intervention would be justified. The exercise requires the determination of complex economic issues. The regulator would be required to devote much of his investigation not simply to the intensity of the advertising within a given industry, but to development of the non-competitive features of the industry's structure and performance.<sup>15</sup> He would need to measure not only the level of concentration in a given industry, but also the relative height of barriers to entry.<sup>16</sup> And he must be in a position to establish not only the bare existence of pricing interdependence, but also the relative strength of the practice in comparison with other industries.<sup>17</sup> Doubts have been raised in some jurisdictions as to the ability of either regulatory agencies or courts adequately to perform these tasks.<sup>18</sup>

Again however there already exist in Australia bodies which are equipped to undertake analyses of this kind. The Industries Assistance Commission has already paved the way with its report on the soap and detergents industry. The various reports of the Prices Justification Tribunal indicate that its members are alive to the oligopoly problem; with the shift in emphasis of the recently amended Prices Justification

<sup>12</sup> Industries Assistance Commission, *op. cit.* 21-2, 39-40.

<sup>13</sup> Cunningham, *op. cit.* 109.

<sup>14</sup> See *Joint Committee on Prices Report*, 115-7.

<sup>15</sup> Wilson, *loc. cit.*

<sup>16</sup> *Ibid.* 62-3.

<sup>17</sup> Areeda, *op. cit.* 228, 233.

<sup>18</sup> *Ibid.* 240-1; Cunningham, *op. cit.* 112.

Act from prices justification to prices surveillance,<sup>19</sup> there is no reason in theory why the resources of the Tribunal should not be used to police price movements on an industry-wide basis.

One point which emerges from the Joint Committee's report is that greater co-operation is required between the Trade Practices Commission, the Industries Assistance Commission and the Prices Justification Tribunal if the oligopoly problem is to be effectively met. It may be feasible to formalize this suggested connection by entrusting the Trade Practices Commission, pursuant to the fairness standard, with the function of co-ordinating regulatory activity over oligopoly practices; it might even be feasible to make the Prices Justification Tribunal the arbiter in proceedings brought by the Commission against oligopoly groups. It may on occasion be appropriate for the Trade Practices Commission to refer cases to the Industries Assistance Commission for inquiry into whether tariff reductions are called for and if so what effect they would have on competition in the industry in Australia. The Trade Practices Commission would of course retain its function of prosecuting misleading advertising in the courts and of taking such measures as are necessary to make advertising claims in a given industry more informative.

It is clear that further research is required into many of the areas canvassed above: there is still too little known about the precise psychological effects and economic impact of advertising; more work must be done both on the means by which troublesome oligopolies can be identified and on the viability of solutions already proposed to the oligopoly problem; and study is required into the likely impact of regulatory intervention of the kind in issue here on the economy as a whole. The important point to be made is that facilities do exist in Australia, in the form of the agencies mentioned above, for undertaking these tasks. It is certainly premature to conclude, as one English writer has done, that the difficulties associated with controlling oligopoly behaviour reinforce the expediency principle in competition policy — 'do nothing where nothing can be done'.<sup>20</sup>

### (c) *Unfairness and the social impact of advertising*

The principal focus of this work has, so far, been on those aspects of modern advertising which run counter to the information theory of advertising control and which might therefore be regarded as proper subjects for regulation on the ground that they are unfair. The information theory, although considerably broader than the traditional statutory approach by which only misleading conduct is proscribed, nevertheless dictates a cautious approach in the regulation of advertising. It is based on the assumption either that advertising is, overall, socially

<sup>19</sup> Prices Justification Amendment Act 1976 (Cth).

<sup>20</sup> Cunningham, *loc. cit.*

beneficial or that it is at least an inevitable feature of the free enterprise system. On either view, the preservation of advertising is necessary and regulatory activity should be limited to the control not of its basic form but simply of its less desirable incidents.

Accordingly, the final question to be asked about the information theory is whether these assumptions are valid. The question is important, for it has on occasion been claimed of advertising in general that it is socially disruptive and runs counter to accepted human values. If these assertions are valid, they would seem to demand a more sweeping role for the regulator than simply one of ensuring that advertising is made more informative. Taken to their ultimate conclusion, they would require the total abolition of advertising in its present form.

