

# BUSINESS SELF-REGULATION IN NEW ZEALAND

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## I. INTRODUCTION

Various professions, trade associations and other representative bodies in New Zealand have promulgated self-regulatory codes of conduct, ethics and practice that supplement the requirements of the law.<sup>1</sup> Whilst this article is concerned primarily with codes of advertising practice and with measures undertaken voluntarily to promote the dissemination of accurate and full disclosure of information relating to goods, services and associated credit, a general appraisal of business self-regulation in the market place is attempted.

Business self-regulation possesses the potential to advance considerably the consumer interest and in the United Kingdom, for example, the Director-General of Fair Trading is under a duty to encourage trade associations to prepare and disseminate codes of practice that will safeguard and promote the interests of the public.<sup>2</sup> A recent New Zealand Government Report<sup>3</sup> recommends that a similar promotional, as well as a monitoring function, be accorded the Consumers' Institute.

Self-regulation has its origins in a number of factors. First, businesses have sought through voluntary codes of conduct to demonstrate their sense of social responsibility and, at the same time, to promote their corporate image. Fortunately for the consumer not all businesses subscribe exclusively to the view expressed by Milton Friedman<sup>4</sup> that "[f]ew trends could so thoroughly undermine the very foundation of our free society as the acceptance of corporate officials of a social responsibility other than to make as much money for their shareholders as possible. This is a fundamentally subversive doctrine." This vocal and erudite campaigner for *laissez faire* economic policies regards the pursuit of profit as the sole responsibility of business and any controls, legal or otherwise, are perceived as superfluous and detrimental in light of the purging effect of market competitive forces. With respect to the corporate image point, codes attract favourable publicity for the association or industry producing them because of the impression that voluntary consumer protection measures are being introduced.

Second, the threat of more restrictive statutory intervention has been a powerful inducement to some groups to adopt some form of self-regulation to accommodate the consumer interest.<sup>5</sup> For example, the Code of Advertising

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<sup>1</sup> E.g. the Newspaper Publishers Association's Codes of Advertising Practice; the Pharmaceutical Society's Code of Ethics; the New Zealand Finance Houses Association (Inc.)'s Code of Ethics and Standards of Conduct; the Footwear Industry's Code; the Solar Heating Industry's Code; the Direct Selling Association's Code of Ethics; the Real Estate Institute of New Zealand's Code of Ethics; and the Corporation of Insurance Brokers of New Zealand's Code of Conduct.

<sup>2</sup> Fair Trading Act 1973, s.124(3).

<sup>3</sup> Report of the Working Party Reviewing Certain Consumer and Commercial Legislation, *Proposals for a Selling Practices Act* (1980), pp 18-20; hereinafter cited as the Martin Report, the Chairman of the Working Party being Mr H.E. Martin.

<sup>4</sup> Friedman, *Capitalism and Freedom* (1962), 133; cited in Cranston, *Consumers and the Law* (1978), 30.

<sup>5</sup> See Page, "Self Regulation and Codes of Practice", [1980] J.B.L. 24, 26.

Practice drawn up by the Advertising Association in Britain in the early 1960's was done under threat of statutory control as a result of the work of the Molony Committee,<sup>6</sup> and the formation of the Press Council<sup>7</sup> in New Zealand in 1972 is another voluntary organisation whose existence is attributable, at least in part, to a fear of undesirable statutory intervention. Similarly, industry regulation of prescription drug advertising in Australia, which is embodied in a code of business practice administered by the Australian Pharmaceutical Manufacturers Association, was introduced in an attempt to pre-empt the institution and implementation of proposed advertising regulations in this area.<sup>8</sup> An editorial in the Australian Medical Journal<sup>9</sup> urged support for the voluntary scheme in the following way:

[V]oluntary self regulation, responsibly administered ... will achieve all that governments should reasonably want to ask for in relation to pharmaceutical advertising in medical journals. We strongly urge the Australian and State governments and governmental agencies to leave the matter alone, for the present at least.<sup>10</sup>

Third, some forms of business self-regulation are devised primarily to control businesses within an industry to the mutual economic benefit of practitioners, and such self-regulation may or may not be in the consumer interest. Thus, many self-regulatory codes embody licensing, registration or accreditation schemes whereby the right to carry on business or to receive certain benefits is dependent upon the satisfaction of criteria laid down in the relevant codes. For example, the Media Council of Australia<sup>11</sup> administers an agency accreditation scheme whereby advertising agents<sup>12</sup> who can satisfy criteria as to financial structure, size and continuity may be accredited. The accreditation rules provide that all advertisements submitted to a media proprietor must conform with the Media Council of Australia's Code of Ethics which is designed to encourage honesty, fairness and responsibility in advertising. The grant of accreditation carries with it certain privileges, as well as obligations such as the need to comply with the code of ethics; in particular 'only accredited agents shall be eligible to receive commission'. This latter rule was subjected to judicial scrutiny in *Re Herald and Weekly Times Ltd*<sup>13</sup> when the Trade Practices Tribunal was asked to review a determination of the Trade Practices Commission which had granted

<sup>6</sup> Cranston, *op.cit.* 46.

<sup>7</sup> A four-member council sponsored by the Newspaper Publishers Association and the Journalists Association. Generally see Burrows, *News Media Law in New Zealand* (2nd ed. 1980), 418.

<sup>8</sup> See Darvall, "Self Regulation of Advertising and the Consumer Interest" (1980) 8 A.B.L.R. 309, 316.

<sup>9</sup> (1974) 2 Medical Journal of Australia 189, 190; cited in Darvall, *idem*.

<sup>10</sup> To date no government regulation of prescription drug advertising has occurred in Australia; see Darvall, *op.cit.*, 318

<sup>11</sup> This is an unincorporated voluntary association of seven other associations, *viz*: the Australian Newspapers Council, the Australian Accreditation Bureau, the Federation of Australian Commercial Broadcasters, the Federation of Australian Commercial Television Stations, the Australian Provincial Press Association, the Regional Dailies of Australia Ltd, and the Australian Magazine Publishers Association.

