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## Access Economics



### Assessing the benefits of a self-regulatory advertising complaints handling system

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# Contents

Glossary	i
Executive summary	ii
1 Introduction	6
2 The advertising industry and regulatory landscape	8
3 The economics of consumer regulation	13
4 Cost	19
5 Compliance	26
6 Efficiency	29
7 Effectiveness	33
8 Responsiveness	37
9 Conclusion	41
References	43
Limitation of our work	45

# Glossary

AANA	Australian Association of National Advertisers
ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
AFGC	Australian Food and Grocery Council
ALRC	Australian Law Reform Commission
ASB	Advertising Standards Bureau
Ad Board	Advertising Standards Board
DAE	Deloitte Access Economics
FCAI	Federal Chamber of Automotive Industries
OMA	Outdoor Media Association

# Executive summary

## Key Findings

Complaints handling relating to community standards for the advertising industry is currently self-regulated through the Advertising Standards Bureau (ASB). In this report, this system of self-regulation of complaints is assessed against a scenario where the system is regulated through direct regulation by government.

Comparing the self-regulatory complaints system for community standards with this hypothetical, we consider it likely that the self-regulatory approach achieves similar outcomes to government regulation in compliance and effectiveness, and performs better in terms of cost, efficiency and responsiveness:

- **Cost:** It is likely the ASB requires a lower budget than a government regulator with \$1.02 million in salaries compared to \$1.42 million.
- **Compliance:** The ASB and the government perform equally well with high compliance rates.
- **Efficiency:** ASB handles the majority of cases (99.8%) in less than three months while a reasonably comparable government regulator completes most (97%) within six months.
- **Effectiveness:** The ASB and a government regulator both score reasonably well in terms of complainant and stakeholder satisfaction with the system.
- **Responsiveness:** The ASB appears to be relatively more flexible in its ability to regulate new mediums emerging in advertising such as social media.

Decisions about regulatory frameworks can be contentious, and at times, the debates can become quite emotive. Often it becomes a contest between competing views of government regulation as red tape which hinders businesses activity and the view that regulation is necessary to address naturally occurring market failures.

Yet looking at how a regulatory system operates for a particular industry allows for a more systematic and evidence based consideration of the role of regulation. In this report we examine how the regulatory system for complaints handling for community standards operates in the advertising industry. This focus provides an opportunity for a more in-depth analysis. In particular, the report focuses on the use of regulation to ensure that advertising complaints handling offers the greatest net benefit.

An assessment of the complaints handling component of the existing self-regulatory system through the Advertising Standards Bureau (ASB) relative to a counterfactual of direct regulation of complaints about advertising by government is used to bring into focus the issues facing policy makers and industry when making regulatory decisions.

Considering the advertising industry and its regulatory landscape is important for the economy. The industry's contribution to the Australian economy has been calculated at approximately \$40 billion in 2014 (Deloitte Access Economics, 2015). It also directly employs nearly 56,000 Australians. More broadly, the advertising industry plays an important role by bringing consumers and producers together, ensuring competition and promoting market efficiency.

As with any industry there are some advertisers who, in the absence of an appropriate regulatory environment, would detract from the benefits associated with advertising. In Australia, the appropriateness of advertising is primarily regulated through a self-regulatory system. The AANA, together with the Advertising Standards Bureau, are the two halves of Australia's system of self-regulation. Both are funded by industry. The AANA maintains and updates codes which dictate what is appropriate in advertising in line with community standards. The ASB resolves community and competitor complaints and arranges for offensive advertising to be removed from the public sphere.

This report aims to compare the effectiveness of the complaints handling arm of the current system of self-regulation of community standards in advertising to a situation where direct regulation by government is adopted. Our analysis of the ASB's performance focuses on its compliance and enforcement role. Importantly we have not considered whether the content of the various codes developed by the AANA and other industry bodies and overseen by the ASB are in line with community standards, or the processes by which the codes are developed. Our analysis is based on five criteria outlined below:

**Cost** – compares the financial costs associated with complaints handling. Where different regulatory systems can be shown to be equally effective along other dimensions, for example in efficiency or effectiveness terms, a regime that represents the least costly solution to a regulatory problem is preferable. We found the ASB pays approximately \$1.02 million in salaries each year. We estimate that a government regulator would spend a slightly higher amount on salaries – approximately \$1.42 million. In this way, having advertising compliance with community standards run through a self-regulatory system saves Australia around \$400,000 per year.

**Compliance** – evaluates the extent of compliance with the regulatory system. Our comparison finds that both the existing self-regulatory complaints handling system and direct regulation are likely to have high levels of compliance. The average compliance rate over the last decade for the ASB is 92%. Further, if it were not for one advertiser, average compliance would sit at 98%.

**Efficiency** – considers the speed with which complaints are processed. This is an important consideration as the primary aim of advertising regulation is to protect the public from inappropriate advertising, the longer a system takes to resolve a complaint and get an inappropriate advertisement out of the public domain where it is causing harm, the less effective it is. Our analysis suggests that self-regulation is relatively efficient with the ASB having resolved 99.8% of complaints within 84 days (less than three months), while a comparable government regulator had just approximately 90% of cases resolved in three months, and 97% resolved within six months.

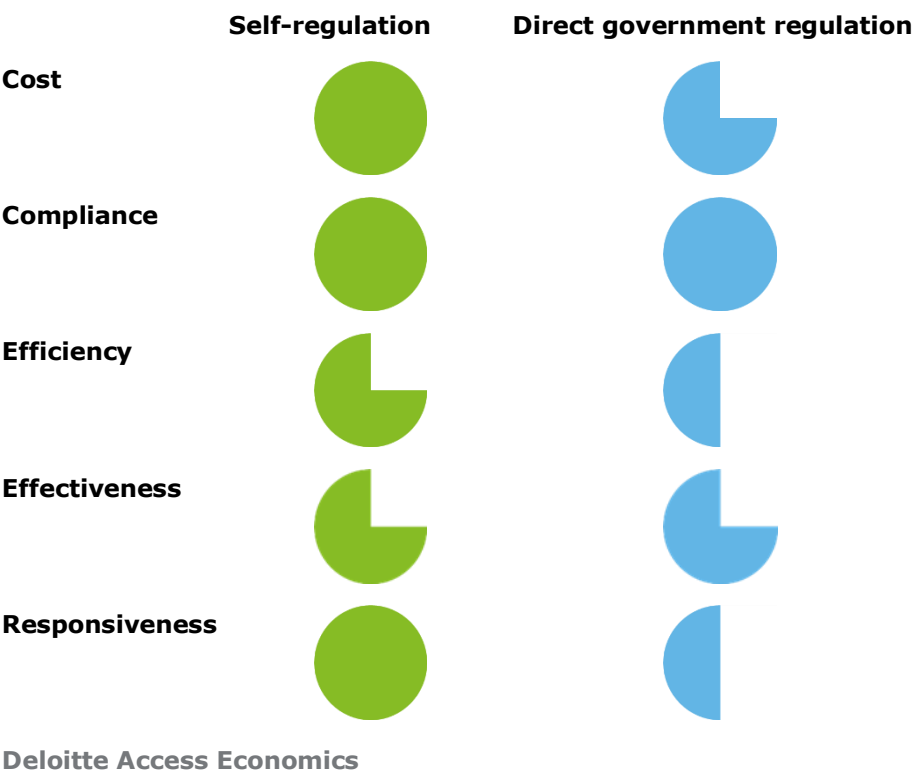
**Effectiveness** – looks at the operation of the complaint process, as well as whether community views are being properly represented when assessing advertising content. A longitudinal survey of 1,200 individuals found that over 90% agreed or were neutral about whether the ASB decisions are in line with community standards. The ASB also conducts surveys on direct user experiences of the self-regulatory body with over 55% satisfied or very satisfied with almost two-thirds (65%) expressing they were either satisfied or neutral. A comparable survey of a government regulator’s stakeholders, including government and industry, found that 64% were satisfied with the ACMA (with 21% dissatisfied).

**Responsiveness** – considers the speed with which the regulatory scheme is updated to take into account changes in the industry. This is particularly relevant for the advertising industry which has seen rapid expansion to online media in the past decade. The ASB has shown it can quickly adjust to the evolution of the advertising industry as the self-regulatory codes which the complaints body administers can more quickly incorporate new forms of media. In contrast, government regulators can have difficulty dealing with new developments in an industry as they are bound by the laws and policies they enforce.

The results of our comparison are represented visually below in Figure 1.1. Our analysis suggests that the complaints handling component of self-regulation (as occurs in respect of the ASB’s compliance and enforcement role) is more likely to be effective than direct regulation by government across three dimensions, and as effective in the remaining two.

It should be noted that many of the comparisons undertaken in the report are not exact. That is, reaching a conclusion as to which regulatory system is preferable requires some judgement. That said, both economic theory and the available evidence suggests that self-regulation of consumer and industry complaint handling appears to be a more appropriate approach than direct regulation by government in this case. Our report shows that the current self-regulatory system of complaints handling appears to be working very well and in the best interests of the Australian community.

Figure 1.1: Regulation scorecard for the advertising industry



# 1 Introduction

Advertising is an important part of the Australian economy, generating \$40 billion worth of benefits in 2014 (Deloitte Access Economics, 2015). It helps to bring consumers and producers together, and fosters innovation, competition and market efficiency.

As with any industry there are some advertisers who, absent an appropriate regulatory environment, would detract from the benefits associated with advertising.

If advertising is misleading or deceptive, consumers can make poor decisions. While the overwhelming majority of advertisers are not going to undertake advertising that is misleading or deceptive, for those that may be tempted, Australia has an effective regulatory regime involving the ACCC and the AANA Codes developed by the advertising self-regulatory regime that sanctions businesses that engage in such conduct. In this context, regulation can act to lift the overall trust of the community in businesses.

The alternative to regulation is to leave outcomes to be determined by market forces. In the absence of any form of regulation, a business could face a significant cost from producing offensive advertising that does not meet community standards. Such advertising could have an impact on branding that could flow through to financial performance.

However, sometimes these market forces may not be enough to ensure appropriate conduct, and where this is the case there is a role for regulation to enforce community standards. As discussed in Chapter 4, regulation can take a number of forms, ranging from self-regulation to formal direct regulation.

Currently, in Australia the appropriateness of advertising is regulated by industry through a self-regulatory scheme. The AANA, together with the Advertising Standards Bureau (ASB), are the two halves of Australia's self-regulation scheme. Both are funded by industry. The AANA maintains and updates codes which dictate what is appropriate in advertising in line with community standards. The ASB resolves community and competitor complaints and arranges for offensive advertising to be removed from the public sphere.

