

law reform process is only one of the important tools in the struggle for reform.

By stringing together various quotes out of context Tomasic has made it difficult to deal with each one of his points, point by point. He is truly a master of the "art of omission" which also shows that he still has retained the traditional lawyering abilities which seem to have overcome the veneer of his sociological training. I can only hope that people will read the book and compare what they find in it with what Tomasic has stated in his review.

Stan Ross

Advertising Regulation, by SHENAGH BARNES, LL.M. (Syd.), Barrister of the Supreme Court of New South Wales; Lecturer in Law, University of New South Wales and MICHAEL BLAKENEY, B.A., LL.M., (Syd.), Barrister of the Supreme Court of New South Wales; Senior Lecturer in Law, University of New South Wales. (The Law Book Company Limited, Sydney, 1982), pp.i-li, 1-612, with Table of Cases, Table of Statutes and Index. Recommended retail price P/B \$45.00. (ISBN 0 455 20545 0).

Some recent outstanding books have tried to deal with legal rules in social and economic context (Atiyah's *Accidents, Compensation and the Law* (3rd ed. 1980) being perhaps the first English or Australian example): and some go further, by collecting from the traditional pigeon holes of legal scholarship the rules relevant to an area of social activity for which there was no corresponding legal pigeon hole, and analysing those rules in context. Cranston's *Consumers and the Law* (1978) is such a book. Barnes and Blakeney attempt to write in this tradition, taking the area of advertising regulation. We have already seen Armstrong's work on the law of broadcasting in Australia, which attempts to take a similar role, and other "new" areas, such as occupational health and safety and the operation of electronic information technology, will no doubt soon attract the attention of legal scholars in similar vein.

In *Advertising Regulation*, Barnes and Blakeney take a functional approach to the operation of legal rules and other forms of regulation, an area of social and economic activity which has attracted considerable attention from politicians and government. This attention reflects the social and economic importance of advertising in modern society. The authors point out that in 1979 estimated annual advertising expenditure in Australia was \$1,689,925,000. Yet how many Australians are aware of the magnitude of the phenomenon? Advertising, like "accidental" injury, is economically important. It quite clearly warrants legislative attention. Yet this is the first major study of the regulation of advertising in Australia. The earlier works by Collinge and Livermore are more in the nature of handbooks of legal aspects of marketing; their analyses of both law and social context are less thorough, and in any case are not confined to Australia.

Advertising, in its modern form, emphasises promotion of the sale and consumption of goods and services. It goes beyond its traditional role, which is simply to inform the public of the availability of goods and services. As Barnes and

Blakeney are aware, the line between the “informational” and “promotional” aspects of advertising is somewhat difficult to draw. Yet they are aware that the methods of advertisers have often been less than honest (they refer to that exemplary work by E. S. Turner, *The Shocking History of Advertising* (Rev. ed. 1965) and other similar studies) and that as a result people have suffered. With the expansion of the vote to all adult consumers it is not surprising that politicians have found regulation of advertising attractive. The result is regulations aimed, in part, at preventing suffering by the targets of advertising.

It is natural to think of the regulation of advertising as being a part of consumer protection law, and certainly, in the end, the consumer is one of the objects of the regulation of advertising. Yet, as this book makes clear, advertising regulation also serves many other interests. Advertisers, their agents, and the media all have been known to engage in anti-competitive activities; thus they are the target of laws relating to restrictive trade practices and monopolies (at least in theory). The airwaves are a limited resource, and since the beginning of radio transmission, governments have sought to regulate their use and control supposedly in the public interest. The print media has traditionally been, and to some extent remains, the object of both censorship and taxation. Health, traditionally, is a matter of public concern; as information may affect community health, it is regulated in that interest. The relation between knowledge and power has been obvious since the heyday of ancient Athens. This relationship has become more important since the formal discipline of feudal society has been replaced by less formal means of disciplining and controlling social activity. Information and the means of conveying it have become valuable in their own right. In modern developed society the conveyance of information to the broad masses of society has become inextricably interwoven with the advertising and other commercial interests which wish to promote the sale and consumption of commodities. It may well be that information, rather than, or perhaps as well as, welfare rights, is the “new property”.

Property rights are basic to English law. But what lawyers traditionally regard as the law of property is only a part of the body of legal rules which protect property interests. The criminal law, the law of torts, contract law, and traditional administrative law, (especially in relation to land use control), are all part of the legal apparatus for the protection of property, and a full study of the law of property cannot safely omit some attention to these aspects.