<sup>12</sup> Advertising agents are the conduits between the advertisers (or customers) and the media; an agent acts for the advertiser whose advertising he is placing; nevertheless the advertising agent in promoting advertising and checking material against standards etc. performs a valuable service for media proprietors and is rewarded by payment of a commission on space booked by him: see *Re Herald and Weekly Times* (1978) 17 ALR 281, 318.

<sup>13</sup> *Ibid*.

authorisation to the accreditation rules subject to the above rule being abandoned. The Trade Practices Tribunal observed that “[this rule] places the advertising agent without the system at a significant competitive disadvantage vis-à-vis the advertising agent within the system”.<sup>14</sup> However the Tribunal found that the accreditation scheme created considerable benefits for the public in, inter alia, maintaining standards of ethical behaviour in advertising, and if the rule were eliminated some large advertising agencies would have no incentive to remain in the accreditation scheme, and the scheme could be eroded, and ultimately collapse.<sup>15</sup> Therefore it was decided that it was in the consumer interest to retain the rule, notwithstanding its anti-competitive effect on non-accredited advertising agents.

Fourth, legislators<sup>16</sup> have exhibited a preference for this form of regulation and in some areas it is extremely difficult to frame adequate statutory controls.

## II. ADVANTAGES AND DISADVANTAGES

Before turning to a consideration of self-regulation in the consumer information field, it is proposed to isolate some of the merits and demerits of self-regulation. There is a number of reasons for favouring business self-regulation over statutory control. For one thing, business self-regulation does not involve the consumer in any direct cost and it conserves public resources. Furthermore a self-regulatory system is arguably more efficient and effective than its statutory counterpart. Proponents of business self-regulation point in particular to the flexibility inherent in such a system and argue that as guidelines in a self-regulatory system are non-legal they may be changed with a minimum of disruption. For example, the Association of British Travel Agents' Code of Practice was substantially amended only six months after promulgation following complaints from consumers about surcharges and hotel overbooking.<sup>17</sup> This potential for quick revision and responsiveness to consumer pressure is a substantial factor in favour of codes of practice.

As far as effectiveness of business self-regulation goes, it is asserted that codes of practice may cover areas and practices beyond the scope of adequate statutory regulation. For example, the New Zealand Securities Commission,<sup>18</sup> commenting on a submission by the Committee of Advertising Practice that self-regulation of financial advertising should be the primary tier of control with adequate legislative support constituting the second tier, concurred in the committee's view that it is impossible to draft regulations defining lawful copy content once it is accepted that an advertiser should be at liberty to be interesting and informative; that is, an advertiser could circumvent any direct prohibition by 'indirect insinuation and suggestion'.<sup>19</sup> However, insofar as codes and legislation employ similar terminology and concepts (such as 'false', 'deceptive', 'misleading', etc.) to categorise prohibited conduct, it is

<sup>14</sup> *Ibid.*, 325.

<sup>15</sup> The accreditation scheme imposes obligations on accredited agents and one of the inducements to join the scheme rests in this rule; by removing the rule the advantages of accreditation may be outweighed by the restraints to which the system subjects them. See the judgment at pp 325-326.

<sup>16</sup> E.g. the Fair Trading Act 1973 (U.K.), s.124(3), and the statutory obligation to promote such codes; the Martin Report, 11

<sup>17</sup> See Cranston, *op.cit.*, 61.

<sup>18</sup> *Proposed Recommendations for Securities Regulations* (1980), 12.3 2.

<sup>19</sup> *Idem*

difficult to see how self-regulation will succeed where legislation fails; problems of interpretation will exist for both in as much as they must be reduced to writing and adherence to the letter of the law or rule will not necessarily entail compliance with the spirit of the same law or rule.

A real advantage of a number of codes, each regulating a particular industry, is that each may be formulated with the idiosyncratic problems of each industry in mind.<sup>20</sup> Legislation, of necessity, must be more general in the obligations that it imposes and it may be virtually impossible to cover with sufficient particularity the problems encountered in numerous and diverse industries, trades and professions. Conversely with self-regulation many practices like expeditious handling of complaints, delays in servicing, clarity in documentation, or periods for which spare parts must be available, may be dealt with in sufficient detail. Moreover, codes of practice may well be in advance of legal provisions and be more favourable to consumers.<sup>21</sup>

It is suggested<sup>22</sup> that businesses which introduce self-regulatory codes are more likely to comply with the spirit as well as the letter of the code, whereas with statutory regulation the incentive is often to evade the law and to find loopholes.<sup>23</sup> This distinction is attributed to “businesses’ interest in the proper implementation of something they have established and from their greater willingness to comply with peer group pressure than when confronted with force”.<sup>24</sup> Finally, self-regulatory systems may be applied in a common sense practical way and not in the technical way of legislative controls and many systems establish elaborate conciliation and arbitration procedures facilitating speedy resolution of consumer complaints.<sup>25</sup>

As against this formidable array of real and imagined advantages that may attach to self-regulation, can be aligned an equally extensive list of disadvantages. A number of factors common to many self-regulatory systems indicate that self-regulation is inferior to statutory control and may in fact work against the consumer interest.

Given that self-regulatory codes of practice are often only introduced when there are threats of onerous governmental control there is at best a reluctant compliance that belies the supposed advantage of ready adherence to the spirit and letter of the code. Self-regulation in this situation may have a positive economic benefit to those in the business as it may avert future costs by preventing more stringent government control and increase consumer confidence. Furthermore a self-regulatory system may embody all the monopoly effects of licensing. As Page<sup>26</sup> comments, “. . . where the provision of goods or services or access to a facility is contingent upon membership

<sup>20</sup> See Marsh, “Voluntary Codes of Practice,”(1977) 127 N.L.J. 419.

<sup>21</sup> See Cranston, *op.cit.*, 34 where he observes that “[i]n some respects the codes of practice approved by the Office of Fair Trading are in advance of the law, in that they cover trade practices for which legal measures have been suggested but not yet adopted”, for example, “value” and “worth” claims, and mandatory price marking on all goods and services.