This report, focusing on the operational, enforcement and compliance aspects of complaints handling regulation, compares the costs and benefits of the current complaints handling self-regulatory system, with direct regulation by government. It considers whether the ASB or a government body is likely to be a more appropriate regulatory vehicle to enforce a given set of codes. Importantly, it does not consider whether the content of the codes written by the AANA are in line with community standards.

A report of this nature is timely for the industry. There were more than 5,000 complaints made about advertisements in Australia during 2016, with over a third (1,941) of complaints being made about only 10 particular advertisements. At times there can be questions about whether the social or cultural values of advertising content in Australia meet contemporary community standards.



More broadly, the optimal level of regulation for specific industries in Australia can be difficult to determine. Regulation can be viewed through different lenses. For example, regulation can be viewed as the “red tape” that unnecessarily constrains business activity and therefore should be reduced by its nature. Yet regulation can also be a necessary safeguard to prevent some harmful industry activity. As a consequence, there needs to be a balance of regulation and careful consideration on how a regulatory framework is designed by government to achieve the stated objectives.

The audience of this report is policy makers as well as the industry. Policy makers regularly make decisions about the nature of regulatory systems for various industries, including the advertising industry, and require a framework to base their decisions on. The advertising industry and other businesses have an obvious stake in the regulatory system they operate within and require an understanding of factors influencing that system.

The rest of the report is structured as follows:

- Chapter 2 provides an overview of the advertising industry in Australia and how it is currently regulated;
- Chapter 3 outlines the need for regulation and sets out our framework for comparing different regulatory options;
- Chapters 4 to 8 compare self-regulation and direct government regulation across a range of criteria; and
- Chapter 9 concludes.

## 2 The advertising industry and regulatory landscape

### The Advertising industry

In Australia, direct expenditure on advertising has been estimated to account for in excess of \$12 billion per year, yet the economic contribution of the sector that includes the indirect flow on effects of the sector is estimated to be worth approximately \$40 billion to the economy every year. The industry is also associated with the employment of over 200,000 people in the Australian economy (Deloitte Access Economics 2017).

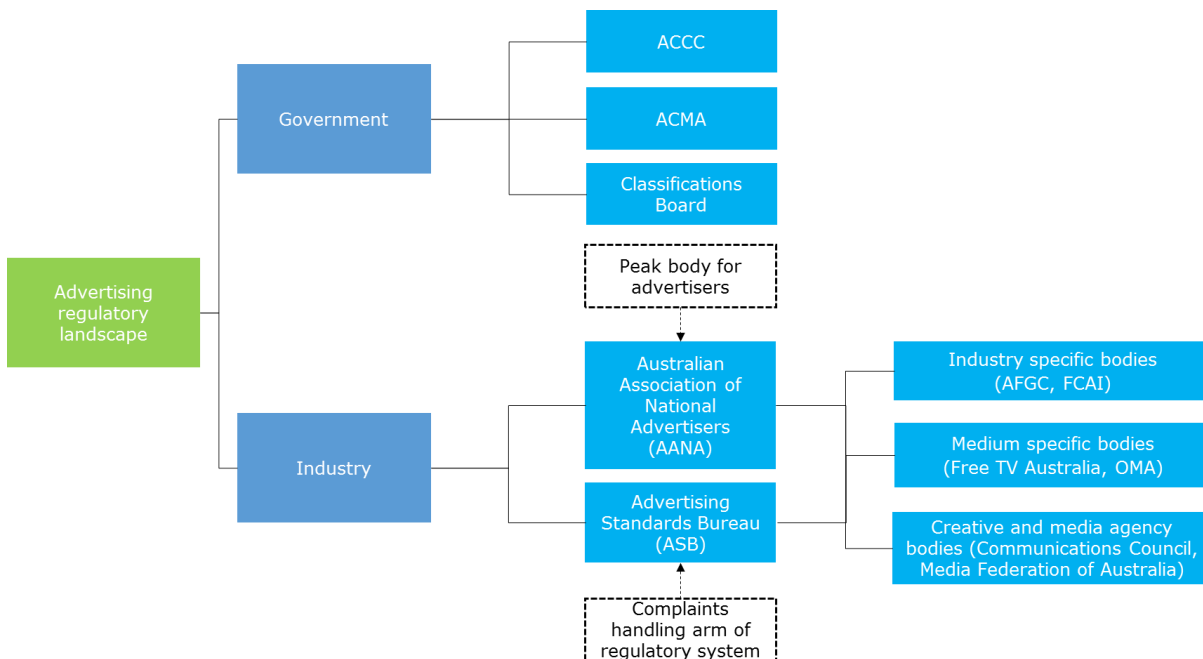
Notwithstanding the positive contribution of advertising to consumers and the economy, there can be costs associated with advertising, and there is a range of legislation and regulation in place that seeks to minimise these costs. For example, advertisements that are misleading and deceptive are likely to impose costs on individuals who are duped into buying products and services that they would not otherwise purchase or which can do them harm or damage competitor businesses. Advertisements that do not meet community standards can cause offence and this can impose costs on individuals, competitors and the community.

Regulators and industry bodies play an important role in managing these costs and impacts of advertising. Self-regulation by the advertising industry is an important feature of the regulatory landscape to ensure the industry meets community standards in relation to the content of advertisements. Several layers of industry bodies make up the Australian system of advertising regulation. This chapter will explore the regulatory landscape of the advertising industry.

### Regulatory landscape

There are a number of bodies that contribute to the regulation of the advertising industry in Australia. These bodies (some government, some industry) are responsible for different elements of advertising regulation. This regulatory ecosystem of bodies is represented in Figure 2.1 and explained below.

Figure 2.1: Some regulators of advertising



Source: Deloitte Access Economics

In terms of government bodies, the **Australian Competition and Consumer Commission (ACCC)** is responsible for regulating misleading and deceptive conduct (advertising that makes false claims about a product or service). The **Australian Communications and Media Authority (ACMA)** ensures compliance with Australia's media and communications legislation and codes of practice (including gambling and 'Do not call' registries). While not regulating advertising content, the **Classifications Board** classifies films, computer games and publications to ensure community awareness about content of the product in advertisements.

The **Australian Association of National Advertisers (AANA)** is the national industry body representing the interests of advertisers. The AANA's mandate is to maintain and evolve the advertising codes which underpin the system of self-regulation in Australia, safeguard the rights of its members to commercial free speech and protect consumers by ensuring marketing communications is conducted responsibly. One of its strategies is developing, implementing and monitoring a set of comprehensive self-regulatory codes which apply to all advertisers regardless of whether they are members of the AANA or not. These codes guide the decisions made by the Ad Board and the matters which the community and competitors can make complaints about. These codes range from general codes to more specific codes such as those that relate to products such as food and beverages or wagering.

The **Communications Council** is the peak body for the creative arm of the advertising industry, with over 160 member agencies. The Council seeks to inform the industry about advertising codes and guidelines by holding information seminars. The Council commissions research about the industry and plays an important advocacy role to the government about issues raised from its members.

The ASB resolves both public and competitor complaints regarding radio, television, print, outdoor and online mediums right across Australia.

There are also industry specific organisations that provide input to the guidelines for advertisements in their specific industry and can provide representation when members are involved in complaints made to the ASB. One example is the **Australian Food and Grocery Council (AFGC)** which is an industry body that represents Australia's food, drink and grocery manufacturing industry with another being the **Federal Chamber of Automotive Industries** which represents manufacturers and importers of vehicles.

In relation to alcohol advertising, Australia's guidelines have been agreed between government and industry in the **Alcohol Beverages Advertising Code (ABAC)** scheme. The ABAC scheme is administered by a management committee which includes industry, advertising and government representatives.

There are also industry bodies that focus on specific mediums for advertising rather than the content of the advertisement, for example looking at billboards and online advertising. One example is Free TV Australia which represents Australian commercial free-to-air licensees and provides a classification, review and information service to ensure that TV advertisements comply with the Commercial Television Industry Code of Practice and legislative and regulatory requirements relevant to TV advertisements before they are broadcast.

Another medium specific industry body is the **Outdoor Media Association (OMA)** which represents 32 traditional and digital outdoor media display companies. The OMA works closely with the AANA and the Communications Council to ensure members only display advertising that meets community standards and the self-regulatory codes.

### **The role of the ASB in advertising regulation**

In order to ensure that advertising content meets community standards, the ASB administers a range of codes developed and evolved by the AANA relating to ethics, communications to children, food and beverages marketing, wagering, and environmental claims. It also administers codes relating to motor vehicle advertising developed by the FCAI and relating to advertising of food and beverages to children developed by the AFGC. The ASB is also the central point for receiving complaints under the ABAC Code.

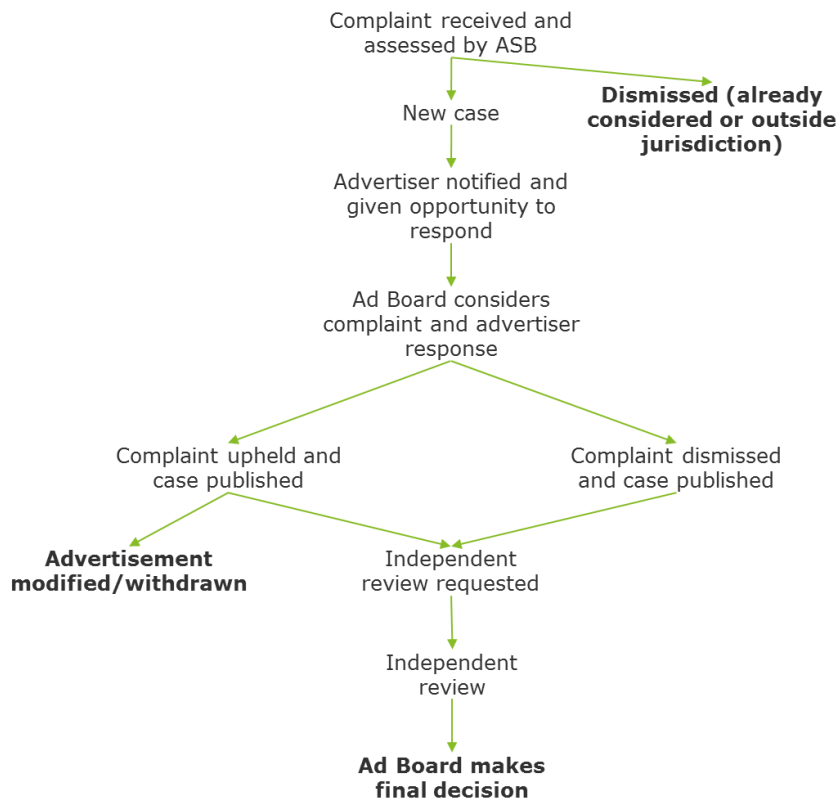
The ASB's complaint procedure centres around two boards that determine whether complaints made against the advertising self-regulatory codes are upheld or dismissed. The two boards that make these decisions include the Advertising Standards Board (Ad Board) and Advertising Claims Board described below.