Similarly, the law of advertising regulation cannot be found solely in laws whose stated, (if not real), objective is the protection of the consumer. The modern Australian legal order is nothing if not a system: most rules extend to and affect areas far beyond their immediately apparent objectives. Barnes and Blakeney are well aware of this. While much of the book focusses on the effects of consumer protection laws, such as the Trade Practices Act 1974 (Cth) and State and Territory consumer protection and other statutes establishing standards for goods, services, and their packaging and promotion, it also examines the effect on advertising of the legal rules relating to torts (especially defamation, but also negligence), contracts (for in the common law of contracts lie the roots of modern consumer protection law), competition and restrictive trade practices, public health, and the licensing and control of various media. Its approach is functional. The introductory chapters

examine and define the concepts of “advertising” and “regulation”, and to sketch the common law and statutory framework for advertising regulation.

Blakeney and Barnes do not fall into the trap which snares many traditionally trained lawyers. They are aware that formal, positive laws represent only part of the picture. Advertising regulation is achieved also by informal pressure from government and other forces influential in modern society, and especially by what is now commonly referred to as industry “self-regulation”. Self-regulation includes highly anti-competitive cartels which restrict access to advertising media; which collude on prices to be charged by media for advertising; which set mutually agreed standards representing a common industry view of what is required of the good corporate citizen in order to maintain acceptable levels of commercial morality and public image; and which, occasionally, genuinely attempt to provide better service at lower cost, in the interest both of the public and the providers of those services. Self-regulation is the subject of a full chapter, but the authors are aware of its effects throughout the book.

Later chapters examine various definitions of the classes within society for whose benefits the regulation is said to exist; the name, appearance, attributes and price of the product advertised; the process of communication of the advertising message (including not only electronic and print media, but, no doubt to the joy of B.U.G.A.U.P., outdoor advertising) and promotion (including packaging, labelling and various sales techniques). This part of the book deals with “substantive” rules or standards. The authors make meticulous study of the technical rules of law. They provide evidence of wide, but extremely thorough and thoughtful consideration of the vast body of statute and case law, drawn from many traditional areas of law, and also of scholarship in areas which are related but not usually regarded as “legal”.

It is not difficult to provide a superficial study of the social or economic context in which legal rules operate. But the pioneering works which study the law in context, such as the works of Atiyah and Cranston referred to earlier, also demonstrate mastery of black-letter law. This is equally important, for technical scholarship of this type is absolutely essential in order to provide a comprehensive study of the law. It is difficult to fault Barnes and Blakeney on their systematic analysis of the technical rules, either in their treatment of the substantive rules, or in the three chapters which deal with the procedures used to regulate advertising.

The consideration of sections 52 and 53 of the Trade Practices Act 1974 (Cth) in Chapter 4 is probably the clearest and most comprehensive treatment of these provisions to date. Their analysis in Chapter 2 of the common law and its failure is excellent, especially their discussion of whether, in the Australian common law, there exists a tort of “unfair competition” (in addition to various statutory remedies for “unfair competition”, dating from the Australian Industries Preservation Act 1906 (Cth)). The only glaring shortcoming is in Chapter 2, where in the discussion of the Contracts Review Act 1980 (N.S.W.), the text reads as if the Supreme Court has exclusive jurisdiction to hear applications under this Act. In fact, the greatest use of the Act is likely to be in the District Court, by way of defences to liquidated debt claims.

The chapters dealing with remedies and enforcement are separated from the chapters dealing with substantive rule by a chapter entitled "Advertising and Social Control". Here the authors who also discuss this aspect of advertising in their opening chapter, show a considerable awareness of the psychology and sociology of advertising. They acknowledge the importance of such works as Ewens' *Captains of Consciousness* (1976) and Packard's *The Hidden Persuaders* (1960) and accept the fundamental purpose of advertising is "psychic manipulation" of the public. Unfortunately, as discussed below, they do not pursue sufficiently a number of arguments suggested in the chapter. Had they done so, the conclusion of the book would have had a far greater impact. The chapter also shows awareness of the moral values which may affect advertising regulation. There are specific sections dealing with the advertising of contraceptives and with advertising which discriminates on the ground of sex, racial or national origin, and other such bases.

The procedural chapters deal respectively with judicial enforcement, (at the suit of both public and private litigants), regulation by administrative bodies, and self-regulation. Here also the authors show expert knowledge of the Australian statute and case-law, and a familiarity with the general thrust of legal regulation of advertising in analogous societies, especially the United States. Perhaps the scarcity of adequate translations accounts for their omission of detailed consideration of advertising regulation in say, the Netherlands or Scandinavia, which could provide some useful lessons. There are, however, some similarities between legal rules and procedures in Australia and the U.S., and, while early studies of consumer protection law in Australia drew heavily on U.S. material, Barnes and Blakeney use illustrations judiciously, preferring where possible to extrapolate from the growing body of Australian court decisions.