The principal argument in this connection is that modern advertising is morally unacceptable not so much because it creates needs, but because it urges immediate satisfaction of those needs. In preaching a doctrine of materialism, it distorts human values:

Advertising creates noxious values to impel the [citizen] into becoming a 'virtuoso consumer'. Advertising has single-handedly transformed the average [citizen] into a passive, lazy, greedy, sensual, woolly-minded, materialistic being, culturally deprived, whose head has become a TV tube and whose motto is 'CONSUME'.<sup>21</sup>

The modern advertisement preaches the doctrine that the acquisition of objects will gratify basic inner needs and aspirations, thereby prescribing externally derived solutions for life's problems. It is populated by a stereotype concerned with external motivation to the exclusion of higher aspirations and the more diverse forms of human experience.<sup>22</sup> In so acting, it elevates trivia to the highest planes of social importance:

the smell of soap, the texture of its suds, the whiteness of textiles treated thereby and the resulting esteem and prestige in the neighbourhood are held to be of the highest moment. Housewives are imagined to discuss such matters with an intensity otherwise reserved for unwanted pregnancy and nuclear war. Similarly with cigarettes, laxatives, pain-killers, beer, automobiles, dentifrices, packaged foods and all other significant consumer products.<sup>23</sup>

Furthermore, the advertiser's philosophy of materialism is, typically, promoted in a highly artificial setting of middle-class suburban domesticity which it holds out to all as the ideal to be ceaselessly sought after.<sup>24</sup> Advertising reduces human aspirations to the pursuit of goals which are contrived and, therefore, nearly always unattainable.

The gloomy view of advertising is, of course, not universally shared. In earlier times it was not politically imprudent to extol as virtues those very features of advertising which are now so frequently the objects of attack:

<sup>21</sup> Millstein, *op. cit.* 447.

<sup>22</sup> Jones, 'The Cultural and Social Impact of Advertising on American Society' (1970) 8 *Osgoode Hall Law Journal* 65, 69 *et seq.*

<sup>23</sup> Galbraith, *op. cit.* 286.

<sup>24</sup> Jones, *loc. cit.* See also Advisory Committee on Programme Standards, *Report to the Australian Broadcasting Control Board* (1976) (Edgar Committee Report), 86-8.

Advertising nourishes the consuming power of men. It sets up before a man the goal of a better home, better clothing, better food for himself and his family. It spurs individual exertion and greater production.<sup>25</sup>

Even today, the role of advertising in the raising of living standards is seen by some as a sufficient answer to those who decry its materialism and superficiality.<sup>26</sup> The debate at this level very often tends to deteriorate into a slanging-match, with ideologues chanting 'materialist' and advertisers rejoining with cries of 'Puritan'. The conflict lends itself admirably to rhetoric:

Remember, if Achilles had heeded only the Ralph Nader kind of advice, when given his famous choice between a long-and-comfortable and a short-and-glorious life, he would have gone home, first wrapping his heel in a rolled-up copy of Consumer Reports.<sup>27</sup>

The advertiser's plea on this question is, typically, one of confession and avoidance: advertising is, admittedly, materialistic in outlook, but what is wrong with materialism?<sup>28</sup>

More sophisticated defences to the charge are to be found in the writings of Galbraith and of the Italian theorist, Giancarlo Buzzi. According to Galbraith's perception of the new industrial state, advertising plays an integral role in modern economic planning. By sustaining the acquisitive ambitions of consumers, it assists in maintaining a level of aggregate demand sufficient to accommodate pre-determined scales of production.<sup>29</sup> In this view, the moral implications of advertising must inevitably play second fiddle to economic imperatives.

Buzzi argues that advertising is not the real *bête noir* in the trend towards materialism. Rather, advertising, far from creating social values, simply reflects values which already exist in society.<sup>30</sup> It is only one symptom of a larger ill which lies beyond the remedial tools of the regulator:

We can rightly ask the advertiser to respect individual values in his messages if we can accept the fact that the individual we speak of is no longer the one delineated by humanistic culture. Moral complaints against advertising, based on individualistic ethics and making accusations against an instrument that works in a socially valued ethic, can only create confusion. To consider these complaints, advertising would have to reject the values of society, deny its own history, promote the return of individualistic ethics, or revolutionize existing society.<sup>31</sup>

There is a strong note of warning in all of this for the aspiring regulator. Even for the much-maligned 'Puritan' who is prepared to join the war against materialism, there remains the sobering reflection that an all-out assault on advertising *through legislative controls* is probably not tactically feasible. On Leff's analysis it would, overall, be socially

<sup>25</sup> Ogilvy, *Confessions of an Advertising Man* (1963) 185 (an undocumented quotation from Sir Winston Churchill).

<sup>26</sup> *Ibid.* 195-6.

<sup>27</sup> Leff, *op. cit.* 401.