<sup>22</sup> See Lawson, “Fair Trading Codes of Practice: the Legal Implications” (1977) 121 Sol. J. 5; Cranston, *op.cit.*, 61.

<sup>23</sup> E.g. Lawson, *Law of Sale and Hire Purchase in New Zealand* (1973), and the cases there cited involving attempts to evade the Hire Purchase and Credit Sales Stabilisation Regulations 1957. These regulations were revoked in 1983.

<sup>24</sup> Cranston, *op.cit.*, 61; Mitchell, “Codes and the consumer”, [1976] *Marketing* 17.

<sup>25</sup> Generally, see Cranston, *op.cit.*, 37-39.

<sup>26</sup> *Op.cit.*, 27.

of the group, it may be used to restrict access to the facility or group or to oppress the minority within it . . .” For example, in *Pharmaceutical Society of Great Britain v Dickson*<sup>27</sup> the Pharmaceutical Society passed a resolution, intended to be included in its code of ethics, to the effect that new pharmacies should be situated only on physically distinct premises and that the trading activities of these new pharmacies in commodities other than medicines and pharmaceuticals should be controlled severely. The Society explained that this measure was designed to raise the status of the profession and to promote the main responsibility of selling pharmaceuticals. However the House of Lords held that the restrictions proposed amounted to a restraint in trade that was unreasonable in the circumstances. Not only would the proposed amendment to the code of ethics limit competition by restricting the number of pharmacies attached, for example, to department stores, but it would severely reduce the profitability of new entrants by inhibiting them from selling certain goods.

Perhaps the greatest drawback of self-regulation, though, is that it often fails on enforcement and sanctions. A voluntary code of practice is only applicable “to members of the association promoting the code, who choose to accept the standards, and to remain members”.<sup>28</sup> For one thing it is unlikely that a voluntary code of practice will attract universal allegiance throughout an industry, trade or profession. For example, the Committee of Advertising Practice has promulgated a code of practice that has had a significant impact on some of the advertising excesses that prevailed in New Zealand.<sup>29</sup> Unfortunately the committee has no control over direct mail solicitation or other distribution of brochures or circulars, nor are certain important journals represented on this committee and bound by the code. Consequently the utility and efficacy of a voluntary code will be restricted through membership of the association promulgating it. Moreover, as one writer<sup>30</sup> suggests “[r]ogue operators are much less likely to join trade associations than honest and experienced traders”. Compounding the problem of non-membership is the fact that associations of businessmen may be reluctant to take action against one of their fellows and are unlikely to allocate adequate resources to enforce codes.<sup>31</sup> Even if a self-regulatory body decides to take action against one of the subscribers to its code, often that body will not have legal powers and it will be difficult to enforce the sanction. It is this problem that led the Securities Commission<sup>32</sup> to conclude that “[t]he main point arising from our study of self-regulation . . . is that it requires reinforcement by legal rules”. Of course, if an association is sufficiently well known and respected by consumers the sanction of expulsion from the association might amount to a sufficient incentive to abide by that association’s code of conduct or practice. Furthermore, since earliest times<sup>33</sup> the principle that no man should be judge in his own cause has been recognised and yet herein lies the very ‘stuff’ of self-regulation and its potential failure in terms of consumer

<sup>27</sup> [1970] A.C. 403.

<sup>28</sup> Marsh, *op. cit.*, 419

<sup>29</sup> *Infra*

<sup>30</sup> Harvey, *The Law of Consumer Protection and Fair Trading* (2nd ed., 1982), 277.

<sup>31</sup> Cranston, *op. cit.*, 63.

<sup>32</sup> *Proposed Recommendations for Securities Regulations* (1980), 12.4.4.

<sup>33</sup> E.g. *Dr Bonhams Case* (1610) 8 Co. Rep. 107; 77 E.R. 638, 646.

protection. As long as the industry sits in its own courtroom, conducts its own prosecution and defence, observes in the jury box and ruminates on the Bench, the risk of vested interests dictating outcomes must remain.

Another big disadvantage of self-regulation is that often advancing the consumer interest is diametrically opposed to business self-interest. Businessmen are unlikely to promote and support any form of regulation that impinges to any large measure on profits, and many codes on closer examination most certainly do not promote the consumer interest. For example in the United Kingdom Motor Industry Code, paragraph 3.11 states that:

Under the Sale of Goods Act, if the buyer examines the goods before the contract is made, there is no condition of merchantable quality as regards defects which that examination ought to reveal. Dealers should therefore provide all reasonable facilities to enable prospective customers or their nominees to carry out an examination of the car prior to sale, in order that any defects which ought to be revealed at the time of sale are made known to both parties.<sup>34</sup>

This rather transparent, and ineffective,<sup>35</sup> attempt to shelter behind the ruling in *Thornett and Fehr v Beer and Sons*<sup>36</sup> can by no stretch of the imagination be regarded as a provision designed in the consumer interest. Moreover, in some areas where it is socially desirable that industries restrict their activities in the consumer interest, self-regulation must fail because business self-interest will prevail. For example, as two American commentators<sup>37</sup> put it, “[i]ndustrial self-regulation is not likely to emerge in the case of cigarettes. Tobacco companies are not going to commit corporate suicide. . . .” Consequently, as a preliminary observation, one can say that there are areas where the consumer interest can be promoted by voluntary action on the part of various business, trade and professional associations, but the limitations inherent in systems of self-regulation may necessitate legislative controls as well.

### III. ADVERTISING CODES OF PRACTICE

One of the more important self-regulatory bodies in New Zealand is the Committee of Advertising Practice (CAP) which was formed early in 1973. It consists of representatives from the Association of Accredited Advertising Agents of New Zealand Inc., the Independent Broadcasters Association, the Newspaper Publishers Association of New Zealand Inc., Radio New Zealand and Television New Zealand.

