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Working Paper – Draft 1

Best Practice Advertising Regulation Checklist

In November 2014 the 21 Asia-Pacific Economic Cooperation (APEC) Leaders, including Xi Jinping, Vladimir Putin and Barack Obama, signed up to a Leaders' Declaration that included the following:

'We endorse the APEC Action Agenda on Advertising Standards and Practice Development to promote alignment of advertising standards and reduce the cost of doing business across the region'

The 'APEC Action Agenda on Advertising Standards and Practice Development' (1) is an outstanding document that extols the benefits of best practice advertising self-regulation and has a rigorous timetable for future action. The opening paragraph of the Action Agenda recognizes the economic importance of advertising and of best practice advertising regulation:

'As an important driving force in guiding consumption, expanding domestic demand and stimulating economic growth, advertising is a critical way of helping companies and industries across the APEC economies grow. Advertising enhances brand recognition, fosters competition, increases cross-border trade and provides for information and educational exchanges that build modern industrial economies. Regulatory and self-regulatory frameworks for advertising help achieve innovation, productivity and growth in all goods and services sold across and within APEC economies.'

The 'APEC Action Agenda on Advertising Standards and Practice Development' (1) lists four challenging tasks for 2015. One of those tasks is to 'Develop an advertising regulatory checklist in 2015 that details key elements of a regulatory framework that facilitates trade and investment and protects consumers.'

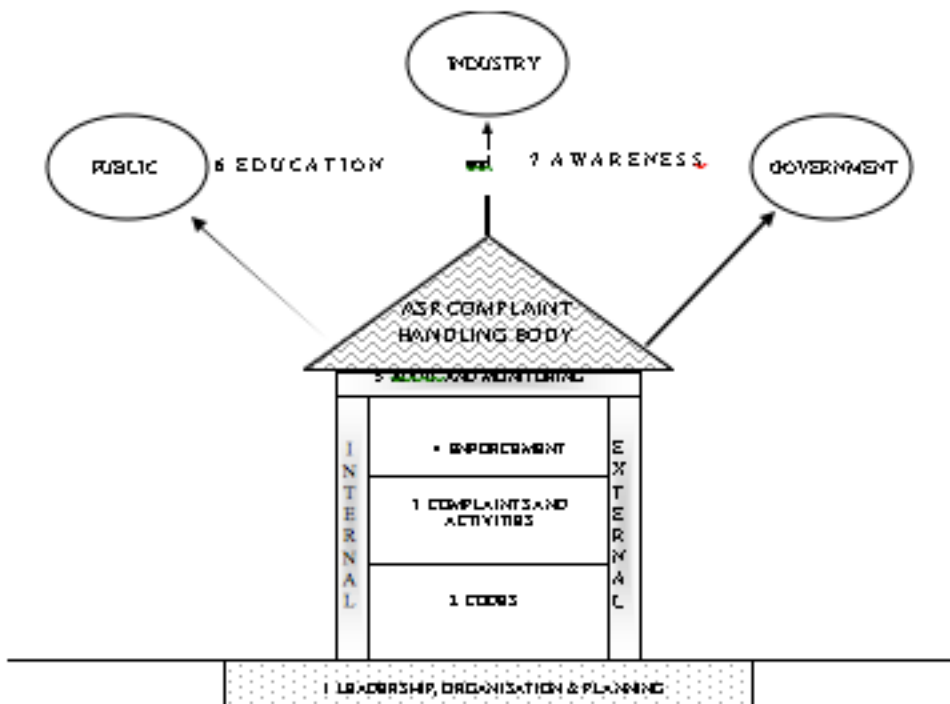
This Working Paper is a draft of a possible checklist. It is derived from previous checklists devised by the Foundation for Advertising Research (FAR), based on studies (2) by Debra Harker, Michael Harker and Glen Wiggs, and the European Union ‘Madelin Report’ (3). These checklists have been adapted to comply with other elements of the APEC Action Agenda (1), the APEC report ‘*Voluntary Advertising Standards and Regulatory Approaches in Advertising in APEC Economies*’ (4), the outcomes of the Hanoi APEC Dialogue on Advertising Standards in November 2012 and the APEC Advertising Standards Forum in Beijing in August 2014.

This is a Working Paper only and we encourage feedback and comment. When received we will proceed to Draft 2 and if necessary Draft 3. We will then submit it to the APEC Advertising Standards Steering Committee for consideration. Please send your comments to gwiggs@ffar.org by 29 May 2015.