<sup>28</sup> Ogilvy, *loc. cit.*

<sup>29</sup> Galbraith, *loc. cit.*

<sup>30</sup> Buzzi, *loc. cit.*

<sup>31</sup> *Ibid.* 124.

unacceptable. On Galbraith's, it would be economically disruptive. On Buzzi's, it would simply be misplaced. In any event, there is still so little known about the social impact of advertising that to argue for its abolition would, at this stage, certainly be premature.

This is, of course, not to say that all social implications of advertising lie entirely beyond the regulatory pale. On the contrary, there are socially significant aspects of certain types of advertising of which the law already takes account. Broadcast advertising for cigarettes has been banned entirely in view of the dangers to health involved in smoking.<sup>32</sup> The advertising of alcoholic beverages<sup>33</sup> and medicines<sup>34</sup> and advertising by moneylenders<sup>35</sup> are all (at least on paper) subject to quite stringent regulation in programming standards, as is advertising directed at children.<sup>36</sup> Broadcasting regulations also enjoin in general terms bad taste, stridency, and excessive repetition in advertising.<sup>37</sup>

The point here is simply that, as a general proposition, it is reasonable to conclude that the assumptions underlying the information theory of advertising control are valid and that the primary thrust of regulatory activity should therefore be to ensure that advertising works in harmony with the goal of an informed and acceptably competitive market place.

#### 4. CONCLUSION

The foregoing analysis indicates that there seem to be sufficient areas of concern in current advertising which would justify the extension of regulatory activity beyond the traditional prohibition of misleading or deceptive statements. The implementation of an information theory would lend coherence to innovatory measures which might be adopted. It must be emphasized, however, that the theory is to be cautiously applied. It must take account of the form and function of modern advertising and of the limits to the ability of advertising to work as an educative device. Nor should it proceed solely from the basis of preconceived notions as to what is desirable information and what is not — advertisers should remain free to persuade and consumers to be persuaded by whatever considerations, 'rational' or 'irrational' of which they choose to take account.

<sup>32</sup> Broadcasting and Television Act 1942 (Cth) (as amended), s. 100(5A).

<sup>33</sup> Australian Broadcasting Control Board, *Broadcasting Programme Standards* (2nd ed. 1967) (as amended) r. 33(d). (At the time of writing, the Board has just been dismantled and is to be replaced by a new body to be known as the Australian Broadcasting Tribunal. It is probable that the Tribunal will, in due course, promulgate standards similar to those currently in force.)

<sup>34</sup> Broadcasting and Television Act 1942 (Cth) (as amended), s. 100(6)-(9).

<sup>35</sup> Australian Broadcasting Control Board, *op. cit.* r. 33(j).

<sup>36</sup> *Ibid.* r. 32(a), 10-3, 15. Just prior to writing, the Australian Broadcasting Control Board released, as one of its final functions, a report in which it recommended the total banning of television advertising during children's viewing times (*Age*, 3 January 1977). The newly formed Australian Broadcasting Tribunal has announced that it will consider the proposal (*Age*, 4 January 1977).

<sup>37</sup> Australian Broadcasting Control Board, *op. cit.* r. 32(b).

Additional information in advertising should only be insisted on where its absence would be likely to result in positive harm.

An attempt has been made here to isolate areas in which there is evidence of such harm and which are currently not subject to regulation. It has repeatedly been emphasized that the primary concern should be with practices which cause economic disruption. This focus immediately precludes the regulation of persuasive advertising where the case rests solely on the moral ground that it is manipulative. It also forecloses (at least for the present) the abolition of advertising on the basis of the distortions which some have claimed it generates in social values. The only situations in which it might conceivably be desirable for the regulator to depart from economic precepts in applying the information theory are those insulated cases where persuasion gives way to active exploitation. Advertising directed at audiences with peculiar susceptibilities, such as children or, perhaps, the ill and the ageing would fall into this category. There is a need for research in this area to measure the impact of advertising of this type and to identify areas other than those mentioned in which regulation might be required.

The sources of economic injury to which the information theory might constructively be applied are varied. In the first place, they would include the omission from an advertising claim of material information so that the claim is itself misleading. This area is, of course, covered by existing legislation.

Secondly, they would include advertising claims relating to product superiority or performance which lack a reasonable basis. These claims, being either inaccurate or incomplete, deprive the consumer of access to product data and tend to discourage comparative shopping. One way of attacking such claims might be to implement an advertising substantiation programme along the lines of the Federal Trade Commission model. Obviously, if such a scheme were introduced, it would not be possible to require substantiation of all claims. The programme would have to be selectively implemented. Guidelines employed by the Federal Trade Commission for the selection of target industries include advertising dollar volume, advertising-to-sales ratios, industry size, the degree of concentration within the industry, the extent of consumer vulnerability to the type of claims being made and the retail price of the product in issue.<sup>38</sup> In addition, the programme concentrates on objectively verifiable claims regarding such product attributes as price, safety, performance and efficacy.<sup>39</sup> The adoption of a substantiation programme within limits such as these might serve the dual functions of providing, through

<sup>38</sup> See n. 69 *supra*.