The Committee of Advertising Practice has established various codes of practice that control what can be said, and for some products (e.g. baldness treatment and slimming garments) effectively ban advertisements unless the advertiser can prove that he has something that really does work. In an introduction to the various particular codes the Committee expresses its two main objectives as follows:

- (a) To seek to maintain at all times and in all media a proper and generally acceptable standard of advertising and to ensure that advertising is not misleading either by statement or by implication;

<sup>34</sup> Cited in Marsh, *op.cit.*, 420.

<sup>35</sup> See Marsh, *idem*; see also *Frank v Grosvenor Motor Auctions (Pty.) Ltd.* [1960] V.R. 607, 609.

<sup>36</sup> [1919] 1 K.B. 486.

<sup>37</sup> Boyd and Claycamp, “Industrial Self Regulation and the Public Interest”, (1966) 64 Michigan Law Review 1239, 1253.

- (b) To encourage media voluntarily to co-operate in any self-regulation that may be necessary from time to time.

Thereafter follow a number of particular codes relating to the marketing of cigarettes, driving advertising, financial advertising, liquor advertising, people in advertising, petrol consumption claims, advertising for slimming or weight loss and youth organisations in advertising.

For example, the code for the marketing of cigarettes indicates that its primary aims are to ensure that cigarette advertising will not be directed towards increasing the number of smokers<sup>38</sup> or towards young people.<sup>39</sup> Furthermore, cigarette advertising is not to be conducted on television, radio or on the cinema screen and point of sale and newspaper advertising in this regard is restricted.<sup>40</sup> Health warnings are to be printed on each cigarette packet manufactured in New Zealand and each press and magazine advertisement for cigarettes shall carry the same warning notice.<sup>41</sup> An agreement has been reached between the Minister of Health and tobacco companies in New Zealand whereby the tobacco companies have agreed to abide by this code and to be subject to the Committee of Advertising Practice's decisions in implementing it.<sup>42</sup> The code relating to people in advertising declares, inter alia, that "people should be portrayed in advertisements in realistic and intelligent terms".<sup>43</sup>

The functioning of this self-regulatory system erected by the Committee of Advertising Practice has been commented on by the Securities Commission<sup>44</sup> and by the Working Party which compiled the Martin Report.<sup>45</sup>

The Securities Commission was impressed by the steps taken within the advertising industry itself to establish and maintain codes of responsible behaviour, but made a number of telling points concerning the system. First, that some important journals, like the *New Zealand Listener*, were not represented on the committee and consequently the publishers of some of these journals would not feel constrained to adhere to the code.<sup>46</sup> Furthermore, the Committee has no control over mailed advertising and in-store advertising and the Direct Mail Association is not a member of the Committee of Advertising Practice. As mentioned above, the efficacy of a voluntary code is dependent to a large measure on universal across-the-board membership of the association promoting it. Non-members cannot commit breaches of a code to which they do not subscribe. Second, the Commission pointed out that any scheme of self-regulation runs the risk of becoming a form of censorship that could operate unfairly as between competing interests.<sup>47</sup> If the media are to sit in judgement on the acceptability or otherwise of certain advertisements and this assessment is to be made by reference to their own code of practice it is inevitable that the charge, if not the reality,

<sup>38</sup> Para 2.1.

<sup>39</sup> Para 2.2.

<sup>40</sup> Para. 3.1, 3.2, 3.3.

<sup>41</sup> Para. 5.1, 6.1.

<sup>42</sup> See *Consumer* 164, 222.

<sup>43</sup> Guideline no 1

<sup>44</sup> *Proposed Recommendations for Securities Regulations* (1980), 12.4.3.

<sup>45</sup> *Supra*.

<sup>46</sup> Para. 12.4.3 (a)

<sup>47</sup> Para 12.4.3 (d)

of bias will raise its head; that is, it must be conceded that in a self-regulatory scheme discriminatory practices *may* be pursued against certain members or non-members. Third, it noted that the committee itself recognises that there is a need to back up the self-regulation by legal sanctions; that is, in the context of financial advertising, a statutory body such as the Securities Commission should have “a very broad and speedy power of injunction if advertising or promotional material promulgated by an organisation ignores self-regulation in a manner which either deceives the public or puts it at risk”.<sup>48</sup> One of the major points to emerge from a recent study of advertising control in the United Kingdom<sup>49</sup> is the high percentage of advertisements that does not comply with the British Code of Advertising Practice, thus reinforcing the assertion that substantial legal sanctions are required. This need is clearly felt in New Zealand as well.<sup>50</sup>

The second recent appraisal of the Committee of Advertising Practice scheme is contained in the Martin Report.<sup>51</sup> This report advocates the gradual consolidation of domestic legislation affecting consumers,<sup>52</sup> the extension of definitions of advertising and labelling, and the updating of provisions as to labelling and marking of goods.<sup>53</sup> However the main thrust of the proposals is that a new Act provide for the “encouragement of fair trading practices through self-regulation, with enforcement procedures relegated to a back-up role”.<sup>54</sup> Thus the proposals envisage a two-tier system, whereby most consumer problems would be resolved at the business, trade or professional association level. A second tier of enforcement procedures and penalties would come into play where amicable resolution at the first tier level failed. The Martin Report suggests that the Consumers’ Institute, a statutory body,<sup>55</sup> but independent and non-governmental, be accorded the role of promoting the development of codes of fair practice since it is regularly in touch with both consumers and the dynamics of the market place. The Institute only would promote the drafting of codes, and offer advice and assistance — it would have no legal power to force associations to accept codes, exclude certain clauses, etc. However, if a code was to be introduced as a defence

<sup>48</sup> Para. 12.4.3 (c). See the Securities Regulations 1983, Parts II and III.

<sup>49</sup> *Review of the United Kingdom Self Regulatory System of Advertising Control*, A Report by the Director-General of Fair Trading (November 1978).