The **Ad Board** incorporates a panel of community members who consider complaints from the public. The Ad Board includes people from a range of age groups and backgrounds and gender balances – to ensure a more representative view of community values.

The Ad Board meets twice a month to consider any complaints. Any upheld complaints will lead to a request for the advertiser to remove or amend the offending advertisement as soon as possible.

There is also an independent review process which provides the community and advertisers a channel through which they can appeal decisions made by the Ad Board. The review process is available to the advertiser and the person who originally made a complaint. Figure 2.2 below shows the process by which the ASB administers complaints about advertising.

Figure 2.2: Self-regulation of advertising process



The **Advertising Claims Board** comprises of a panel of lawyers who consider complaints from *competitors* regarding the accuracy and legality of advertising that is being examined. A competitor who is complaining must pay fees for this service in order to discourage vexatious complaints.

If the Claims Board finds that any of the claims are substantiated, a draft report will be produced for the review of the defending advertiser. If an adequate response to the draft report is not provided by the advertiser, a final case report outlining the findings is produced and is made public, and includes details to be taken by the defending advertiser if the complaint against them is found to be justified. The Board can also refer the report to an appropriate government agency. We do not explicitly consider the operation of the Advertising Claims Board any further in this report.

### International comparisons of advertising regulation

On an international level, the use of the self-regulation model for the advertising industry is widely used among countries comparable to Australia (Harker et al. 2005).

The New Zealand self-regulatory body, the Advertising Standards Authority, extends beyond monitoring whether advertising meets community standards by also considering if the advertising is providing misleading information (Advertising Standards Authority 2017a).

Meanwhile the UK and the USA both have self-regulatory bodies to ensure advertising meets community standards (Advertising Standards Authority 2017b, Advertising Self-Regulatory Council 2017). Further information about self-regulatory set up in other countries can be found through the International Council for Ad Self-Regulation at <https://icas.global/>.

While there are some countries that favour direct regulation by government in relation to complaint systems for advertising and do not have a self-regulatory system they tend not be comparable to Australia, in terms of their level of economic development or the nature of their political system.

This is the case with Chinese advertising regulation which combines regulation that ensures community standards are met with regulation to protect against advertisements providing misleading information. In Australia, only misleading information is the subject of direct regulation by government (Dezan Shire & Associates 2016). Yet the differences in the political system between Australia and China has an obvious influence on the possibility of self-regulation for the advertising industry.

# 3 The economics of consumer regulation

Markets tend to operate best when regulation appropriately sets “the rules of the game”. However, that same regulation, if overly interventionist, poorly designed or enforced, can be counterproductive, taking away oxygen from economic activity.

A number of industries have self-regulatory systems with external complaints resolution functions in place to provide protections to consumers of their products. Examples include the Financial Ombudsman Service in Victoria, the Telecommunications Industry Ombudsman, the Energy and Water Ombudsman Victoria and the Press Council. In this report we focus on the self-regulation of complaints handling around community standards in advertising, which is administered by the Advertising Standards Bureau.

It appears clear that there is a role for regulation of some form in the case of advertising standards.

In the advertising industry, advertisers are likely to know more about their products than those who might purchase them. In economics this is known as an information asymmetry, and it has been shown that absent some form of intervention, markets can produce suboptimal outcomes.

It isn’t always possible to avoid advertising. Turning down the television when an advertisement is on, or closing your eyes while driving past a billboard, isn’t always an option. In economics, this can be thought of a negative externality – an advertiser can impose a cost on others without imposing a cost on itself.

These issues are referred to by economists as market failures and in themselves can justify regulatory intervention.

Beyond the issues above, the idea of community standards suggests that the community, rather than an individual, knows what standards are most appropriate, in order to maintain a community in which we would all want to live.

Despite these issues, which require some form of regulatory intervention, the contribution of advertising to the Australian economy is overwhelmingly positive. Deloitte has previously found that advertising is worth \$40 billion to the Australian economy (Deloitte Access Economics, 2015) through improved information provision, increased market competitiveness and a range of other channels.

Regulation can take many forms, and these sit along a spectrum from industry-led self-regulation to direct government regulation.

## Regulation Forms

**Self-regulation** is characterised by industry-formulated rules and codes of conduct, where industry is solely responsible for the enforcement of these codes. Self-regulatory codes and complaints systems are voluntary in the sense that there is no legislation to enforce compliance. An example of self-regulation is advertising content in Australia.

**Quasi-regulation** is an arrangement where government influences businesses to comply, but does not explicitly establish government regulation. For example, the agreement by Telstra, Optus and Primus to voluntarily filter a list of child abuse URLs compiled by the ACMA.

**Co-regulation** refers to a situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced. For example, radio and television broadcasts are regulated by industry in consultation with the ACMA.

**Direct government regulation** is the most commonly used form of regulation. Government is responsible for designing and administering legislation, and ensuring compliance with the legislation. For instance, the classification of publications, films and computer games is regulated under the *Commonwealth Classification Act 1995* (Cth).

Source: Australian Law Reform Commission (2012)

Each of these regulatory forms have advantages and disadvantages, and each can be appropriate depending on the circumstances. This report focuses on the differences between self-regulation and direct government regulation, and which of these is more appropriate for regulating complaints handling around whether advertising meets community standards in Australia.

When weighing up regulatory options it is useful to first understand the principles that underpin government decision making. The Australian Government has made a commitment to reducing red tape and the regulatory burden for individuals, businesses and community organisations (Department of Prime Minister and Cabinet, 2014). The *Best Practice Regulation Handbook* stipulates that minimal intervention is preferable when it comes to regulation, and self-regulation can be a feasible alternative under certain conditions.

The Handbook lists a number of factors that help guide government when determining the most appropriate regulatory form. These include:

1. **Severity of the problem** – if the problem is high risk, or of high impact or importance, direct regulation may be needed, particularly if the problem relates to the health or safety of the public. Conversely if the problem is low risk or of minimal impact self-regulation may be more appropriate.
2. **History of the problem** – if there has been a systemic compliance problem with a history of intractable disputes and repeated breaches of fair trading principles, self-regulation is likely to be insufficient. However, if it seems likely that the market will be able to fix itself when the problem arises then government regulation is unlikely to be necessary.



3. **Cost of regulating** – self-regulation should be considered if the time, effort or cost of direct government regulation outweighs its benefits.
4. **State of the industry** – the more concentrated the industry, the more likely it is that self-regulation will be effective as non-compliers will not be able to hide amongst other, complying firms. Competitive industries are also less likely to require government regulation; the threat of losing market share or reputation is often sufficient to ensure compliance and therefore self-regulation will be sufficient. Similarly more mature industries are more likely to have success with self-regulation as the firms that remain in the industry are likely to have more resources available and be more committed to self-regulation.

Industries self-regulate for a number of reasons; such as, to improve an industry's image, promote consumer confidence, or to avoid direct regulation from the government.

This report concentrates on self-regulation in relation to complaints handling around community standards in advertising. Notwithstanding this, there are some generic observations that are often made in relation to self-regulation and direct regulation.

In general, self-regulation has the potential to be more flexible and adaptive than government regulation given that it is industry managed and no legislative change is needed to update the regulatory system. It can have lower compliance and administrative costs for society as a whole, particularly as the system is industry and not government funded. Additionally, it provides the opportunity to harness industry knowledge and expertise to address industry-specific and consumer issues directly (ALRC, 2012).

Self-regulation is the most common method of regulating community standards in advertising throughout the world. Amongst other things, it appears to be selected for its low cost and regulatory burden for industry (Parliament of the Commonwealth of Australia, 2011). However, more generally there are also disadvantages of self-regulation, and instances where it is not appropriate.










Given that there is no legislative backing to dealing with complaints about community standards in advertising in relation to self-regulation, there are circumstances where enforcement can be a challenge. Penalties for ignoring regulation enforced by industry may be smaller, or not enforced, in the same way in which rules set out by direct regulation may be.


In general terms, self-regulatory bodies such as the ASB require carefully considered governance structures to be in place in order to be able to play an impartial role in regulating their industry. It is important that self-regulatory regimes are transparent and that results are reported so that their operations are able to be observed by government and the general public in order to ensure their effectiveness.

### 3.1 The advertising industry example

We have considered where the regulation of community standards in advertising sits amongst the characteristics outlined in the previous section.

Figure 3.1: The regulation of community standards in the advertising industry

Industry characteristic		Self-regulation			Government regulation	
Severity of the problem	Risk to the community	Low risk				High risk
	Impact on the community	Low impact				High impact
History of the problem		Consistent compliance				Systemic compliance issues
Cost of regulating	Time required	Long process				Short process
	Effort required	Complex process				Simple process
	Cost of regulation	Expensive				Inexpensive
State of the industry	Industry concentration	Small number of firms				Large number of firms
	Level of competition	Competitive				Uncompetitive
	Industry maturity	Mature				Young

 = Advertising Industry

Source: Commonwealth Government 'Best Practice Regulation Handbook' (framework) and Deloitte Access Economics analysis (as the framework applies to community standards in advertising)

**Severity of the problem** – the problem that arises from inappropriate advertising<sup>1</sup> is unlikely to be severe compared with what could happen in other industries. For instance, if a road network was not regulated and people could drive at any speed they wanted, there would be deaths. By contrast, advertising content that is not aligned with community standards is unlikely to put people in significant danger. However, social attitudes could be challenged by repeated inappropriate content, and this could threaten social cohesion over time.

**History of the problem** – the advertising industry has been largely compliant with the self-regulatory system since its foundation in 1974, and even more so since the system was established in its current structure in 1997. See Chapter 5 for more information on this.

**Cost of regulating** – drafting legislation for the advertising industry would likely be a long and costly process. However, it is unlikely to be a particularly complicated process compared with some legislation which would require experts such as engineers or medical doctors. Government run enforcement would not be particularly expensive given the size of the task (compared to something like regulating the running of hospital care).

<sup>1</sup> This report considers the impact of advertising that is not aligned with community standards as opposed to false and misleading advertising, which can be a more severe problem.