<sup>39</sup> Note, 'The F.T.C. Ad Substantiation Program' (1973) 61 *Georgetown Law Journal* 1427, 1435; Consumer Subcommittee of the Committee on Commerce, *loc. cit.*

publication of collected data, a source of product information to supplement the advertising message and in assisting in the detection of claims which are unfounded and which ought to be prohibited.

Thirdly, there appear to be sound theoretical grounds for the imposition of controls over the advertising methods which prevail in certain oligopolies. The information theory is relevant in this context since the tendency in highly concentrated industries is to resort to brand proliferation and intensive advertising as a substitute for price competition. Where this occurs, the advertising is typically persuasive rather than informative. It impedes effective consumer choice by creating artificial distinctions between functionally identical products, a process which in its turn serves to drive up prices and to maintain excessive profit levels through the erection of barriers to entry.

There have to date been few steps taken actively to combat these problems, although inquiries into particular industries and proposals for regulatory intervention abound. There are difficulties involved in identifying troublesome industries and in devising workable remedies. These problems are compounded by the incompleteness of present learning on the effects of advertising and by the *ad hoc* nature of the inquiries which have been conducted to date. There is a need for the co-ordination of endeavours undertaken in these areas and for the formulation of coherent policies. It has been suggested that the Trade Practices Commission is the body ideally placed to co-ordinate both research efforts and remedial action and that it might work in these areas in conjunction with both the Prices Justification Tribunal and the Industries Assistance Commission. The actual framework within which these three bodies might most effectively co-operate is itself a matter requiring detailed investigation.

As to the selection of an appropriate statutory formula which would embrace the information theory, it has been argued that the proscription of 'unfair' practices has much to commend itself. It is a term which is by no means foreign to consumer statutes having been employed, to various ends, in Australian, English and American legislation. The singular advantage in the concept of unfairness is its open-endedness — it can be tailored to cover new abuses as the need arises and to sustain new directions in regulatory activity. The inherent vagueness of the term is also, for obvious reasons, its greatest drawback. However, this can be reduced. One possibility would be to supplement the broad prohibition with a list of examples of what the legislature regards as constituting unfair conduct. This is a device frequently employed in model United States legislation. Another approach might involve the enactment of the broad prohibition together with provision for a power to make regulations which would extend the concept of unfairness in clearly specified directions or to defined abuses. The regulation-making power might be entrusted to an official consumer agency (as in the United States, in the



case of the Federal Trade Commission) or it might be made subject to the parliamentary process, the agency having power to recommend to the responsible Minister the promulgation of regulations (this would approximate the scheme employed in the United Kingdom Fair Trading Act).

However, these are all matters of detail which are peripheral to what has been the primary concern of this article. It may well be that the prospects of legislative reform in some of the areas canvassed here are at best long-term. Nevertheless, the important point to be made is that there is no cause for complacency in the present state of advertising and trade practices laws, however recent in origin they might be.

On the contrary, the regulator must be prepared to question the utility and investigate the likely consequences of his activities in much greater detail than has hitherto been the case. If he is to avoid squandering resources, he must be prepared to sponsor ongoing research into the social and economic impact of advertising, to analyze the relative effectiveness of any proposed prosecution and to assess the viability of existing or proposed remedial measures.

As to the first, there is little point in prohibiting or prosecuting, albeit with great zeal, the least socially significant aspects of advertising while leaving untouched those areas which cause the greatest harm. Lack of continuing research and reassessment may render policy obsolete and result in prosecutions being misplaced.

As to the second, the regulator must ensure that in selecting cases for prosecution he chooses not those in which conviction will be 'easy', but those which will secure the greatest returns, in terms of consumer benefits, on the amount spent in enforcement. Calculations along these lines will of course be inextricably bound up with the results of research into the functioning and effects of advertising in general; accurate cost/benefit analyses can hardly be attempted in the absence of comprehensive data on the nature and degree of harm wrought by different advertising practices.

As to the third, if research findings point to the existence of species of harm caused by advertising for which no effective remedy currently exists (as, for example, in the case of artificial product differentiation) the regulator must work at devising appropriate cures. It can, in the final analysis, be no answer to the charge that the law has seized the shadow and missed the substance of the problems attributable to advertising to say that no workable solutions to the problems exist. Nor can it be supposed that the problems will simply fade away if their existence is denied or ignored.