<sup>50</sup> E.g. (1974) 4 Consumer Review 122; *Consumer* 114, 9; *Consumer* 115, 56; *Consumer* 117, 119; *Consumer* 120, 207; *Consumer* 130, 167; *Consumer* 145, 145; *Consumer* 149, 75; *Consumer* 154, 244; *Consumer* 157, 351; *Consumer* 158, 31; *Consumer* 163, 190; *Consumer* 191, 18. Cf. *Consumer* 150, 114.

<sup>51</sup> *Supra*

<sup>52</sup> Laux, “Deceptive Advertising, the Law and the Canadian Consumer”, in *Studies in Canadian Business Law* (1971), ed. Friedman, at pp 218-219 observes that “. . . the scattering of legislation . . . in a broad variety of enactments which are primarily directed at matters other than advertising and for which the advertising provisions are merely incidental suggests that the enforcement will be equally scattered and somewhat piecemeal”. This observation is equally apposite as regards consumer legislation in general. Consolidation is strongly advocated by Mrs Margaret Shields, Minister of Consumer Affairs: see *The Press*, 28 July 1984.

<sup>53</sup> These recommendations of consolidation and rationalisation are directed primarily at the Consumer Information Act 1969, the Merchandise Marks Act 1954 and the Wool Labelling Act 1949. A Competition Bill, modelled on the Australian Trade Practices Act 1974, embraces these recommendations.

<sup>54</sup> Martin Report, 9.

<sup>55</sup> Constituted under the authority of the Consumer Council Act 1966.



in any court action, the Martin Report proposes that the Institute could be called as a witness to give its opinion as to the fairness or otherwise of the code. Moreover, it is envisaged that the courts should have regard to codes as indicators of what is normal industry practice.<sup>56</sup>

In relation to the advertising industry, in particular, the Martin Report “heaps” praise on “the highly successful operation of the Committee of Advertising Practice” and categorises these codes as being of “great significance” and “an excellent model for other self-regulatory codes of fair practice”.<sup>57</sup> Furthermore the Committee of Advertising Practice system is hailed as “so successful in eliminating the worst forms of misleading advertising that the Consumer Council has on occasions expressed its unreserved satisfaction and approval.”<sup>58</sup> Whether these high accolades are merited falls to be determined.

The Martin Report summarises the advantages of self-regulation, in general, in the following terms:

The proposal, advocating the promotion of codes of fair practice, provides distinct advantages for consumers, for traders, and for the government:

*For consumers*

- (a) Less delay, expense and frustration in obtaining redress, and elimination of legal complexities.
- (b) The codes will be developed by traders in consultation with the Consumers’ Institute, thus giving consumers a say in how fair practices are defined.

*For traders*

- (a) The marketplace will have a full say (and the major initiative) in setting codes of practice.
- (b) Less cost and frustration, and the risk of damage to his reputation in Court action will be reduced.
- (c) Better relationships between consumers and traders.

*For the government*

- (a) Avoid cost and involvement by government departments.
- (b) Fewer disputes where the government becomes the “meat in the sandwich” between traders and consumers, or between trader and trader.
- (c) A flexible system providing smoother methods of reviewing and updating consumer legislation.<sup>59</sup>

As regards these advantages the following observations are made. There are undoubted advantages for the consumer in facilitating redress without court proceedings. Legislative codes can only be enforced by court proceedings which can be costly and much more time consuming. Whether codes eliminate legal complexities is debatable — as mentioned above, codes and legislation employ similar terminology and concepts to categorise prohibited statements and conduct with the result that problems of interpretation will be common to both. The “advantage” of consumer participation in the formation of codes of fair practice is by no means unique to the scheme proposed in the Martin Report, and the Consumers’ Institute actively advises and influences the government as to the content of legislation; therefore the “consumer voice” is no less evident in the legislative arena. The trader undoubtedly perceives advantages in a scheme that lessens the threat of court sanctions, and has a legitimate interest in an approach that reduces the risk of damage to his reputation in court. The proposals have obvious appeal to any government in times of economic stringency in that the role of government departments

<sup>56</sup> See the Martin Report, pp. 16, 18-21.

<sup>57</sup> *Ibid.*, p. 20.

<sup>58</sup> *Idem.*

<sup>59</sup> P. 11 of the Report.

is played down. This, however, may be categorised as “buck-passing” masquerading as benevolence; the responsibility of government departments is reduced in favour of the Consumers’ Institute, an independent body with the consumers’ interest at heart — but this body is powerless to force advertisers, for example, to include particular clauses in codes, to adopt codes, or to enforce them.

While some of these “advantages” are open to doubt, a more remarkable feature of the Martin Report is that it, quite extraordinarily, omits to outline the negative features of the approach that it espouses.<sup>60</sup> Fundamental assumptions underlying the successful functioning of the proposed scheme are open to considerable doubt. For example, in the advertising context, the following observations may be advanced:

- (i) The assumption that the consumer knows about a code and his rights under it may be patently false. A feature of overseas codes has been their lack of publicity and the secrecy of complaint proceedings. Following criticism of this by the Office of Fair Trading and the government in the United Kingdom, a publicity campaign led to a significant increase in the number of complaints received by the Advertising Standards Association, which, as Cranston points out,<sup>61</sup> is particularly ironical because the Association had always trumpeted the smallness of the number of complaints as evidence that the self-regulatory system was working satisfactorily. Extensive publicity, therefore, is essential to a good code, and this is not in harmony with the cost saving advantages spelt out above.
- (ii) The assumption is made that the offending professional, business or tradesperson is covered by, or belongs to an association which adheres to a code of practice. As we have seen there are some notable “non-subscribers” to the Committee of Advertising Practice Codes of Practice. There is no means to coerce such “outsiders” into a self-regulatory scheme.
- (iii) The success of such a scheme is dependent upon the goodwill of the members of a self-regulatory body, and on consumer surveillance. Darvall<sup>62</sup> cites the following illustration:

The National Safety Council of Australia lodged a complaint with the Advertising Standards Council concerning an advertisement for a circuit breaker. The illustration complained of in the advertisement portrayed a child plunging a knife into an electric toaster. The Safety Council claimed that it could encourage children to mimic the actions with fatal results. The complaint was upheld by the Advertising Standards Council and the advertiser was requested to amend its copy to eradicate the aspects of child mimicry. The amended advertisements portrayed a woman plunging a knife into a toaster.