Background

In 2003 Debra Harker, after researching best practice advertising regulation for some years, published a normative model of best practice advertising self-regulation (2) that contained seven components.

The Seven Components of Best Practice Advertising Self-Regulation



Subsequently, the European Advertising Standards Alliance (EASA) developed the '*10 Principles for Effective Advertising Standards*' that incorporated the Harker seven components and it became the accepted standard for best practice advertising self-regulation in Europe.

The Hanoi Dialogue in 2012 adopted the EASA '*10 Principles for Effective Advertising Standards*' as a basis for best practice advertising self-regulation in APEC economies. A considerable part of the Dialogue was spent on the 10 Principles and a consensus developed that they were also appropriate for the APEC region. The subsequent APEC report "*Voluntary Advertising Standards and Regulatory Approaches in Advertising in APEC Economies*" (4) discussed the 10 principles at length. It also included a survey of adherence to the 10 Principles by the economies that had Advertising Self-Regulatory Organisations (SROs). We have made extensive use of this report.

There are two parts to best practice advertising regulation – Government regulation and self-regulation. It is not an either/or situation, as even the most sophisticated self-regulatory regimes require a regulatory framework. Fraudulent advertising requires a Government regulator to prosecute offenders. Medicines are strictly regulated by Governments and usually require registration to ensure safety. Claims concerning efficacy need to be accurate and truthful. It is therefore appropriate that the restrictions and conditions extend to advertising. However best practice regulation requires close cooperation between the Government regulator and industry self-regulator.

This checklist includes a section on Government regulation. The APEC Report '*Voluntary Advertising Standards and Regulatory Approaches in Advertising in APEC Economies*' (4) contains a summary of areas regulated by APEC economies. An interesting result was, although there is Government regulation regarding untruthful advertising in broadcast advertising in all APEC economies, this did not extend to the print and online media where the coverage was 90.5% and 95.2% respectively. Included in the checklist are various sectors where we consider Government regulation is required.

Much of the draft checklist regarding self-regulation refers to procedures; particularly in regard to the Codes (which relate to particular products, services and areas of concern such as misleading advertising, alcohol advertising, or advertising to children). A similar approach is taken with the Government regulation. We use two base documents to measure to what extent Government regulation of advertising meets best practice. The OECD paper '*Industry Self-Regulation: Role and Use in Supporting Consumer Interests*' (5), published in March 2015, discusses the various ways Governments can support SROs and provide a regulatory framework within which the SRO operates. Of importance is legislation regarding misleading and deceptive advertising, and advertising concerning the health and wealth of consumers. Although self-regulation can deal with legitimate traders, legislation is required for those who undertake fraudulent advertising with the intent of deceiving consumers.

The second document is the “*APEC Guidelines for the Preparation, Adoption and Review of Technical Regulations*” (6). This is a comprehensive document that details the process Governments should follow when planning regulation.

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SECTION I

Checklist for a Best Practice Advertising Self-Regulatory Organisation

1. Universality of the Self-Regulatory System

The system should apply without exception to all three parts of the industry - advertisers, advertising agencies and media. This is called tripartite. All three parts should be actively engaged in supporting and running the self-regulatory organisation (SRO). Additionally there would be actual and moral support and commitment from the wider industry.

With the advent of new media, new forms of promotion have been developed. These include Internet, email and SMS advertising, viral marketing, word of mouth marketing, advergames, social media, etc. There are also the traditional marketing tools of packaging, in-store and sales promotions and sponsorship that have reached a new level of sophistication. Some of these activities fall within the traditional definition of advertising and come within the ambit of the Cs but others do not and are completely unregulated. From a consumer perspective they are all advertising and therefore covered in this checklist.

It is quite usual for a self-regulatory regime to replicate provisions in Government regulations. In order to prevent complaints about advertisements being considered simultaneously in different jurisdictions (called double jeopardy) arrangements need to be made by the SRO with other jurisdictions.

1.1 Does the SRO operate in a **tripartite model**?

1.2 Do all major sectors of industry give **actual** and **moral** support, and **commitment** to the SRO?

(a) Actual support?

(b) Moral support?

(c) Commitment?

1.3 Do all sectors of the industry accept the Codes as the **industry standard** to which all advertising should conform?

1.4 Do all sectors of the industry agree to **abide by the decisions** of the complaints adjudication body?

1.5 Does the SRO have **cooperation arrangements** with other regulatory and self-regulatory agencies to redirect complaints to the correct body?

- (a) Regulatory agencies?
- (b) Self-regulatory agencies?