In their opening chapter Barnes and Blakeney attempt to weigh both the advantages and disadvantages of advertising in social, commercial, political and economic terms. They summarise thoroughly both the evidence and the argument, yet they reach no conclusion. At the opening of the book, forbearance in making a judgment is wise, for advertising is a social reality. Conclusions are easier to follow once the reader has a fuller picture of the nature and extent of advertising and existing means of regulation.

The chapter on "Advertising and Social Control" considers carefully the instrumental nature of advertising, but the authors appear reluctant to peel back a further layer of the onion to discover whose interests are served by that instrument. They may avoid tears, but their omission to do so, it is respectfully suggested, prevents what is an extremely good book from becoming a great one. Because they fail to ask the basic question of the nature of the interests served by advertising they cannot, nor do they attempt to, suggest structural changes in practice which seem necessary if advertising regulation is to be really effective.

In each chapter, the authors evaluate the specific rules critically in the light of industry and community consistency. Unsurprisingly, their main criticisms are of the system of enforcement of advertising regulation. The specific criticisms in this area are drawn together in the final chapter which evaluates various aspects of the system of advertising regulation and makes proposals for reform. The criticisms of the existing system of enforcement suggest that it is unwise either to entrust

regulation entirely to a government agency or to private interests. Government agencies are potentially subject to "capture" by the interests they are supposed to regulate. They are open to political manipulation, either directly or indirectly, for example, by appointments or by limiting resources. They are also prone to bureaucratic caution or inertia and to remoteness from both industry and consumer interests. Several observers, notably Fels, Venturini, Pengilley and Armstrong, have comprehensively discussed "capture" of regulatory agencies in Australia. Private enforcement will not work either. As the authors show in their earlier chapters the common law proved inadequate to regulate advertising, largely because it was left to individuals to undertake the risk, inconvenience and expense of litigation. While private enforcement of the consumer protection provisions of Part V of the Trade Practices Act 1974 (Cth) is possible, the majority of such actions have been brought by business competitors seeking to keep new entrants out of an established market or to maintain a monopoly, thus turning the provisions from "consumer protection" to "business protection". As the authors acknowledge, consumers may gain benefits from this change of emphasis but only as one incident to the interests of business. This evaluation, and the conclusions, seem well supported by the evidence.

Barnes and Blakeney's study of advertising self-regulation, some of which has been published previously, certainly supports the increasingly widely-held view that self-regulation is equal to no regulation. It will affect neither the marginal operator nor the established and respectable operator in any situation where that operator's vital interests are at stake. They note the contrast between the Media Council of Australia's attitude to the campaign by the N.S.W. Health Commission to advertise healthy foodstuffs (censored and removed from exhibition within days of its first appearance, on the complaint of an advertising agency) and to complaints about the use by a tobacco company of the well-known popular entertainer, Paul Hogan, in children's advertising (which took many months to reach an unsatisfactory conclusion). This study, together with with study of self-regulation carried on in 1982 by the Australian Consumers' Association should be absolutely compelling evidence of the futility of self-regulation. Yet the system of "co-regulation" which they suggest is based largely on "self-regulation". The conclusion does not seem consistent with the results of their study.

After considering a number of suggested reforms of advertising regulation, they make some proposals for the reform of advertising regulation in Australia. This proposal is for a system which they call "co-operation" where instead control would be in the hands of industry, but subject to the overriding control of an advertising standards committee. These proposals are not fully stated and represent the weakest part of the book. It is not clear, for instance, exactly how the standards would be formulated, to what extent they would have the force of statute, how these would be enforced and what sanctions would apply to breaches. It is not even clear what room if any would be left for legislative control.

It seems to me that the "solution" suggested by Barnes and Blakeney for the problem of advertising regulation is not really a solution at all. They admit that it is a compromise between a bureaucratic solution and one based on self-regulation. However, they have decided that advertising is an instrument used by particular

interests. If they wish to propose an effective system of regulation, surely they must identify those interests and design a system which is capable of controlling their activities. The material presented by the authors leads me to the conclusion that there is a fundamental conflict between the interests of advertisers and those of consumers. If law is to provide a resolution of the conflict it must take account of the factors which lead to it. The suggested solution is therefore most disappointing because the preceding chapters contain a wealth of material and detailed criticisms which, to me, would have suggested somewhat different conclusions. The logical connection between the micro-analysis of specific rules and the suggested reforms could be much clearer: but such a connection might have been easier for the authors to formulate if they had examined in more detail the deeper purposes of advertising. Such questioning would have provided a better organising focus to enable more satisfactory suggestions for reform to be made. Because the book tapers off at this point, it does not quite succeed as a thorough analysis of the law in context, in the way that, say, Atiyah's and Cranston's books do.