Such an attitude reflects an absence of goodwill or sheer ignorance.

In the absence of adequate surveillance abuses will go undetected and consumers have an important role in this area as the Consumers’ Institute,<sup>63</sup>

<sup>60</sup> Save for mention, at p.21, of the fact that not necessarily all members of a particular industry will subscribe to a voluntary code of conduct. The Martin Report records that “some types of advertisements are not directly controlled by the Committee of Advertising Practice because they do not appear in newspapers or magazines or on TV. or radio. The most significant examples are letterbox leaflets and in-store advertisements. . . .”

<sup>61</sup> Op.cit., 49.

<sup>62</sup> Op.cit., 315.

<sup>63</sup> The Twentieth Annual Report and Statement of Accounts of the Consumer Council, 31 December 1983, reports that the staff of the Institute was brought up to sixty-one in 1983. Staffing levels were as high as seventy-eight in 1975.

with a staff of approximately sixty persons, cannot possibly monitor the market exclusively. However consumer surveillance may be less than satisfactory for a number of reasons:

- (i) ignorance of the relevant code and its provisions;
- (ii) unless a significant loss or failure to live up to expectations is involved the incentive to complain is absent; and,
- (iii) certain claims are vague, subconscious and largely psychological and the consumer may not even perceive the claim, let alone contemplate complaining about it.<sup>64</sup>

On the basis of the objections outlined earlier in this article, and for the reasons just enumerated, this writer cannot muster the same enthusiasm for self-regulation as reflected in the Martin Report.<sup>65</sup>

However this is not to suggest that this writer does not recognise the undoubted usefulness of the Codes of Advertising Practice. Such non-recognition could be challenged by reference to numerous specific examples where the codes have operated effectively. Two such examples are as follows:

- (i) A Rotorua mail order business advertised over a number of years the availability of certain slimming garments and tablets.<sup>66</sup> Most of these advertisements contained misleading and untrue claims.<sup>67</sup> No action was taken under the Consumer Information Act 1969<sup>68</sup> but *Consumer*<sup>69</sup> asserts that "since 1974 the Newspapers Publishers Association's disapproval of many of his ads (sic) has caused the volume to fall away to a comparative trickle".<sup>70</sup> The adoption of the Code for Slimming or Weight Loss has improved the position of the consumer in this area considerably. The code recommends that the media should not accept advertisements which contain "superlative, highly exaggerated or misleading claims" and "full, authentic, and believable substantiation should be made before any claim is considered acceptable". Furthermore the Code, states, inter alia, that any claim as to specific weight loss should be regarded as unacceptable.
- (ii) A Leopard Breweries beer advertisement featuring Richard Hadlee contravened a section of the Code for Liquor Advertising in that a section of the Code provides that young people should not be encouraged by an "identifiable hero" to drink liquor.<sup>71</sup> Following a complaint from

<sup>64</sup> E.g. an image advertisement may subtly promise the fulfilment of sexual or romantic imaginings if the consumer purchases a particular product. The advertisement may transgress code requirements as to ethics and taste, but consumer complaint is unlikely in such circumstances.

<sup>65</sup> See Part II, Advantages and Disadvantages.

<sup>66</sup> See *Consumer* 145, 292.

<sup>67</sup> E.g. an advertisement for "trim jeans", a plastic garment, read as follows: "The space age slenderiser . . . you are ready for the most astounding experience in rapid slenderising you have ever known . . . lose ten pounds in ten days . . ." The Health Department reported that there was no scientific support whatsoever for the claims made for these garments.

<sup>68</sup> No prosecution has ever been brought under this Act which contains extensive consultative procedures

<sup>69</sup> *Consumer* 145, 296.

<sup>70</sup> The "Code for Slimming or Weight Loss" was promulgated in August 1973; the advertisements *Consumer* refers to appeared in newspapers and magazines such as *Truth*, *The Sunday Times*, *The Sunday News* and *The New Zealand Woman's Weekly*; during the period 1971 to 1977; note that the fact that such advertisements were still appearing after 1973 reflects a weakness of voluntary codes of practice.

<sup>71</sup> See *The Press*, 15 December 1981.

an anti-liquor advertising campaigner, the Newspaper Publishers Association advised its member newspapers that the advertisement contravened the code and recommended that it be rejected.<sup>72</sup> This recommendation was complied with by the various member newspapers.<sup>73</sup> These illustrations serve to demonstrate the usefulness of the Codes of Advertising Practice and it is clear that such codes have an important place in any scheme of advertising regulation.

#### IV. OTHER CODES OF PRACTICE

Brief mention must also be made of some other codes of practice and ethics that have bearing on the issue of consumer information.

##### 1. *The New Zealand Finance Houses Association (Inc.)'s Code of Ethics and Standards of Conduct*

The New Zealand Finance Houses Association (Inc.) was founded in 1965 with the general objectives of acting to promote and protect the interests of member finance companies; to set and maintain high standards of ethical conduct and practice within the industry; to act as a public relations agency; and to negotiate with the Government and monetary authorities as the representative of the finance industry.<sup>74</sup> The association includes all of New Zealand's major finance companies<sup>75</sup> and this feature is an essential prerequisite for effective self-regulation.

In accordance with the objectives outlined above members have agreed to operate according to a code of ethics. Of particular significance to the consumer are paragraphs 3 and 5 of this code. Paragraph 3 reads:

Members will explain fully to customers the cost, terms and contractual obligations of credit transactions. Written documents will be as simple, lucid and unambiguous as circumstances will permit. A member shall at all times act honestly and in such manner that customers are not misled.

and paragraph 5 states that:

Members will discourage commitments by borrowers in excess of their financial resources.