1.6 Do those arrangements include the **avoidance of double jeopardy** in the event of a Government agency and the SRO receiving the same complaint?

1.7 Does the SRO have jurisdiction over **all sectors** of advertising?

Including

- (a) Brand advertising?
- (b) Retail advertising?
- (c) Medicine advertising?
- (d) Financial advertising?
- (e) Government advertising?
- (f) Political advertising?
- (g) All media including SMS, USG content and other forms of new media?
- (h) In-store advertising?
- (i) In-store promotions?
- (j) Other forms of marketing communication such as packaging?

2. Sustained and Effective Funding

The system should be funded properly and sustainably by the industry so that it is properly resourced to operate effectively. The preferred method of funding is a levy-based system where a small percentage of the cost of placing the advertisement is collected (usually by agencies) and remitted to the SRO. Some jurisdictions have a subscription for members of the SRO. It also requires commitment from advertisers, agencies and media. Ideally all three should be members the SRO and take responsibility for running and funding the organisation as partners.

2.1 Is the SRO **sufficiently funded** to enable it to provide a level of service in accordance with best practice standards?

2.2 Is there a **levy-based system** of funding?

2.3 If there is a levy-based system is it paid on all **kinds of advertising**?

Including:

- (a) Brand advertising?
- (b) Retail advertising?
- (c) Medicine advertising?
- (d) Financial advertising?

- (e) Government advertising?
- (f) Political advertising?
- (g) All media including SMS, USG content and other forms of new media?
- (h) In-store advertising?
- (i) In-store promotions?
- (j) Other forms of marketing communication?

2.4 Do members of the SRO pay a **subscription**?

2.5 Do all major sectors of industry give **financial support** to the SRO?

3. Independent, Efficient and Resourced Administration

The system should be managed in a cost-efficient and business-like manner with defined standards of service. These include having independent secretariat and strategic action plan. Although the organisation is owned by industry it should act independently for the benefit of the consumer. It should also have the appearance of being independent.

3.1 Is the SRO **sufficiently resourced** to meet its objectives?

3.2 Is there a **written Constitution/Rules** available to everyone (e.g. on the website)?

3.3 Is the Secretariat **independent** of industry, government and sector interests

- (a) Industry?
- (b) Government?
- (c) Sector?

3.4 Is the SRO located in **independent premises**?

3.5 Is the SRO **consumer focused**?

3.6 Is the general approach when dealing with **all** stakeholders (including consumers) **flexible** and **non-bureaucratic**?

- (a) Flexible?
- (b) Non-bureaucratic?

3.7 Does the SRO have good and professional **relationships** with the following **regulatory organisations**:

- (a) Other self-regulatory organisations?
- (b) Other co-regulatory organisations?

(c) Government regulatory organisations?

3.8 Does the SRO have good and professional **relationships** with the following **organisations**:

- (a) Advertisers?
- (b) Advertising agencies?
- (c) Media?
- (d) Other industry members?
- (e) Other industry groups?
- (f) Government?
- (g) Consumer Government agencies?
- (h) Health Government agencies?
- (i) Financial Government agencies?
- (j) Other Government agencies?
- (k) Consumer groups?
- (l) Health groups?
- (m) Other agencies or groups?

4. Universal and Effective Codes

The Codes should be based on universally accepted International Chamber of Commerce (ICC) ‘*Codes of Marketing and Advertising Practice*’, apply to all forms of advertising and are widely available. The Codes should be written in plain unambiguous language. They should reflect national culture and values, law and commercial practices. There should be specific Codes to deal with sensitive areas such as medicines, financial, alcohol and advertising to children. It is important to involve all stakeholders in the development and revision of the Codes. These stakeholders include Government agencies; academia; relevant business sectors; ethical authorities; lawyers; and consumer, family, youth and other relevant citizen organisations. There should be a commitment by industry to abide by the Codes both in the spirit and the letter.

4.1 Are the Codes available in **written** form?

4.2 Are the Codes based on the **ICC Codes** of Marketing and Advertising Practice?

4.3 Are the Codes easily **accessible** to everyone?

4.4 Are there **specific** Codes for different areas of concern?

- (a) Children?
- (b) Alcohol?
- (c) Therapeutic?

- (d) Financial?
- (e) Food?
- (e) Environment?

4.5 Are the Codes written in **unambiguous** plain language?

4.6 Do the Codes reflect national **culture**, **law** and **commercial** practices?

- (a) National culture?
- (b) Law?
- (c) Commercial practice?