**State of the industry** – where there are a large number of firms, as is the case in the advertising industry self-regulation can be less effective as it can be harder for a self-regulatory body to include all firms. On the other hand, an industry characterised by many firms tends to be competitive, and firms that produce content that does not meet community standards will tend to lose business to those firms that do. Advertising is a mature industry although it is constantly evolving.

The preceding analysis suggests that community advertising standards appears to be well suited to self-regulation on most measures. The problem is not severe and the state of the industry provides favourable conditions for a self-regulatory system. However, these measures do not guarantee the success of self-regulation. For that reason in the following chapters we go on to evaluate the current complaints handling self-regulatory regime against an alternative of direct regulation.

### 3.2 Analytical framework

This report aims to compare the effectiveness of the current system of complaints handling (the self-regulation of community standards in advertising) to a situation where direct regulation by government is adopted. This report does not use a counterfactual of no regulation to the existing regulatory system as it was considered an unrealistic option – it is generally accepted that some form of regulation needs to be in place.

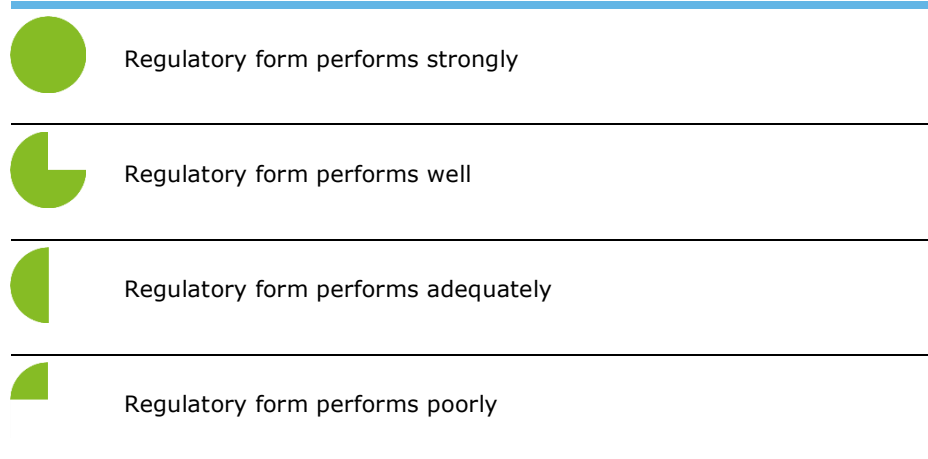
The analysis has been informed by industry consultation, data from the ASB, government bodies, and a literature review.

The regulatory forms are considered along the following dimensions:

- **Cost** – the financial costs associated with regulation;
- **Efficiency** – the speed with which complaints are processed;
- **Responsiveness** – the speed with which the scheme is updated;
- **Effectiveness** – the alignment with community standards; and
- **Compliance** – the extent of compliance with the scheme.

Self-regulation of complaints handling and direct regulation are each then given a rating of their overall effectiveness. Figure 3.2 below explains this rating. A full circle means that the regulatory form is likely to perform strongly, while a quarter circle indicates that that form of regulation is likely to perform poorly.

Figure 3.2: The rating system



The data used to compare self-regulation and direct regulation by government of complaint handling for each of the five dimensions is set out below in Table 3.1.

Table 3.1: Data used for comparing self-regulation and government regulation

<b>Criterion</b>	<b>ASB data</b>	<b>Counterfactual data</b>
Cost	<ul style="list-style-type: none"> <li>• ASB data request</li> </ul>	<ul style="list-style-type: none"> <li>• ACMA annual report 2016</li> </ul>
Compliance	<ul style="list-style-type: none"> <li>• ASB annual reports 2008-2016</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
Efficiency	<ul style="list-style-type: none"> <li>• ASB data request</li> </ul>	<ul style="list-style-type: none"> <li>• ACMA annual report</li> <li>• ABC annual report</li> <li>• Commonwealth Ombudsman annual report</li> </ul>
Effectiveness	<ul style="list-style-type: none"> <li>• ASB conducted satisfaction surveys</li> </ul>	<ul style="list-style-type: none"> <li>• ACMA conducted satisfaction surveys</li> </ul>
Responsiveness	<ul style="list-style-type: none"> <li>• ASB data request</li> </ul>	<ul style="list-style-type: none"> <li>• ACMA website information</li> </ul>

## 4 Cost

Different regulatory regimes have different costs, and depending on the regime, these costs can fall on different organisations and individuals within the economy.

The cost of a regulatory scheme is an important consideration when comparing the appropriateness of different regulatory systems. Where different regulatory systems can be shown to be equally effective along other dimensions (such as efficiency, consistency, responsiveness, effectiveness and compliance), a regime that represents the least cost solution to a regulatory problem is preferable.

In the case of the ASB, costs vary only moderately from year to year, so it is reasonable to take 2016 as a benchmark. In 2016, the self-regulatory scheme cost approximately **\$1.9 million** to run.

These costs are made up of both labour and non-labour costs, and cover all operations. The operations of the ASB are diverse and include:

- direct complaint handling;
- dealing with the media;
- community awareness campaigns;
- publications and information;
- education;
- expenses associated with twice monthly board meetings, with attendees from all over Australia;
- data analysis;
- reporting to government and industry; and
- input into code development.

In relation to the ASB's core business of complaint handling, in 2016 the ASB processed 576 cases coming from 5,529 complaints, and from this a cost per complaint can be estimated.

Table 4.1 presents costs per complaint, first using the ASB's total costs, and then just its salary costs. Considering salary costs in isolation is important because if such regulation were to move to direct regulation it is likely that the main additional cost to the government body enforcing the rules would be salaries, with non-salary costs such as buildings already largely in place.

Table 4.1: ASB costs per complaint and per case 2015-16

	Total Expenses	Number of complaints	Average cost per complaint
Total costs	\$1.9 million	5,529	\$388
Salary costs	\$1.02 million	5,529	\$186

Source: ASB data

Note: Complaint data is based on calendar year 2016, expense data is based on financial year 2015-2016.

Another factor for consideration is who pays for a regulatory scheme. Currently, the ASB is **industry funded** – advertisers pay a levy each year,

0.05% of their gross media spend. In 2016, total revenue for the ASB was just under **\$2.3 million**, enough to cover the cost of running the broad range of activities involved in administering the complaints resolution system.<sup>2</sup>

The complaints scheme being industry funded is one advantage of self-regulation over direct regulation by government. The complaints scheme does not directly cost the government anything, and it is also “incentive compatible”, in that if the cost of the scheme balloons due to an increase in complaints, the levy paid will need to increase to cover it. However, it is possible that if government were to regulate the industry it could maintain this ‘industry pays’ approach.

## BCF – Television (2017)

This campaign depicted a group of people enjoying various outdoor activities such as fishing and camping and featured a jingle “Boating, camping, fishing is BCFing fun.”

The ASB received numerous complaints about the jingle, claiming that it infers offensive language (“effing”) and should not be played on prime time television.

The Ad Board considered whether the advertisement breached the AANA Code of Ethics relating to inappropriate language and decided to dismiss the complaints. The Ad Board put forward a number of reasons for this.

Firstly, the term is sung as part of a jingle in a light rather than aggressive tone. Further there is a clear link between the brand name, brand abbreviation and lyrics of the jingle.

They also considered this case’s similarity to another case where the phrase “F ‘n’ L” was used. In this case complaints were dismissed because the context of the ad made it clear that the phrase was intended to stand for ‘Full and Luscious’ rather than any other inappropriate phrase.

Based on these factors, the Ad Board concluded that the advertisement did not breach the Code and therefore dismissed the complaints.



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<sup>2</sup> Additionally, if complainants wish to challenge the decision of the board after a complaint has been resolved, they can pay \$100 for an independent review. This fee is applied to discourage unnecessary independent reviews, and is returned if the decision is overturned.

## Counterfactual

In order to carefully assess the current complaints handling self-regulatory regime in relation to the community standards of advertising we have sought to create a credible – but necessarily hypothetical – counterfactual to consider it against.

Developing a credible counterfactual to the current complaints handling self-regulatory scheme is difficult. A number of options were considered, including benchmarking against direct government regulation internationally and benchmarking against other comparable industries in Australia. However, as noted self-regulation is the most common form of advertising complaints regulation around the world and countries that have direct regulation in the area of community standards and advertising are not comparable.

Similarly, it was difficult to think of a directly comparable area with direct regulation in Australia. Notwithstanding this, the ACCC, the ACMA, and the Classification Board provide some basis for comparison. For example, while the Classification Board is responsible for rating films, computer games and publications, it performs a different role to the ASB. It is proactive in that it pre-emptively classifies media, while the ASB is responsive, in that it responds to complaints that the community or competitors raise.

We consider two hypothetical scenarios by which the advertising industry could be subject to direct regulation by government in Australia:

1. The Australian Communications and Media Authority (ACMA) – a government body – absorbs advertising complaints handling into its operations.
2. The Australian Government creates a new body to resolve community complaints about advertising.

### Counterfactual 1

The ACMA is the Australian government regulator for broadcasting, the internet, radiocommunications, and telecommunications. It employs around 500 people, and enforces the *Broadcasting Services Act 1992* (among others), which is co-regulatory, meaning that in many cases complaints are dealt with by the industry (ACMA, 2017a). However, complaints relating to a range of topics go straight to the ACMA, including:

- Tobacco advertising
- Political/election advertising
- Therapeutic goods advertising
- Children's TV standards breaches

In 2015-16 the ACMA received 1,232 complaints and conducted 156 investigations. Given that the ACMA is already present in the advertising regulation space, it is possible to conceptualise a counterfactual where handling complaints about advertising standards is absorbed by the ACMA.

There are a number of factors to think about in relation to a counterfactual where the ACMA absorbed the ASB.

First is labour costs. It seems likely that the ACMA would set up a team of similar size to ASB's current team. Based on standard Australian public service classifications, Table 4.2 provides an estimate of what this might cost.

Table 4.2: Labour costs of the potential ACMA team

Classification level	Median gross salary (\$)	Number of FTE employees	Total cost (\$)
APS 4	82,670	2	165,340
APS 5	90,456	2	180,912
APS 6	105,788	2	211,576
EL 1	131,375	2	262,750
EL 2	163,501	1	163,501
SES 1	246,476	0.8	197,181
SES 3	402,488	0.6	241,493
<b>Total</b>	-	10.1	<b>1,422,753</b>

Source: ASB data and Australian Public Service Commission (2015)

We estimated analyst and team manager time (APS4 to EL2) based on the structure and workload of the ASB, attempting to replicate the ASB team's workload. The full time equivalent (FTE) of 0.8 of Senior Executive Service (SES) Band 1 employee time represents the time spent by the board members of the ASB who meet twice a month to determine the outcome of cases. The 0.6 FTE of SES Band 3 level employee time is an estimate of the time required of CEO level oversight for the complaints process, again built to replicate the ASB's workload. This estimate of FTE also incorporates the time made by the Authority board members in the ACMA to make decisions on investigations for complaints.