As regards paragraph 3 the requirement of clarity in documentation is an example of a practice that is exceptionally difficult to cover by the precise wording appropriate for legal regulation,<sup>76</sup> and the paternalism inherent in paragraph 5 is nevertheless welcome. From the point of view of enforcement paragraph 13 provides that disciplinary action may be taken against any

<sup>72</sup> *Idem*.

<sup>73</sup> See *The Press*, 19 December 1981. It is worth noting that Leopard Breweries (i) accused the Newspaper Publishers Association of double standards in that similar advertisements using the cricketer, Glenn Turner, and the golfer, Simon Owen, escaped criticism; and (ii) stated that if the newspaper ban continued, the campaign would turn to other methods — point-of-sale advertisements, hoardings and magazines.

<sup>74</sup> E.g. The N.Z. Finance Houses Association (Inc.) Annual Report 1984.

<sup>75</sup> I.e. AA Finance, Australian Guarantee Corporation Ltd., Beneficial Finance Ltd., BNZ Finance Ltd., Broadlands Finance Ltd., Dalgety Crown Finance Ltd., F & P Finance Ltd., Finance and Discounts Ltd., General Finance Ltd., Marac Finance Ltd., National Mutual Finance Ltd., NatWest Finance New Zealand Ltd., NZI Finance Ltd. and UDC Finance Ltd.

<sup>76</sup> Borrie, "Laws and Codes for Consumers" [1980] J.B.L. 315, 322. The Credit Contracts Act 1981 obviously provides for the mandatory disclosure of the cost of credit and terms of the contract, but the intelligibility or otherwise of the disclosed information is, to a large extent, dependent upon the goodwill of the financier.

member found to be in breach of the code.<sup>77</sup> The fact that no action has yet been taken against any member<sup>78</sup> suggests either salutary adherence to the code or inadequate allocation of resources to the enforcement of its provisions. If the latter be the case, it would be unfortunate for the consumer if the code were allowed to descend to the level of mere window dressing and amount to no more than a public relations feature.<sup>79</sup> However it is probably true to say that some of the worst abuses in the finance industry are perpetuated by firms which do not belong to this voluntary association.<sup>80</sup> This again highlights one of the deficiencies in self-regulatory codes of practice.

## 2. *The Pharmaceutical Society's Code of Ethics*

The Pharmaceutical Society of New Zealand has the responsibility, *inter alia*, to promote and encourage proper conduct among pharmacists and to combat objectionable practices.<sup>81</sup> Pursuant to these obligations and in accordance with its rule-making powers<sup>82</sup> the Society recently<sup>83</sup> prescribed a Code of Ethics. The preamble to this Code records that "the Code of Ethics has been prepared to enable pharmacists to ensure that their professional work is of the highest standard and is seen to be so by the public". The Code specifies a pharmacist's obligations with respect to the profession, the public, fellow pharmacists, and to medical practitioners in a comprehensive manner. For example, in relation to the profession, all advertising pertaining to a pharmacy must be "dignified, restrained and such as to uphold the dignity of the profession" and the "sale of contraceptives shall not be advertised directly".<sup>84</sup> In relation to the public, a pharmacist is obliged to maintain a service adequate to the needs of the community that he serves, must closely supervise the carrying out of any act that he delegates, and must refrain from supplying anything he knows or should reasonably be expected to realise is likely to be misused.<sup>85</sup> The requirement that an adequate service be maintained with reference to the community in which a pharmacist operates is an illustration of the valuable flexibility inherent in self-regulation.

Powerful sanctions exist to secure compliance with this code in that a pharmacist who has been guilty of professional misconduct<sup>86</sup> or who has wilfully disobeyed a provision of the code,<sup>87</sup> may be fined, censured, suspended for up to three years or even deregistered.<sup>88</sup> Furthermore the person concerned may be ordered to pay any costs and expenses of, and incidental to, the inquiry.<sup>89</sup> Needless to say, the potential for rigorous enforcement favourably

<sup>77</sup> Disciplinary provisions empower the Disciplinary Committee of the Association to censure or expel a member.

<sup>78</sup> As at 20 November 1984.

<sup>79</sup> See the Association's Annual Report and Review of Activities 1978/79, p. 11.

<sup>80</sup> See *Consumer* 192, 151.

<sup>81</sup> Pharmacy Act 1970, s.3(2).

<sup>82</sup> *Ibid*, s.12(c)

<sup>83</sup> 20 February 1980.

<sup>84</sup> Para. 2.

<sup>85</sup> Para. 3.

<sup>86</sup> Pharmacy Act 1970, s.30(1)(b).

<sup>87</sup> *Ibid*, s.30(1)(f).

<sup>88</sup> *Ibid*, s. 31.

<sup>89</sup> *Ibid*, s. 31(2), (3).

distinguishes this code from other voluntary codes of practice, but it is to be observed that legislative backing gives the code its "teeth".

### 3. Insurance brokers

A further example of a code of conduct is that compiled by the Corporation of Insurance Brokers of New Zealand. All members of this body agree to abide by the Corporation's Code of Conduct. Paragraph (b) of this code requires that a broker must be "impartial and independent of any insurer and be able without hindrance or favour to provide his client with proper insurance advice", and, to take a further example from this code, paragraph (c) requires that a broker "provide the same service to clients whether individual persons or corporations".