4.7 Are the following stakeholders involved in the **development** of the Codes:

- (a) Government agencies?
- (b) Academia?
- (c) Business sectors?
- (d) Ethical authorities?
- (e) Lawyers?
- (f) Consumer, family, youth organisations?
- (g) Other relevant citizen organisations?

4.8 Are the Codes **revised** on a regular basis?

4.9 Do the Codes **require advertisements** to:

- (a) Comply with the law?
- (b) Not mislead?
- (c) Be socially responsible?
- (d) Take a duty of care when advertising to children?
- (e) Respect fair competition?
- (f) Not impair public confidence in advertising?

4.10 Are advertisements in all **mainstream and traditional** media covered by the Codes?

4.11 Are advertisements in all **local** media covered by the Codes?

4.12 Are advertisements in **new media** covered by the Codes?

(Note: New media includes Internet, email, SMS, viral marketing, word of mouth marketing, advergames, social media.)

4.13 Are **all kinds** of advertising covered by the Codes?

Including:

- (a) Brand?
- (b) Retail?
- (c) Classified?
- (c) Advocacy?
- (d) Government?
- (e) Political?

4.14 Are product names, packaging, merchandising, sales promotions, sponsorship and new forms of promotion arising out of the **new media** (e.g. advergames) covered by the Codes?

- (a) Product names?
- (b) Packaging?
- (c) Merchandising?
- (d) Sales promotions?
- (e) Sponsorship?
- (f) Promotion arising from new media?

4.15 Is there a **commitment by industry** to abide by the Codes both in the spirit and the letter?

- (a) Abide to letter?
- (b) Abide in spirit?

5. Appropriate Advice and Information

The system should be able to provide services such as copy advice and advice on general interpretation through precedents, guidance notes and industry education. One aspect that distinguishes self-regulation from other regulatory systems is education of the industry. Education is an ongoing process and generally advertisers, agencies and media are keen participants.

Self-regulatory organisations should have structured seminar and training programmes and availability of decisions of the adjudication panel to industry members. Advertising Alerts to inform industry of important decisions of adjudication panel and new provisions in Codes are also important. The publication of all decisions is a key part of the education programme to ensure precedents are available for the guidance of industry.

A copy advice service should be available free to industry as they are primarily responsible for adherence to the Codes. For sensitive products such as alcohol and therapeutic products a pre-approval system operates in many jurisdictions. The Philippine SRO has a very sophisticated pre-approval system for all types of advertising. Media should ensure that all ads comply with the self-regulatory

Codes and relevant legislation prior to publication or broadcast. In some jurisdictions all television ads must be pre-approved by an independent body.

5.1 Are there structured **seminar and/or training programs for industry** on the Codes and important decisions of the adjudication panel?

(a) Codes?

(b) Adjudication panel decisions?

5.2 Are **regular communications** (such as advisories, alerts or information) sent to industry by the SRO?

5.3 Does the SRO or associated organisation provide **free copy advice** to advertisers, ad agencies and media?

5.4 Does the SRO or associated organisation provide a **pre-approval service** for ads for **alcohol, therapeutic or other product** categories?

(a) Alcohol?

(b) Therapeutic?

(c) Other products?

5.5 Do the television, radio, newspaper, magazine, outdoor, letterbox, online, and new media have a **screening process** to ensure ads comply with the self-regulatory Codes and the law?

(a) Television?

(b) Radio?

(c) Newspaper?

(d) Magazine?

(e) Outdoor?

(f) Letterbox?

(g) Online?

(h) New media?

5.6 Does the television media require all ads to be independently **pre-approved** prior to broadcast to ensure they comply with the self-regulatory Codes and the law?

6. Prompt and Efficient Complaint Processing

The system should be able to handle complaints promptly and efficiently. Decisions of the adjudication panel should be in writing and contain the justification and reasons for the conclusion. They should be sent to all parties to the complaint. All decisions should be released publicly and be available on the

SRO website. Not only should consumers be encouraged to complain but it should be easy to complain and for consumers to make enquiries. Use should be made of websites and toll-free telephone numbers. An advantage of self-regulation is its ability to process complaints faster than Government regulation; it is important that this occurs. Timeliness is a very important factor, as justice delayed is justice denied in the fast moving world of advertising.

Many complaints lack merit for various reasons such as words have been misheard, there is objection to the sale of the product although it is legal to do so, no reasonable person would consider there is a breach of the Codes, etc. Many jurisdictions have a filtering process to ensure that complaints have a prima facie or possible breach of the Codes before being considered. However there should be an appeal system to ensure fairness both actual and perceived.