The correct comparison to the \$1.42 million that the ACMA would likely spend on salaries for the team is the \$1.02 million that the ASB spends. In this way, the economy saves around \$400,000 per year by self-regulating complaints about advertising. In addition, the \$1.42 million is funded by industry rather than through government expenditure funded by taxpayers. It is possible that the government could run the advertising complaints process differently to the ASB, and this would increase costs. However, we do not have sufficient information to estimate with any reliability the impact this would have on costs.

The second change would be to non-labour costs. Here, direct government regulation may be cheaper than self-regulation. The ACMA already pays for office space, utilities and other fixed costs across its 500 staff, whereas the ASB has to pay all of these for a small team. However, there would also be set-up costs associated with establishing a new team.

The ASB's fixed costs in 2016 were approximately \$800,000, it is possible this could be saved if the ACMA took over. However, \$70,000 of this was spent on advertising the complaints system to increase awareness and research to monitor how effectively the complaints system is working. These expenses would likely be necessary in a government-run system as well.

Finally, government may be reluctant to charge the \$100 fee of individuals wishing to challenge a decision, and this could have a small impact on revenue. However, the likely larger impact is that it could encourage more people to challenge a decision, adding to workload and increasing operating costs.



As an aside, there would also be legislative costs associated with government regulation. This would be a significant expense; the Government already spends over \$20 million a year on drafting legislation (Office of Parliamentary Counsel, 2016), and the broader political process is likely to impose significant costs beyond this.

Legislating can also be a lengthy process, which would mean the change to government regulation would be slow. For example, recent changes to the *Competition and Consumer Act 2010* have taken several years to be passed. A review of competition policy was announced in December 2013, an issues paper was released in April 2014 and a final report detailing recommendations of changes to be made was published in March 2015. The Government response was then released in November of the same year, and the changes were introduced into parliament in March 2017. In this case it has taken more than three years to amend the legislation.

Further, if the advertising complaints system were to be legislated, the legislation may need to be updated periodically, further adding to cost. Because self-regulation is a voluntary scheme, no legislation is needed to enforce it. Because no legislation needs to be drafted this is likely to offer a significant saving over direct regulation. However, this cost is not within the main scope of this report, which focuses on the cost of enforcement of regulation rather than the design of the system.

### Option 2

This option considers a hypothetical counterfactual of direct regulation by a newly established government body dedicated to monitoring advertising content and responding to community complaints.

This body would likely function in a similar way to the ASB, though it would pay its staff at government rates. Therefore, it would cost at least as much as Option 1 (if the ACMA were to absorb the responsibility), but would also have to pay fixed costs such as rent for office space and utilities.

Like Option 1, this scenario would require the drafting of legislation, making it more costly than the current regime where the ASB administers the complaints handling system.

## Consistency

A consistent regulatory scheme is one where regulatory processes and practices are equivalent across jurisdictions and mediums. This consistency can create economies of scale as there is no duplication of legislation and enforcement bodies across the jurisdictions.

A consistent regulatory system also reduces uncertainty for consumers, as well as the industry being regulated, as there is one set of rules rather than disparate systems of regulation to navigate.

An example of a regulatory regime where issues of consistency arise is the Australian Consumer Law. This is a federal law yet parts of its implementation rests with each state. This regulatory system was recognised 'performing well' yet having the potential for efficiency gains through improvements by the Productivity Commission (Productivity Commission, 2017).

This was in part a result of the “intrinsic difficulties” of having two commonwealth and eight state and territory bodies administer and enforce the law. The Productivity Commission recognised that the need for the 10 separate regulators required communication, coordination and collaboration to administer the law effectively. This additional effort required to ensure consistency of administration and enforcement in the multiple regulatory systems increases the cost to administer the law compared to a single national regulator.

In the case of advertising, this means that a consistent regulatory scheme would apply across all states and territories in a comprehensive and equal manner across the various formats of advertising (e.g. outdoor, print, online, etc.).

Currently, the ASB administers a complaints handling system with a very high level of consistency – applying the AANA Codes in particular on a national basis across all forms of advertising and as such advertisers and consumers face the same process and meet the same community standards around Australia. A single national body requires only one decision for any particular advertisement, rather than separate decision making across states for the same advertisement.

The ASB also applies the uniform standards set out in the AANA Codes across different advertising mediums – including print, television, radio and online. Similarly to the national regulation, this ensures that advertisers are assured that the same standards are applied across the various mediums on which the advertisement may be presented, which provides them with certainty about what content they should produce.

### **Counterfactual**

If a government regulator were to supersede the current self-regulatory system the regulator would most likely be a national body. This would ensure fairness across different states and ensure the standards are being met across the country, and would mean that the current system would be matched in terms of consistency.

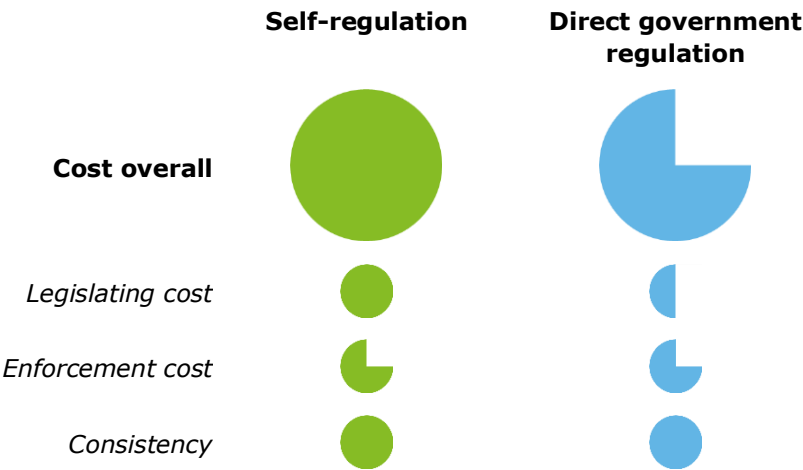
There is some possibility for delegation to the States if the government were to regulate the advertising industry. In the case of the Australian Consumer Law, it is administered and enforced by two Commonwealth regulators and eight state and territory regulators.

It is also possible that direct regulation would not be applied across all mediums. As an example, the ACMA only has jurisdiction over broadcast and no control over print, outdoor or other mediums.

Conclusion

Having regard to the significant cost associated with drafting and the ongoing need to update legislation, and the fact that self-regulation is industry funded, it is unlikely that there would be material savings, even from an economy wide perspective, from switching from the current regulatory regime to a direct regulation regime.

Figure 4.1: Comparing the options, cost



# 5 Compliance

Compliance with a regulatory system is essential to ensure that the community is protected and inappropriate advertising is removed from the public sphere. A low compliance rate significantly detracts from the value of a scheme, even if it is performing well in other dimensions. In essence, unless the scheme is complied with, it is not regulating the industry and is therefore ineffective.

Government regulation is, almost by definition, likely to have a very high compliance rate. This is because once legislation has been written to govern an industry any breach can result in penalties such as fines and even prosecution. In order to avoid these penalties, companies comply with the scheme. That being said, it is not always so simple. There are examples of companies not complying with law (for example ridesharing was not legal when it began), or weighing the odds and deciding not to comply because the penalty is more than offset by the benefits of breaking the law. Poorly designed and unclear regulation can also result in unintended non-compliance.

By contrast, self-regulation relies on more subtle mechanisms to ensure compliance. Industry peer pressure and loss of reputation can be enough to ensure compliance in many cases, but sometimes legislation is needed. The threat of direct regulation can also be a powerful incentive to comply.

A Treasury paper (2000) with guidance on when self-regulation is appropriate found that compliance is unlikely to be an issue in instances where businesses understand that their "...future viability depends not only on their relationship with their current customers and shareholders, but also on the wider community." This is the case in the advertising industry; successful advertisers are the ones who connect with the community and increase sales for their clients. Creating advertisements that leave the community disenfranchised or offended are unlikely to sell product, and thus will lose business.

The numbers reflect this idea, and the ASB has a high rate of compliance with its upheld complaints. Table 5.1 below shows compliance rates with the self-regulatory scheme over recent years.

Table 5.1: Compliance with Ad Board decisions

	2016	2015	2014	2013	2012	2011	2010	2009	2008
Number of cases considered by Ad Board	576	501	545	424	497	438	520	595	547
Number of cases upheld or withdrawn by the advertiser before a decision	114	110	92	78	93	64	78	92	72
Number of advertisements not modified/discontinued	18	13	21	8	3	3	1	0	0
Compliance rate	84%	88%	77%	90%	97%	95%	99%	100%	100%
Number of advertisements not modified/discontinued from one advertiser	11	9	19	7	1	0	0	0	0
Compliance rate (excluding that advertiser)	94%	96%	98%	99%	98%	95%	99%	100%	100%

Source: ASB annual reports, Deloitte Access Economics calculations

Compliance has historically been high; with the exception of 2014 compliance has been above 80% every year. Further, most of the non-compliance in any given year comes from one advertiser – for instance 9 of the 13 ads from 2015 were from one advertiser, and similarly in 2014, 19 of the 21 ads came from one advertiser. Were it not for that one advertiser, compliance would be consistently above 94% (as shown in the final row of Table 5.1). We note that while the number of advertisements not being modified or discontinued has been higher in recent years, it remains very low.

The large majority of advertisers are sufficiently incentivised by the self-regulatory complaints resolution scheme to comply with the findings of the Ad Board. If an advertiser does refuse to comply, the ASB has cooperation from the traditional and online media to remove the advertisement. For instance, television advertising is fully compliant with Ad Board decisions through Free TV which withdraws approval for an advertisement the ASB has deemed non-compliant with the Codes and notifies commercial free to air broadcasters of the withdrawal (consult with FreeTV Australia, 2017).