As far as paragraph (b) is concerned, this serves as a reminder of the broker's obligations at common law; namely, the broker is under an obligation to procure satisfactory insurance cover within a reasonable period of time,<sup>90</sup> must proffer sound advice to his client,<sup>91</sup> and must not act for another in a matter relating to his principal unless he makes a full disclosure of the material circumstances to his principal and obtains the principal's consent to his so acting.<sup>92</sup> Paragraph (c) serves to emphasise the broker's obligation to be impartial in the performance of his duties. These provisions, therefore, do not extend the broker's duties but stand as a worthwhile reminder to the broker of potential pitfalls if he should stray from the ethical path that the code exhorts him to follow. Much the same can be said for other provisions of the code that direct a broker should adhere to the requirements as agreed from time to time with the Reserve Bank with regard to the placement of New Zealand-based risks in international offshore markets, and should comply with legislation which regulates or supervises the insurance industry in New Zealand.<sup>93</sup> Of course, scrupulous adherence to such a Code has the potential benefit of obviating the necessity for rigorous legislative controls such as those recently introduced in Australia.<sup>94</sup>

### 4. General

Other codes that merit brief mention are:

- (i) The Direct Selling Association Code of Ethics which stipulates, among other things, that sales representatives must clearly identify themselves and their company,<sup>95</sup> that the consumer must be given the full name and address of the company so that it can be readily contacted,<sup>96</sup> that a written guarantee must be given on all products, and that customer complaints must be dealt with "fully and fairly".<sup>97</sup>
- (ii) The Footwear Industry Code, and a code on care labelling drafted by

<sup>90</sup> E.g. *Osman v J. Ralph Moss Ltd.* [1970] 1 Lloyd's Rep. 313 and *Pennant Hills Restaurants Pty. Ltd. v Barrell Insurances Pty Ltd.* (1981) 55 A.L.J.R. 258.

<sup>91</sup> E.g. *Fanhaven Pty. Ltd. v Bain Dawes Northern Pty. Ltd.* [1982] 2 N.S.W.L.R. 57.

<sup>92</sup> E.g. *Anglo-African Merchants Ltd. v Bayley* [1970] 1 Q.B.311.

<sup>93</sup> See paragraphs (d) and (e).

<sup>94</sup> See the provisions of the Insurance (Agents and Brokers) Act 1984 (Aust.).

<sup>95</sup> See *Consumer* 192, 37. Electrolux agents carry identification cards bearing a photograph of the agent.

<sup>96</sup> By virtue of the Door to Door Sales Act 1967, s.6, such disclosure is mandatory where the representative effects a transaction that is subject to the Act.

<sup>97</sup> Generally, see du Fresne, "Both Feet in the Door", *The Listener*, 5 January 1980.

the garment and textile industry, are designed to improve consumer information as regards these products.<sup>98</sup>

- (iii) Numerous other organisations, ranging from the New Zealand Bankers Association and the Real Estate Institute of New Zealand<sup>99</sup> to the unlikely extreme of the Pest Control Association of New Zealand (Inc.),<sup>100</sup> have set up self-regulatory schemes designed to ensure certain standards of ethics and skill amongst members for the protection of members and consumers generally.

### 5. Conclusions

First, self-regulation must be backed up by adequate legal controls for the simple reason that not all business people will choose to belong to a particular association or group that promotes self-regulation and endorses a code of ethical practice. Furthermore, not all members of such associations or groups will adhere to the self-regulatory provisions and effective legal sanctions will support compliance with codes of conduct.

Second, there is little doubt that self-regulatory schemes have an important role in the regulation of advertising and the disclosure of information. However, two specific observations are made regarding the Committee of Advertising Practice Codes and their implementation:

- (i) The implementation of the codes rests exclusively in the hands of the advertising industry. The presence of consumer representatives on the committee might beneficially affect the approach of that committee to advertising problems and dispel the argument that industry representatives have a "limited view of what is against the consumer interest and should be curtailed".<sup>101</sup> In order that the codes of practice be independently enforced the committee might well follow its British counterpart and establish an Advertising Standards Authority staffed by a substantial number of persons from outside the industry.<sup>102</sup>
- (ii) The codes of practice thus far promulgated do not cover the whole spectrum of advertisements. No doubt, codes have been promulgated for those areas where abuses have been most apparent, but the absence of a general code applicable across the board is a *lacuna* that is easily remedied.

Third, the proposal that the Consumers' Institute be entrusted with the task of promoting codes of practice in many more businesses and industries in New Zealand has its attractions,<sup>103</sup> as does the suggestion that this same body be responsible for monitoring codes of practice.<sup>104</sup> However, it is submitted that more extensive power should be accorded to a "watchdog" body, namely, the power formally to approve a code and to compel a trade group to include certain clauses or exclude restrictive clauses. This, it is

<sup>98</sup> See the Martin Report, p. 20.

<sup>99</sup> See *The Press*, 24 June 1981.

<sup>100</sup> See *Consumer* 165, 250.

<sup>101</sup> Cranston, *op.cit.*, 63.

<sup>102</sup> The British Advertising Association has established an Advertising Standards Authority, a company limited by guarantee, to supervise the advertising code. The chairperson is an individual from outside the industry and approximately half its members must be from outside the industry.

<sup>103</sup> See the Martin Report, p. 21.

<sup>104</sup> *Idem.*

recognised, goes beyond self-regulation into the field of statutory control but it is suggested that this will prevent codes of practice or ethics from amounting to mere window dressing for the exclusive benefit of the promulgating members. Such a body should also have full investigative powers in order to monitor compliance, or the lack of it effectively.<sup>105</sup>

Fourth, the codes of practice provide a useful yardstick against which the courts may measure parties' behaviour. For example, where an allegedly deceptive advertisement was the subject of litigation, the court could refer to a relevant code of advertising practice as an indicative test of what is normal industry practice.<sup>106</sup>

Finally, while business self-regulation represents a potentially effective way to promote the consumer interest in some areas, care must be exercised lest the advocacy of self-regulation clouds its limitations. As the Director-General of Fair Trading in the United Kingdom, Sir Gordon Borrie, asserts, "[t]here must . . . be caution over proposals that would mean codes becoming in part a substitute for law rather than a supplement to law . . . ."<sup>107</sup>

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<sup>105</sup> It is recommended that this "body" be the Ministry of Consumer Affairs. This has specific responsibility for consumer protection and would not regard the fulfilment of this function as ancillary to other major duties; furthermore, greater cohesion will result from the administration of all major consumer-orientated legislation under "one roof".

<sup>106</sup> See Page, *op. cit.*, 31.

<sup>107</sup> Borrie, "Laws and Codes for Customers", [1980] J.B.L. 315, 325.