It is not uncommon for complainants to send a complaint to the wrong authority so there should be reciprocal arrangements with other organisations to redirect complaints.

6.1 Is it **easy for consumers** to complain?

6.2 Are consumers **encouraged** to complain?

6.3 Is there a toll-free number for **consumers to make enquiries**?

6.4 Can complaints be made to the SRO by **mail, website, email and SMS**?

(a) Mail?

(b) Website?

(c) Email?

(d) SMS?

6.5 Are complaints by **consumers free**?

6.6 Are there **reciprocal arrangements** with other regulatory and self-regulatory authorities to redirect complaints made to the wrong authority?

6.7 Are all decisions **released publicly**?

6.8 Are all decisions **available** on the SRO website?

6.9 Is there a **filtering system** for filtering complaints (e.g. no prima facie case)?

6.10 Is there an **appeal system** for complaints that have been filtered out?

6.11 Are complaints processed in a **timely manner** without compromising fairness?

6.12 Are most complaints processed with **20 working days**?

6.13 Are complaints processed **significantly faster** than the courts?

7. Independent and Impartial Adjudication

The system should be able to judge complaints efficiently, professionally and impartially. An independent complaints panel is essential. At least 50% of the panel should be independent with no background in the media or advertising. Those independent persons should have diverse backgrounds and skills but importantly should have the ability to fairly and impartially assess and adjudicate on evidence and be able to interpret and understand communication. Independent members should be selected from nominations from Government agencies; consumer and citizen groups; and from expressions of interest received from public advertisement.

All adjudications should comply with the rules of natural justice and a right of appeal is important.

7.1 Is the adjudication panel **separate and independent** from the Board of the SRO?

- (a) Separate from Board?
- (b) Independent of Board?

7.2 Are at least 50% of the **adjudication panel** public (non-industry) persons?

7.3 Is the **chair** of the adjudication panel a **public person** and of **high public standing** ?

- (a) Public person?
- (b) High public standing?

7.4 Are those **public persons** selected from expressions of interest from persons nominated by Government agencies, ethical authorities, consumer or citizen organisations, or replies to public advertisements?

- (a) Government agencies?
- (b) Ethical authorities?
- (c) Consumer or citizen organisations?
- (d) Replies to public ads?

7.5 Do those public persons have **diverse backgrounds** and **expertise** on **interpreting** and **understanding communication**?

- (a) Diverse backgrounds?
- (b) Expertise on interpreting communication?
- (c) Expertise on understanding communication?

7.6 Do those public persons have the ability to assess evidence **impartially**?

7.7 Do the industry persons on the adjudication panel have the ability to assess evidence **impartially**?

7.8 Do all adjudications have a **written decision**, which is sent to **all parties** to the complaint?

- (a) Written decision?
- (b) Sent to all parties?

7.9 Is **all evidence** in a complaint considered by the complaints panel?

7.10 Is special attention paid to ensure all adjudications adhere to the principles of **natural justice**?

7.11 Is there a **right of appeal** of adjudications by any party?

8. Effective Enforcement

The system should have a range of sanctions to ensure compliance such as media agreement not to publish or broadcast offending ads. It is a common criticism of self-regulation that the sanctions are weak as only the advertisement is withdrawn in the event of a breach of the Codes. Most critics advocate fines and other punishments. The European Madelin Report (3) disagrees and says withdrawal is an effective penalty. The Report states:

'... available evidence suggests that the business costs to companies of a withdrawal are real (reputation, share price). These market penalties can be a more effective source of good behaviour than imposition of specific financial penalties.'

It is therefore important that advertisements are immediately withdrawn. In a tripartite system this is easily achieved as the media agree to abide by the decisions of the adjudication panel. In non-tripartite systems formal arrangements need to be made with the media. It is recommended that media make adherence to the Codes and adjudications included in their terms of trade. There should be similar provisions in agreements between advertisers and agencies. Difficulties can arise with advertisements in the new media such as websites as the advertiser in effect controls the media. In such cases use can be made of legal backstop arrangements with the Government regulator.

8.1 Do advertisers, agencies and media **accept an adverse decision** of the adjudication panel?

- (a) Advertisers?
- (b) Agencies?
- (c) Media?

8.2 Do Government agencies and political parties **accept an adverse decision** of the adjudication panel?

- (a) Government agencies?
- (b) Political parties?