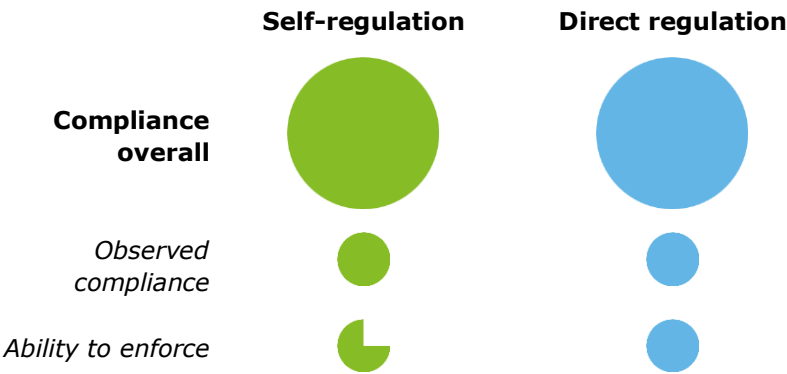
Although non-compliance is unlikely, those that do not comply tend to be small and medium size businesses with local and own premises signage as opposed to large businesses with advertising that the broad community sees. This appears to be because of the costs associated with removing the advertising and the lost investment in not being able to display it, and non-compliance has happened in a small number of instances.<sup>3</sup> This raises a question as to whether there needs to be some stronger form of incentive for the small portion of advertisers who do not comply. However, given

<sup>3</sup> In these cases legislation might be used to reinforce the self-regulatory scheme. For example, the Queensland Government has legislated to provide for deregistration of vehicles if a business refuses to comply with an ASB decision.

overall compliance is relatively high it does not seem like an immediate priority.

Even without regulating, the ACMA could exert stronger influence if there was non-compliance by advertisers by refusing to endorse the advertising codes written by industry which apply to television and radio in relation to community standards. The industry is aware of this, and for the most part, it appears that the threat of direct regulation of community standards in advertising is sufficient to ensure compliance by advertisers with decisions of the Ad Board.

Figure 5.1: Comparing the options, compliance



# 6 Efficiency

Efficiency in resolving complaints and having inappropriate advertisements removed from the public sphere is an important feature of an effective advertising regulatory scheme. Given a primary aim of advertising regulation is to protect the public from inappropriate advertising, the longer a system takes to resolve a complaint and get an inappropriate advertisement out of the public domain where it is causing harm, the less effective it is.

In the context of self-regulation, we think of efficiency as the proportion of complaints responded to, the time taken first to respond to a complaint, and the time to resolve a case (that is, determine whether the advertisement is appropriate, and if not, remove it from the public domain).

When a complaint comes in, the ASB initially triages it to determine if the matter is material enough that it needs to be considered by the Ad Board. If not (for instance if it has already been considered, or is outside the ASB's jurisdiction), the complainant is informed and the complaint is resolved through a referral to the relevant organisation. All complaints are triaged, meaning that 100% of complaints are responded to.

If the complaint is to be considered, the advertiser is notified and given time to respond before the board reviews the case. The Ad Board meets twice a month to consider complaints, and if an urgent matter arises that cannot wait for the next meeting, a teleconference is arranged.

When a complaint is upheld by the board, the advertiser is given a report within 48 hours and has 5 days to respond (remove the advertisement or request an independent review). The complainant is then notified of outcome within 8 to 10 days of a decision.

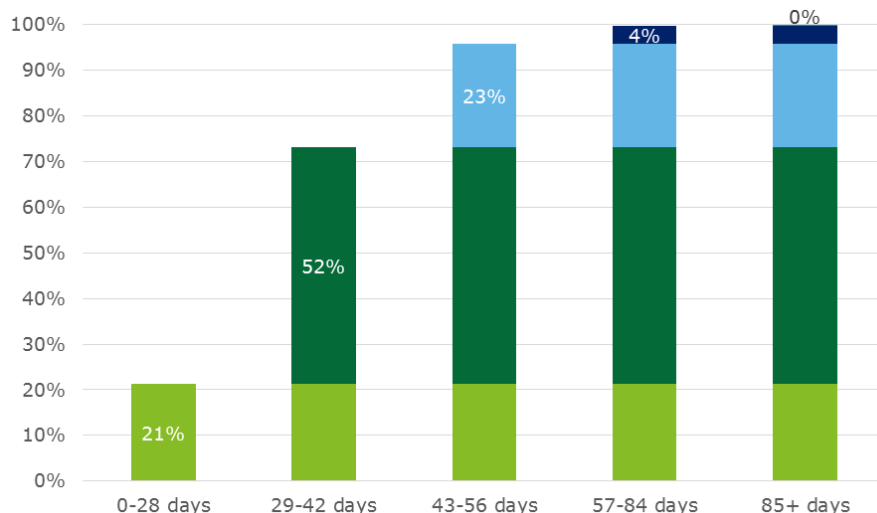
If the complainant or an advertiser is dissatisfied with the decision, they may request an independent review for a fee of \$100 in the case of complainants and between \$1000 and \$2000 for advertisers. This request must come within 10 business days of learning the outcome of the Ad Board's decision, and then the independent review takes additional time to complete.

Given the variability of time taken to process and resolve a complaint, it is not appropriate to consider the ASB's performance in the context of a simple average time taken.

A complaint can be processed in anywhere from 20 minutes to several months depending on its nature, the advertisement, and the evidence base required for the ASB or the Ad Board to make a decision.

Chart 6.1 shows the breakdown of time taken to resolve complaints in 2015. Over 70% of complaints are resolved within 42 days, and over 95% within 56 days (that is, from receipt of complaint to resolution of the case takes under two months).

Chart 6.1: Speed with which ASB resolves complaints, 2015



Source: ASB data

Fast response times are important. If response times are slow, an advertising campaign may have run its course by the time the ASB makes a decision to remove it from the public realm.

## Transparency in regulatory schemes

The operation of a regulatory system should be transparent. Its importance, particularly where self-regulatory systems are in place, has been recognised by the Commonwealth Treasury (2000). A system that is transparent can be monitored by others, such as consumer groups, media and the general public.

With every ruling made by the Ad Board, along with its justification, made public, there is substantial transparency in the existing self-regulatory complaints handling system. This should operate to instil confidence in the regulatory system for the community, especially when the community standards being assessed can be quite subjective.

## Counterfactual

As with cost, we consider that the most realistic counterfactual in relation to the efficiency of the ASB's operations is to consider the ACMA's time spent on cases. This is because the ACMA processes complaints about specific advertising topics, such as tobacco, therapeutic goods and political advertising.

The ACMA annual report shows that in 2015-16, 99.7% of complaints were 'actioned' (meaning the complainant had been notified the ACMA was investigating). The ACMA undertook 156 investigations, which on average took 1.6 months to complete (ACMA, 2017a). However, complaints only get to the ACMA after having been through a television or radio network, or if a network has not responded in 60 days (ACMA, 2017b). So the ACMA annual report presents only part of the picture when it comes to efficiency of the system as a whole, which in reality takes longer given the multi-stage complaint process.



Just over 90% of cases were resolved in three months, and 97% were resolved within six months. By comparison, the ASB had resolved 99.8% of complaints within 84 days (less than three months). As the ACMA's work does not represent a perfect comparison to the work of ASB, and the ACMA is just one body's response for administering direct government regulation, we also consider two other government bodies and their complaint resolution process.

The Australian Broadcasting Corporation (ABC) received 12,224 complaints in 2016. It aims to respond to complaints within 30 days, a target it managed in 85.4% of cases in 2016 (ABC, 2017). Of the 12,224 complaints, just 23 matters were sent to the ACMA, an option for those who did not hear from the ABC or were dissatisfied with the response.

These are results at least as good, if not better than the ASB. However, they are not totally comparable – the ABC can resolve complaints internally. It does not need to go through the process the ASB conducts of notifying the advertiser, waiting for a response, then holding a board meeting to determine the appropriateness of an advertisement, all the while keeping the complainant updated on the progress of the case. Instead it can internally review the complaint and decide whether to remove a program or not, without consulting with other parties. Therefore, it is not appropriate to compare these results perfectly to the ASB. Instead, it can be used as a guide to show that even with the consultative process that the ASB goes through, it is able to resolve a significant portion of cases within the timeframe of the ABC.

Another government body with a similar role is the Commonwealth Ombudsman. In 2016, the Ombudsman resolved 82% of category 3 complaints within 90 days (compared with the ASB's 100%). This suggests the ASB is faster to resolve cases, but again the results are not directly comparable. The Commonwealth Ombudsman deals with some complaints that are fast to resolve, but there are also some which are highly complex, and are not expected to be resolved within 90 days. Figure 6.1 below shows how the Ombudsman performed against the targets set. Overall, 76.5% of complaints were resolved within the target timeframe.

Figure 6.1: Commonwealth Ombudsman efficiency

Complaint Category	Timeframe goal	Complaints resolved	Complaints closed within timeframe	Percentage finalised in timeframe
Category 1	3 working days	13,708	11,851	86.5%
Category 2	2 weeks	15,484	10,386	67.1%
Category 3	3 months	2,364	1,942	82.1%
Category 4	6 months	566	398	70.3%
Category 5	12 months	9	2	22.2%
Total	-	32,131	24,579	76.5%

Source: Commonwealth Ombudsman (2017)

Conclusion

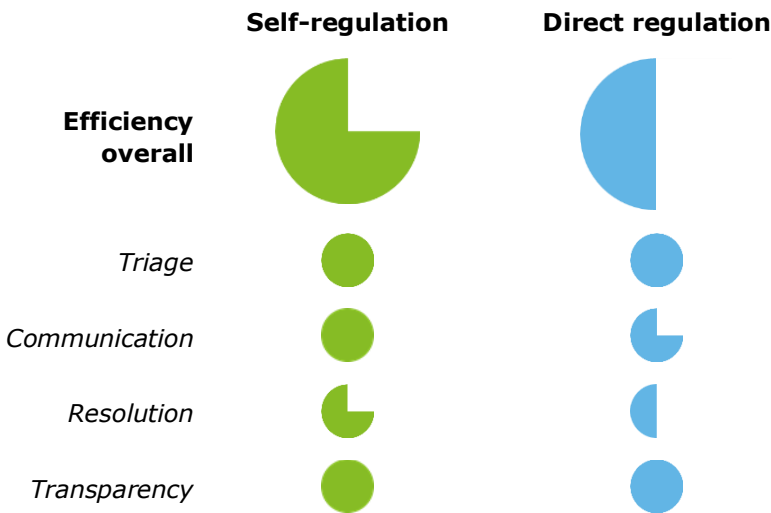
Both self-regulatory and direct regulatory systems are able to respond to complaints in a timely way. The ASB works quickly to triage complaints, and keeps complainants and advertisers well informed of the progress of the case. Despite difficulties in comparison, on balance it appears that self-regulatory schemes may be quicker to resolve complaints than direct regulation schemes.