The solution suggested by Barnes and Blakeney bears a close resemblance to that established in the United Kingdom (U.K.) under the Fair Trading Act 1973 (U.K.). There a system of "dual control" operates. A committee comprising industry and consumer representatives formulates "codes" of conduct to be observed by all members of the industry. The Director-General may approve these codes, and has power to act unilaterally, in certain conditions, if he is of the opinion that the codes may not operate in the public interests. Once approved by the Director-General, the codes have statutory force, and breach may be restrained by injunction issued by a court on the application of the Director-General. The system has many critics in the U.K.: they believe that with all the shortcomings of a bureaucratic system, the regulatory system operated by the Federal Trade Commission in the U.S. provides more benefits to consumers and the public generally, despite its costs.

Barnes and Blakeney suggest a modified form of the U.K. scheme, but their proposals are really insufficiently detailed to enable a thorough evaluation to be made. However, they do propose an Advertising Standards Council upon which the Trade Practices Tribunal, the Broadcasting Tribunal and the Health Department, as well as consumer organisations are represented. The choice is not really explained. They do not propose any industry representatives (an omission which seems politically unwise). So perhaps they do, implicitly, recognise that the interests of consumers and the public on the one hand (to the extent that state instrumentalities can be said to represent the public, itself a problematic issue) are by their nature in conflict with the interests of advertisers. This weakness — it is the main, if not the only weakness — flows from a reluctance to raise more fundamental social issues, which, though not "legal" in a formalistic sense, profoundly affect the law and its effectiveness.

The remainder of the book is excellent, and should be of great assistance to the advertising industry, regulatory agencies, and their legal advisers as well as to students in many areas of law. It shows evidence of extremely wide reading and thorough consideration of a variety of issues. There is a select bibliography, and many further detailed references to material drawn from a variety of disciplines in the footnotes. The appendices include a wide selection of standards and codes of

conduct which are in daily use in the advertising industry. The book is organised functionally and logically, and a detailed table of contents and index should facilitate use by practitioners. It is much more difficult to achieve a comprehensive study of the law in context than simply to state the legal rules in a systematic way. Barnes and Blakeney certainly succeed in stating the legal rules, and they almost succeed in their wider aims. Those who are looking for a study of law in social context will also find considerable value in the book, though they will have to pose and answer more fundamental questions about the nature of advertising and the place of legal rules in its regulation.

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Broadcasting Law and Policy in Australia, by MARK ARMSTRONG, B.A., LL.B. (Syd.), LL.M. (N.S.W.), Barrister-at-Law (N.S.W.), Senior Lecturer in Law, University of New South Wales. (Butterworths, Sydney, 1982), ppi-xxviii, 1-291, with Table of Cases, Sections of the Broadcasting and Television Act 1942 and Index. Cloth. Recommended retail price \$29.50. (ISBN 0 409 30910 9).

When this book was published earlier this year, it was with a fanfare of media publicity. This was appropriate. For the first time the law relating to broadcasting has been brought between the covers of a single book, heralding the fact — long recognised in the United States and Canada, though not Britain or Australia — that such a subject was no longer a footnote or a few paragraphs in books concerned with various other legal disciplines.

The earlier situation had come about because of the history of broadcasting in Australia. Insofar as the Australian Broadcasting Commission (A.B.C.) played a predominant early role in the development of radio, the “law” was mainly there to set its relationship with Government, enable it to carry on necessary business transactions and to empower it to order its internal affairs. By the time television was started in Australia, the A.B.C. had already become Queen of the Quangos — a status from which she has yet to be dislodged. Television, of course, held out promise of great profits, so that the law relating to commercial broadcasting — particularly the ownership provisions and those relating to conditions upon licences and transmission — started to reflect more the complexity of competing interests. With colour television — which transformed the broadcasting industry into the most profitable one, in relation to capital investment, in Australia — the competing interests of parties were brought into higher relief. Earlier legal rules were thus found wanting under pressure and new arrangements accordingly had to be sought.

Thus, an approach to broadcasting law which regarded its ownership and control provisions as nothing more than an interesting gloss upon general company law and the legal constraints upon the A.B.C. as a mere footnote to principles of