8.3 Are decisions of the adjudication **recognised** by Government agencies?

8.4 Is the advertisement **withdrawn immediately** when it is found in breach of the Codes by the adjudication panel?

8.5 Do advertisers, agencies and media all **ensure the advertisement is withdrawn** when asked to do so?

- (a) Advertisers?
- (b) Agencies?
- (c) Media?

8.6 Is the SRO tripartite, or are arrangements in place with the media to **enforce decisions** of the adjudication panel if required?

8.7 If a claim in an advertisement in one media is found to be in breach of the Codes by the adjudication panel will **other media decline** to run similar advertisements with the same claim?

8.8 For **repeat offenders** or recalcitrant advertisers, are there systems to deal with them such as Ad Alerts, mandatory pre-approval and a regulatory backstop?

- (a) Ad Alerts?
- (b) Mandatory pre-approval?
- (c) Regulatory backstop?

8.9 Do the terms of trade of the media usually contain a **requirement to comply** with the SRO Codes?

8.10 Do contracts between advertisers and agencies have a requirement that **advertisements comply** with the SRO Codes?

9. Monitoring and Audit

The system should have systematic internal monitoring and external audit to assess its performance. Internal monitoring is a common practice by mature SROs. However, mainly because of the cost, external audit is probably the area which is most ignored. Critics of self-regulation are becoming more vocal about the lack of independent audit and this aspect is an important component of best practice. Plainly this is the area that needs most attention by SROs.

There should be independent audit of the performance standards and Key Performance Indicators (KPIs), and in particular the timeliness standards. Other areas of audit are the ease of complaint, whether the Codes meet the expectations of stakeholders, and the quality of the decisions of the adjudication panel. There should be independent surveys of stakeholder satisfaction, customer satisfaction and consumer awareness of the organisation and right to complain. All audits and surveys should be carried out on a regular basis.

An analysis of the sources of complaint, their type and frequency should be conducted from time to time. An analysis of complaints by number, Code and type should be published at least annually. Upheld rates should be benchmarked against similar international regimes. It can also be useful to benchmark against similar organisations in other fields but care should be taken to ensure that the comparison is appropriate.

Internal

9.1 Does the SRO **monitor** complaint performance standards?

9.2 Are there **KPIs** relating to these performance standards?

9.3 Are these performance standards and results **publicly stated**?

9.4 Are these performance standards **reviewed annually**?

9.5 In particular are **timeliness** performance standards monitored?

9.6 Is there regular analysis of the **sources of complaint**?

9.7 Is there regular analysis of the **type and frequency** of complaint?

(a) Type of complaints?

(b) Frequency of complaints?

9.8 Are the **number** of complaints, and **analysis** of the **Codes cited**, **products**, **media**, and **result** of the adjudications published annually?

(a) Number of complaints published annually?

- (b) Analysis of the Codes cited published annually?
- (c) Analysis of products published annually?
- (d) Analysis of media published annually?
- (e) Result of adjudications published annually?

9.9 Is that data **benchmarked** against similar SROs in other countries?

9.10 Is the complaint **upheld rate** consistent with overseas SROs?

9.11 If your SRO uses a **filtering system** for complaints, is the percentage of those filtered out consistent with overseas SROs?

External

9.12 Are the performance standards **independently audited**?

9.13 Is there an independent audit of the ease of complaint and information given to **consumers** upon enquiry?

9.14 Are there regular independent surveys of **stakeholders** to check that the Codes meet their expectations?

9.15 Are there regular independent surveys of general **stakeholder** satisfaction?

9.16 Are there regular independent surveys of **customer** (parties to complaints) **satisfaction**?

9.17 Are there regular independent surveys of **public awareness** of the SRO and the complaint process?

9.18 Is there regular independent systematic **monitoring of advertising** in all media to measure compliance with the Codes?

9.19 Are there regular independent surveys of the public to ascertain **community standards** on issues of taste and decency depicted in advertising?

10. Awareness and Transparency

The system should have a high profile so that consumers are aware of the complaint procedures and industry players are aware of their obligations. There is little point in having a self-regulatory system if no one knows about it. Promotion to the public is an important requirement for an effective SRO. Tools available include promotion, advertising, brochures, a user-friendly website, use of social media such as Facebook, and media releases about Codes and complaints. All of these tools should be utilised.

Decisions, especially about unusual complaints, provide interesting media coverage and a good opportunity to publicise the right to complain. Cooperative arrangements with Government agencies and other organisations to redirect complaints will also increase awareness.

One aspect that distinguishes self-regulation from other regulatory systems is education of the industry. Education is an ongoing process and generally advertisers, agencies and media are keen participants. This is not common in other areas of regulation where the public are expected to know the law and ignorance of the law is no excuse.