This is because government regulation often faces more complex process requirements than self-regulation. Following governmental processes and ministerial protocols, particularly when senior officials are required to make decisions can significantly add to the length of time it takes to resolve a complaint. However, it is difficult to be definitive given that there is no directly comparable government regulation scheme to compare the ASB’s processes to.

There are instances where it is important that a complaint is resolved in a short period of time, for instance a short running offensive advertisement where there is a risk it could complete its campaign before the Ad Board resolves the case, and as a result the public is exposed to inappropriate content.

However, it is not feasible to run a complaints resolution system that instantly actions and resolves all complaints (as evidenced by the similar and longer case lengths in the counterfactual), and it appears likely that the ASB works more quickly than would an alternative regime under direct regulation.

Figure 6.2: Comparing the options, efficiency



# 7 Effectiveness

Here we take effectiveness to mean that the complaints process is working well and that community views are properly represented when assessing advertising content. The ASB seeks to ensure the effectiveness of its operations by incorporating members of the community into decision making roles, measuring satisfaction of the community or other stakeholders in the regulatory system, and conducting other formal research into community values and standards.

The ASB takes into account community views through an Ad Board with a representative membership. The Ad Board includes people from a range of age groups and backgrounds and is gender balanced. This diversity is designed to ensure decisions are representative of community standards in Australia.

The ASB has also commissioned research about community standards in advertising. These reports by Colmar Brunton Social Research have been done for 10 years, the latest in 2017. Based on surveys of over 1,200 people they have found:

- 94% of people agree or were neutral about the statement Decisions of the ASB are fair and well considered
- 94% of people agree or were neutral about the statement The ASB makes decisions in line with community standards
- 94% of people agree or were neutral about the statement Decisions of the ASB are independent
- 95% of people agree or were neutral about the statement The ASB take every complaint they receive seriously

These numbers do not include the 16-23% who said 'don't know'. Between 18-25% of responses were 'neutral'. However, while attitudes to the ASB were overwhelmingly positive, community perceptions of advertising in general do suggest that community standards are not always being met. In 2017, almost one in five (19%) of survey respondents said yes, they had recent exposure to unacceptable advertising, with sex, sexuality and nudity the most common area. This highlights the importance of maintaining an effective complaints handling system over time.

The ASB also directly surveys users of the complaints handling system. The links to these surveys are embedded in the final case notification provided to both public complainants and advertisers raising cases to the Advertising Claims Board. When the public complainants were asked whether the Ad Board is broadly representative of the Australian community, 27.8% agreed or strongly agreed.

The ASB survey also asked about the user experience with the entire complaint adjudication system. In response to this question, over 55% were satisfied or very satisfied with this to almost two-thirds (65%) expressing they were either satisfied or neutral.

The survey data is from a small sample of 86 responses collected over the 2015-16 financial year yet could suffer from a bias as a result of the significant proportion of respondents who had their complaint dismissed. That is, it is reasonable to think that those who have their complaints

dismissed are less likely to think that the process was appropriate, as they will be unhappy that their complaint was dismissed.

This appears to be supported by an analysis of the survey results. Of the 53 respondents who had their complaint dismissed, only 28% were satisfied or very satisfied with the process. Meanwhile, all except one respondent who had their complaint upheld were either satisfied or very satisfied with the system, representing 97% of the total number of respondents.

In a similar survey of the advertisers who had complaints brought against them by the ASB, 7 out of 9 advertisers who responded said that they were satisfied or very satisfied with the self-regulatory system.

Thirdly, over the last decade, the ASB has instigated a regular research program where the decisions of the Ad Board are tested against the views of the broader community<sup>4</sup>.

The research program has provided confirmation that the Ad Board's decisions are broadly aligned with the views of the community, assists the Ad Board in ensuring decisions reflect community standards and provides capacity to track changing community views on the broad code issues such as language in advertising.

The research also provides evidence for ASB to feed into the AANA's code development work identifying where there may be opportunities to update the codes. It should be noted though, that this analysis is focused on the enforcement of community standards rather than the determination of the community standards. Yet enforcement requires a comprehensive understanding of the community standards.

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<sup>4</sup> Specifically, the ASB has undertaken community standards research conducted by Colmar Brunton Social Research in *Discrimination and vilification in advertising* (2008), *Community perceptions of violence in advertising* (2009), *Community perceptions of sex, sexuality and nudity in advertising* (2010), *Community perceptions* (2012), *Community perceptions of exploitative and degrading advertising* (2013) and *Advertising to Children* (2016).

## Moran Prizes – Poster (2017)

In early 2017 a series of large banners along the front glass windows of a Sydney street promoted the annual Moran Art Prizes competition and exhibition. One of the images displayed (second from the right in the below image) portrayed two men at a polling booth, one of whom is wearing speedos with the words “p\*\*sy magnet” on them.

The ASB received a complaint that this breached Section 2 of the AANA Code of Ethics by having an unnecessarily sexual image on display in a public place.

When the advertiser was notified of the complaint, they recognised some members of the community may be offended and so placed a sticker over the offending words to cover them.

The Ad Board then considered the advertisement and determined it was in breach of the Code. First, it considered whether the advertisement treated the issue of sex, sexuality and nudity with sensitivity and concluded it did, given the man is not portrayed in a sexual manner and is wearing swimwear in a standard manner.

However, the board also noted that the advertisement was clearly visible to passers-by including children, and determined that in this context, the language was inappropriate.

They upheld the complaint, and given the advertiser had already censored the offending aspect of the image no further action was required.



### Counterfactual

We consider that the ACMA provides a reasonable counterfactual for direct regulation in relation to the category of effectiveness.

In 2015, the ACMA undertook a survey to understand the level of stakeholder satisfaction with its operations. The survey involved a variety of stakeholder groups (telecommunications companies, general public and politicians) rather than the users of the complaints handling system. This does limit the comparability to the ASB survey of users of the complaints handling system. The stakeholder survey also does not specifically provide evidence of effectiveness in terms of ensuring that community views are adequately represented within the regulatory system. However for practical purposes it provides a roughly comparable source of evidence. From 92

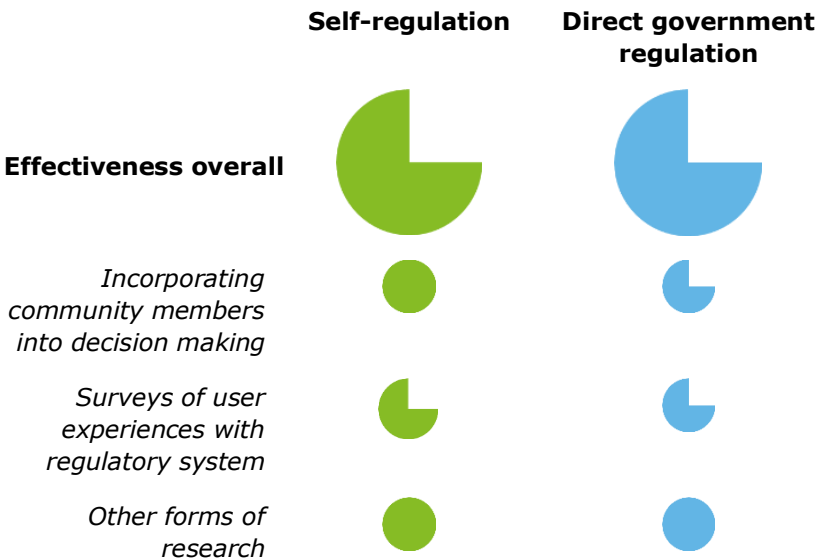
completed surveys from a range of stakeholders, including government and industry, it was found that 64% were satisfied with the ACMA (with 21% dissatisfied) (McNair Ingenuity Research 2015). This is comparable to the 65% of respondents who were satisfied or felt neutral about the ASB self-regulatory system. This has led to both the ACMA and the ASB receiving green lights in Figure 7.1 for achieving overall satisfaction with their respective regulatory systems.

ACMA stakeholders were also asked if the way that the ACMA engages with their organisation has become better or worse over the last 12 months or if there has been no change. The majority of respondents (57%) believed there was no change with 11% feeling the way the ACMA engaged stakeholders became worse over the previous 12 months, leaving 32% feeling ACMA’s engagement had become better in the same period.

The ACMA does not have a community consultation program, although it does undertake research and reporting to ensure its regulation activities are consistent with community perceptions and values. While the ACMA does not currently have a community consultation program, there does not appear to be any particular reason why it could not adopt one in the future.

The similar ways in which the ASB and the ACMA undertake research to ensure community values are adequately represented in decisions means that both bodies score well for effectiveness. While there are clear limitations to the survey data being used – consisting of small samples and selection bias – they do provide a useful data point to assess the effectiveness of both bodies.

Figure 7.1: Comparing the options, effectiveness



# 8 Responsiveness

The advertising industry is constantly changing and responds quickly to new developments in consumer trends and technology. National advertising through television channels or radio broadcasts have been complemented by new platforms that advertisers can use – including Facebook, Instagram and online streaming.

In 2015-16, online advertising made up a third of total advertising expenditure, and it is forecast to increase to over a half of all spending by 2019-20 (Department of Industry, Innovation and Science 2016).

An effective regulatory regime will be required to quickly adjust in response to the changing nature of the advertising industry. As the popularity of new advertising channels (such as adverts on 'TV-on demand' and social media) increases, it will be important for regulation to be medium agnostic. Therefore it becomes important to consider if the self-regulatory system of resolving community concerns about standards in advertising would be able to react more quickly in the evolving market than a regime of direct regulation.

In addition to the regulatory system's responsiveness to developments in the advertising industry, it is important to consider the system's responsiveness to changing community attitudes.

This type of responsiveness involves monitoring changes in societal values over time. This requires an ability to apply the regulatory principles to a slowly changing structure of 'community standards'.

## **Responsiveness to changes in Advertising industry**

The advertising self-regulation system has shown it can quickly adjust with the evolution of the advertising industry. At the time of the ASB's inception in 1998, the self-regulatory AANA code the ASB administered related only to advertising on traditional media (free to air television and paid television, radio, print cinema and outdoor) which was shown to broad national audiences. However the nature of self-regulatory Codes and schemes mean that they can more quickly be evolved as well as providing the ability for the administrator to interpret the codes more widely to suit emerging issues.

In 2006 the ASB started receiving complaints about internet advertising and immediately started considering those complaints.