SROs should have structured seminar and training programmes and distribution of decisions of the adjudication panel to industry members. Advertising Alerts to inform industry of important decisions of the adjudication panel and new provisions in Codes are also important.

The publication of all decisions is a key part of the education programme to ensure precedents are available for the guidance of industry.

10.1 Does the SRO actively inform consumers of their **right to complain**?

10.2 Is there **ongoing promotion** to the public of the Codes, and their right to complain?

(a) Promotion of the Codes?

(b) Promotion of right to complain?

10.3 Does the **promotion** include advertisements, brochures and other promotional material?

(a) Advertisements?

(b) Brochures?

(c) Other promotional material?

10.4 Is the promotional material created by advertising agencies **pro bono**?

10.5 Do the media run the advertisements **pro bono**?

10.6 Are those advertisements **placed** in high audience times and locations?

(a) High audience times?

(b) High audience locations?

10.7 Does the SRO have a **website** with the Codes, written decisions of adjudications and information on how to complain?

(a) Codes?

(b) Written decisions?

(c) How to complain?

10.8 Are there regular **media releases** about decisions of the adjudication panel and other issues?

(a) Decisions of adjudication panel?

(b) Other issues?

10.9 Is there liaison with consumer agencies to **redirect** complaints to the SRO and to **encourage** complaints?

(a) Redirect complaints?

(b) Encourage complaints?

10.10 Are **policymakers and stakeholders** sent copies of all decisions of the adjudication panel?

(a) Policymakers?

(b) Stakeholders?

10.11 Is there a structured program to inform **policymakers and stakeholders** of current issues?

(a) Policymakers?

(b) Stakeholders?

10.12 Are decisions of the adjudication panel sent to the media for **publication or broadcast**?

10.13 Are all decisions of the adjudication panel easily **accessible** by the public?

SECTION II

Checklist for Best Practice Government Regulation of Advertising

1. Regulatory Framework

Self-regulation and Government regulation are not mutually exclusive but should operate in a complementary manner. Self-regulation operates best within a regulatory framework. In practice the Government regulator deals with policy issues, criminal and fraudulent activities and unfair trade practices. Prosecutions usually take months or years with heavy fines and imprisonment. Consequently the process is expensive so volumes are low.

There are a number of subject areas where Governments should regulate advertising. Misleading and deceptive advertising can be part of wider fraudulent conduct therefore Government regulation is required. Medicines and other therapeutic products are strictly regulated by Governments to ensure their efficacy and safety so it is logical that advertising should also be covered by the same legislation. Similarly the financial industry is subject to Government regulation thus advertising should be included. Governments also commonly have legislation regarding indecency, racism, sex discrimination and other human rights. This legislation should also include provisions about advertising.

SROs deal with a large number of complaints in a short timeframe. Advertisements that are found to be in breach of the Codes are voluntarily withdrawn upon request of the SRO. The compliance rate of this request is usually near 100%. Where an occasional maverick declines to withdraw the advertisement then the Government regulator can act as a regulatory backstop and take action against the advertiser. This occurs in a number of jurisdictions.

A breach of the Codes is often also a breach of the law so in effect the SRO is undertaking the tasks of the regulator without charge. It is therefore desirable to have a proper and efficient regulatory framework within which the SRO operates.

1.1 Is there legislation regarding **misleading and deceptive** advertising?

1.2 Does this particular legislation cover **all media** including new media?

1.3 Is there legislation regarding the advertising of **medicines** and other **therapeutic products**?

1.4 Does this particular legislation cover **all media** including new media?

1.5 Is there legislation regarding advertising of **financial services**?

1.6 Does this particular legislation cover **all media** including new media?

1.7 Is there legislation regarding **sexist, racist or indecent** advertising?

- (a) Sexist advertising?
- (b) Racist advertising?
- (c) Indecent advertising?

1.8 Does this particularly legislation cover **all media** including new media?

- (a) Sexist advertising?
- (b) Racist advertising?
- (c) Indecent advertising?

1.9 Does legislation on advertising **align with international standards** in the following areas?

- (a) Misleading and deceptive advertising?
- (b) Medicine advertising?
- (c) Financial advertising?
- (d) Sexist advertising?
- (e) Racist advertising?
- (f) Indecent advertising?

1.10 Is there recognition by the appropriate Government agencies that the SRO **operates within the regulatory framework** in the following areas?

- (a) Misleading and deceptive advertising?
- (b) Medicine advertising?
- (c) Financial advertising?
- (d) Sexist advertising?
- (e) Racist advertising?
- (f) Indecent advertising?

2. Relationship With Self-Regulatory Regimes

Best practice regulation requires cooperation between the Government and SROs. The OECD paper (5) discusses the various ways this can occur (pages 12–15). In particular Governments have a role in encouraging self-regulation, providing advice, supporting compliance by providing a regulatory backstop, providing a formal structure where there is regular interaction between Government and the

SRO on matters of mutual interest, involving civil society and stakeholders in the ongoing development of the SRO and providing public endorsement of the SRO.

A key aspect a good working relationship between Government and the SRO is to abide by the advertising Codes in its own advertising and to participate in the complaints process if a complaint is made about the advertising of a government agency. It is important that Governments set a good example.

The complaints process is primarily available for consumers but sometimes (where appropriate) Government agencies make complaints to the SRO rather than prosecute. This is in accordance with best practice.

2.1 Does the Government **support and promote** industry self-regulation?

- (a) Support?
- (b) Promote?

2.2 Does the Government **support and promote** the SRO?

- (a) Support?
- (b) Promote?

2.3 Does the Government **provide advice** to the SRO?

2.4 Is there a regulatory backstop for **misleading and deceptive** advertising?

2.5 Is there a regulatory backstop for **medicine** advertising?

2.6 Is there a regulatory backstop for **financial** advertising?

2.7 Is there a regulatory backstop for **sexist, racist and indecent** advertising?

- (a) Sexist advertising?
- (b) Racist advertising?
- (c) Indecent advertising?

2.8 Does the Government formally or informally **monitor** the performance of the SRO?

- (a) Formally?
- (b) Informally?

2.9 Do Government agencies **abide** by the self-regulatory advertising Code in their own advertising?

2.10 Do Government agencies **participate** in the SRO complaints process and **abide** by the decisions when complaints are received about their advertising?

- (a) Participate in the process?
- (b) Abide by the decisions?

2.11 Do Government agencies **lodge complaints** with the SRO about advertising?

3. Government Regulation Process

Many countries have adopted best practice regulation principles or guidelines. For example the US has its '12 Principles of Regulation' and Australia '8 Principles of Regulation'. Regions have also adopted best practice principles. In ASEAN there is the 'Good Regulatory Practice (GRP) Guide' and in APEC the 'Guidelines for the Preparation, Adoption and Review of Technical Regulations' (6). Not surprisingly all are similar. An underlying purpose of the APEC Guidelines is the elimination of barriers to trade as all too often regulation is used to protect certain interests from competition.

An important guideline is whether non-regulatory options have been considered as an option to regulation. The APEC Guidelines are detailed and specific: *'In order to ensure that any government intervention brings the greatest possible net benefits, it is important to ensure that all the feasible options are identified and assessed. In addition to the imposition of technical regulations, there are a number of policy instruments available which should be considered.'*

Such alternatives could include:

- *status quo*
- *reliance on general law*
- *educational programmes*
- *voluntary standards*
- *economic instruments (taxes, tradable property rights)*
- *insurance and liability laws*
- *codes of conduct/practice*
- *industry self regulation and co-regulation'*

The APEC Guidelines also state that, *'members should adopt international standards or the relevant parts of them, as the basis for the technical regulation'*. This is most relevant for advertising regulation. The base standard for advertising Codes is the ICC Code of Advertising and Marketing that has been in existence since 1937.

3.1 When planning regulation of advertising are you **required to consider** national best practice regulatory principles or guidelines?

Do the regulatory **principles or guidelines** include the following:

3.2 Has the problem been **clearly identified**?

3.3 Have **all the options** to address the problem been considered?

3.4 In particular, has **self-regulation** been considered?

3.5 Has the problem been **discussed** with the SRO?

3.6 Have **international standards and obligations** been considered?

3.7 Have **compliance mechanisms** been considered?

3.8 In particular, is **compliance likely to be higher** than if dealt with by self-regulation?

3.9 Have provisions for **review and monitoring** of the regulation been considered?

3.10 Has **consultation** taken place?

3.11 Will regulation be more **cost-effective** than self-regulation?

3.12 When planning regulation of advertising have the **APEC 'Guidelines for the Preparation, Adoption and Review of Technical Regulations'** been considered?

3.13 In particular, is consideration given to whether the planned regulation will be **a barrier to trade**?

3.14 Is the ICC Code of Advertising and Marketing considered to be the **base standard** for the regulation of advertising?

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