In 2007 the AANA amended all the AANA Codes to expand their ambit from 'advertising' to 'advertising and marketing communications'. This broadening of the codes was in response to changes in the media landscape and the increasing opportunities available to advertisers and marketers. The amendment was designed to ensure that all advertising and marketing communications, including those on the internet and social media sites were clearly within the ambit of the AANA Codes and the self-regulatory system.

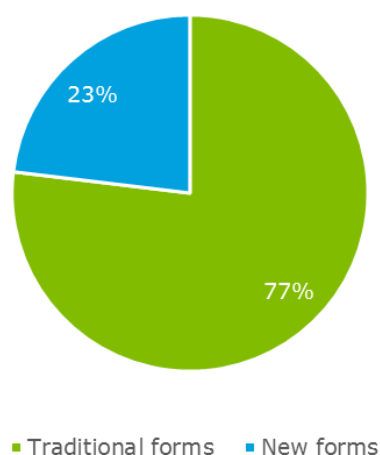
Then in 2012 the ASB became the first advertising regulatory body in the world to consider complaints about user generated content on social media sites.

AANA extensively reviewed the Code of Ethics in 2010 and 2011 and consequently the Code of Ethics was expanded in 2012. This ensured

broader application regarding the portrayal of people in advertising as well as clarifying that the codes apply to all advertising or marketing communication activities whether or not 'payment or other valuable consideration' is tendered. This ensured the codes remain relevant in an increasingly digital media landscape and that the ASB could receive complaints about advertising in any medium. The ASB complaints system and the AANA codes it enforces now extend to new forms of advertising including digital media (including internet, microsites, mms and catch up TV), new outdoor formats (sky banners to out of home TV), and social media (YouTube, Facebook, Instagram and Twitter).

As these new formats become increasingly dominant, the importance of the regulation being responsive to different advertising mediums will increase. Chart 8.1 shows that nearly one quarter of advertising complaints to the ASB are from these new channels.

Chart 8.1 Breakdown of complaints by traditional and new advertising mediums\*



Source: ASB records

\*Traditional forms: TV free to air, poster, radio, Pay-Tv, billboard, print, cinema, outdoor, mail. New forms: internet, Facebook, transport, email, out of home TV, TV on demand, promotional material, Instagram, mobile billboards and other internet advertising

## Responsiveness to changing community standards and expectations

The responsiveness of the self-regulatory system includes not only the mediums of the advertisement, but also how complaints are received. In 2006 the ASB modernised its complaints system, enabling it to receive online complaints. In 2013 a mobile and tablet friendly complaint lodgement facility was added.

Also, the ability to change codes and guidelines quickly in response to changing community attitudes favours a self-regulatory system, which is more flexible than a system of direct regulation by government. The ASB's ability to interpret the codes to reflect community judgements, as well as its role in providing input into the code evolution process through decisions the Ad Board makes and issues it sees, means that a self-regulation model is



likely to be quite responsive to changing community standards and expectations. For example, the Ethics Code says:

“Advertising or marketing communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.”

There is a lot of judgement involved in determining what is ‘appropriate in the circumstances’ or what is ‘strong or obscene language’. While self-regulatory regimes are able to exercise judgement, direct regulation regimes are, on average, more likely to be bound by legislative instruments that can be slow to react and change over time.

## McDonald’s – Social media (2016)

This advertisement on Facebook portrays a woman and child at McDonald’s. As the user scrolls past the advertisement a hand reaches in from the side of the frame to take a single fry from the box.

Complaints received by the ASB claimed that this advertisement was directed at children, and thus McDonalds was in violation of the AANA Code of Ethics and the Quick Service Restaurant Initiative.

The advertiser responded that the advertisement was not directed at children by virtue of being on Facebook (only people over the age of 13 are able to register for Facebook), and that the language used speaks to adults (for instance, referring to ‘the little ones’).

The Ad Board determined that the advertisement complied with the relevant Codes and the QSRI and dismissed the complaints. The reasoning put forward was that the theme, visuals, language and medium used were not directed towards children.

They noted that although the advertisement does feature a ‘Happy Meal’ (a product designed for children) and a child eating at McDonald’s, the language is directed at adults, referring to children in the third person.

Finally, they noted that the advertisement is promoting the ‘Create Your Taste’ product, with a value-add of a Happy Meal – a concept appealing to adults and not children. Therefore, the Board concluded that the advertisement did not breach the Codes or the QSRI and dismissed the complaints.



Counterfactual

If the ACMA were to take the role of the ASB, there would of course continue to be a need to respond to the changing nature of the advertising industry. Under direct regulation, legislation may need to be passed to allow the ACMA to regulate different mediums of the advertising industry.

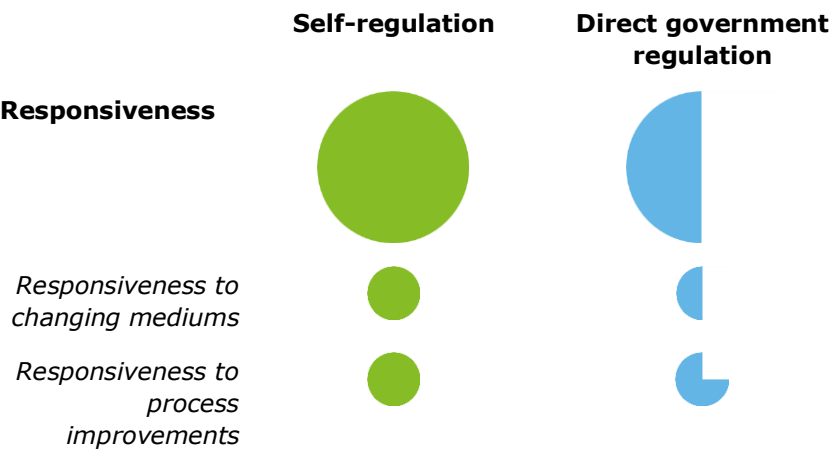
This is a plausible scenario as there are current examples in which the ACMA has not responded quickly to changing mediums in its regulatory environment. For instance, the ACMA can effectively enforce a Disclosure Standard on radio stations that received payments from companies in exchange for positive comments without telling listeners. Yet the Disclosure Standard covers only commercial radio licensees and does not extend to online radio stations or podcasts.

The ACMA regularly investigates complaints that television broadcasts are biased, inappropriate or unfair but none of these minimum standards apply to online shows that are streamed or downloaded. For example blackout periods for political advertising near an election does not apply to catch up TV or streaming television.

Conclusion

In terms of responsiveness to changing mediums and media in the advertising industry, the advertising self-regulatory system appears more flexible in its ability to apply its regulatory remit to contemporary forms through periodic updates to the codes it enforces and because those codes are written in a manner that ensures they can be interpreted and applied in a broad sense to achieve a code’s objectives. When comparing both self-regulation and government regulation responsiveness to process improvements, the AANA Codes and ASB have proven to be adaptable in changing community standards and expectations through flexible operations and codes.

Figure 8.1: Comparing the options, responsiveness



# 9 Conclusion

Advertising is an effective tool to spread information, foster innovation and improve the competitiveness of markets. An effective regulatory regime ensures that the benefits of advertising can be maximised.

This report has considered whether the complaint handling component of the self-regulatory system is more effective than direct regulation by government in relation to the assessment of community standards in advertising through complaints handling.

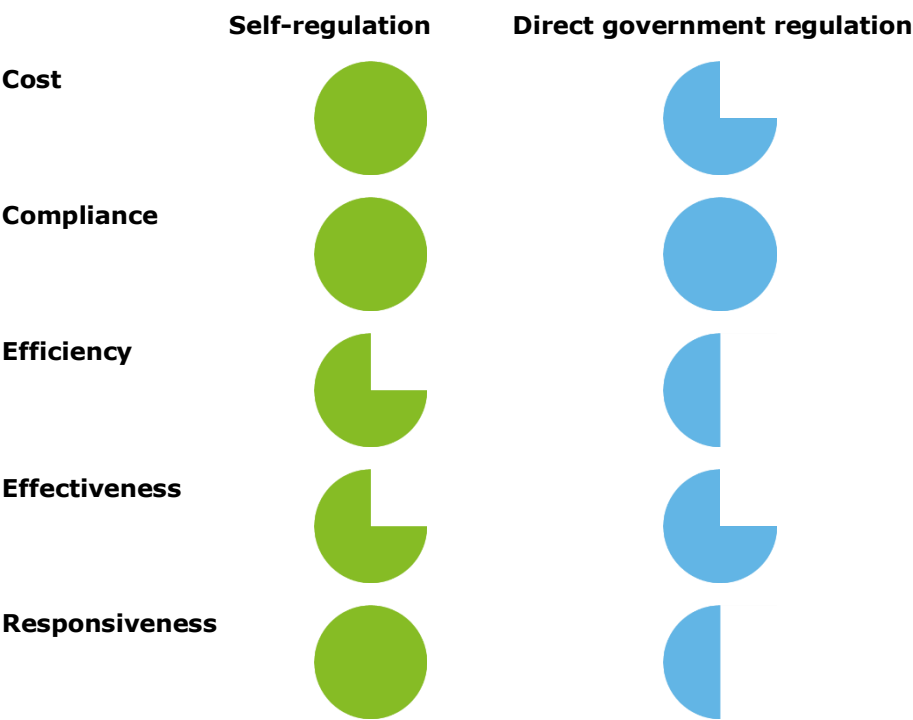
The analysis explored how complaints handling in the advertising industry is regulated rather than simply looking at the level of regulation. This is an important issue as regulation can be considered pejoratively as 'red tape' and holding back economic activity. Regulation can also be important to prevent harmful actions or decisions with unintended side effects by businesses.

Yet it is also tempting for government to over regulate an industry as the businesses bear the impact of regulation, while the government gains the benefit of being seen to take action. Only with detailed analysis of specific industries can the appropriate balance be found.

In Chapter 3 we found that from a theoretical perspective, self-regulation of complaints handling appears to be the more appropriate regulatory solution for this problem. This was because, amongst other things, the risk and impact on the community was low, there is a history of consistent compliance and the industry is competitive.

We compared the options across five criteria: cost, compliance, efficiency, effectiveness and responsiveness. Figure 9.1 below shows how the regulatory options compare across these criteria.

Figure 9.1: Regulation scorecard for the advertising industry



We find that on balance, self-regulation of complaints handling is more likely to be effective than direct government regulation across three dimensions, and not less effective in the remaining two.

Therefore, in our view in this case self-regulation appears to be a better choice than direct regulation by government.

The current self-regulatory complaints handling system for community standards in advertising appears to be working effectively and in the best interests of Australian consumers.

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