

Advertising law book review

“It does exactly what it says on the tin”

“A guide to the Code of Advertising Practice” by Gail Schimmel

Gail Schimmel's *Advertising Law* (Juta) has everything you could possibly want in a book – an agreeable number of pages (157), a conversational style, few footnotes, and a visual appeal that comes from using the now-popular device of presenting certain things (in this case decisions, summaries and clauses of the ASA Code) in separate boxes. And for those of you with short attention spans, the book even has helpful wake-up warnings like this: “*Now here is where it all starts getting messy, and I want you to concentrate carefully*”.

The book is aimed at the advertising practitioner as much as it's aimed at the lawyer. As Schimmel makes clear early on, the focus of the book is the ASA Code rather than all the law affecting advertising. Any lawyer who needs to deal with an ASA issue will find this book extremely useful.

Advertising Law will take you through all you need to know in order to deal with an ASA complaint. Starting with the understanding that the ASA Code is a system of self-regulation, a contract between those companies that choose to become members of the ASA, in terms of which they agree not to accept any advertising that the ASA has held must be withdrawn.

Schimmel explains the basic procedural matters: how the ASA deals with both consumer complaints and competitor complaints; how all complaints are dealt with by the Directorate; how appeals regarding consumer complaints are heard by the Advertising Standards Committee (ASC), whereas appeals regarding competitor complaints are heard by the Advertising Industry Tribunal (AIT); how all further appeals are heard by the Final Appeal Committee (FAC).

The book's highly practical and it tells you all sorts of useful stuff: how to fill in the forms; what e-mail addresses to use; how you can extend the tight deadlines by withdrawing the advertising pending a response; how a voluntary unequivocal undertaking can dispose of a complaint; how you should keep a paper trail of the steps you've taken to comply with an order to withdraw advertising; how it makes no sense to argue constitutionality as the ASA takes the view that the Code is a justifiable restriction on freedom of expression; how lawyers can draw up papers but can't appear, except before the FAC (they can apparently also appear before the ASC and AIT in exceptional cases); how you can remain seated whilst appearing before the FAC; and how you can use Power Point. The most practical advice is possibly this: “*Do not waffle or bore*”. It's advice

that Schimmel took on board when she wrote this book.

Then there's the substance. The provisions that deal with offensive advertising, honesty, and the fact that advertising shouldn't play on fear, encourage violence, support illegality, or have any discriminatory content or gender-stereotyping. And when it comes to gender issues, advice doesn't get much more practical than this: “*Don't use*

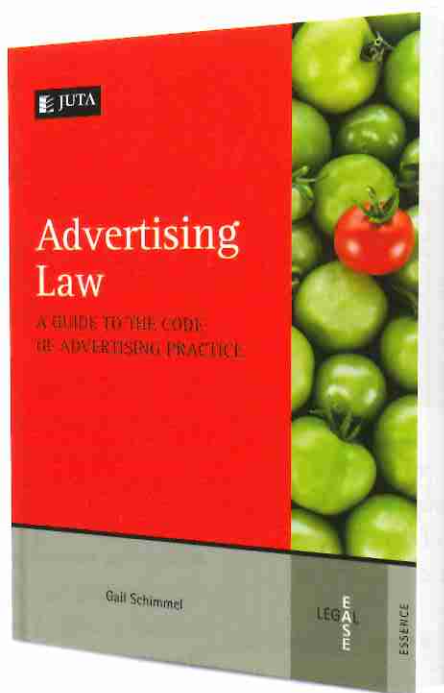
half-naked women if it has nothing to do with the product or the plot of the commercial or advertisement...don't cut off the woman's head or feet (she doesn't mean this in the Saudi sense) ... don't compare women to consumables or food.” Yet there are, I fear, double standards at play at the ASA. Adverts with men who snore and fart are apparently okay, as was the recent Lays chips' ad, the one where the female cop nicks the hunk, steals his chips and then slaps him on the arse.

There's plenty on how you substantiate claims that have been made, and how you can submit new substantiation, but only once. There's a discussion on how advertising claims differ from puffery and hyperbole. It seems that if you're “someone” like Checkers it's fine to describe your product as the “*Best Boerie*”, but “*Best-selling boerewors*” needs substantiation. Aspirational claims like *Simpler Better Faster* are also OK, basically because no-one believes them anyway.

Schimmel discusses the important issues of disparagement and comparative advertising. She tells how the ASA decision of *Chicken Licken v KFC* tells us that parody can disparage. And how the ASA really had to come to grips with modern SA-speak when it heard the case of *Cell C v MTN*, where the one cellphone service provider complained that the other's actions were “*not kwa ...yoh yoh yoh*”.

I was particularly interested in the discussion of the clauses that deal with passing-off issues. There's Clause 8, which deals with the Exploitation of Advertising Goodwill, and Clause 9, which deals with Imitation, or what's been described as the “*conscious copying of original intellectual thought*”. Schimmel tells us that the decision in the recent case of *Kuhula v SAA* makes it clear that, whereas Clause 8 covers trade marks, Clause 9 does not. If I have one criticism of this book it's that the quote from this decision is far too long.

There's lots more. Schimmel discusses how testimonials must be genuine but that, according to a recent decision, it's quite okay to change the



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name of the person giving the testimonial to suit local conditions – in this case the ASA had no issue with the fact that the name of Callum, “which is not a typical South African name”, was changed to Marius. She discusses the requirement that adverts need to be identified, and suggests that paid-for tweets endorsing products will need to be identified as ads. And she looks at some of the nanny state-style provisions, citing an ASA decision that held that it’s not okay for an advert to show a mad scientist climbing into a fridge, as this might encourage kids to do the same.

Reading this book you can’t help feeling that there are an awful lot of people out there who need to get a life. Not least the person who complained about the fact that the Blue Train isn’t, in fact, all blue. But they

exist, and it’s partly because of them that advertising law is the vibrant area of law that it is.

On its cover, *Advertising Law* is described as “A guide to the Code of Advertising Practice”, which is truthful, honest and all those good things advertising law requires. As the old advertising slogan says: “It does exactly what it says on the tin.” ♦

Muhlberg is a SA Attorney, a UK Solicitor and a UK and EU Trade Mark Attorney (non-practising). His consultancy is Muhlberg IP.

www.muhlberg.co.za

Tax

Share incentive schemes dividends

PHILLIP LOURENS

Many South African companies seek to incentivise their employees by allowing them to participate in the ownership of the company, directly or indirectly. Complex share incentive plans are not uncommon.

Employers may issue shares to eligible employees directly, or may allow them to participate in the ownership of the company through participation units in a trust which, in turn, holds a fixed number of shares in the company. The latter option ensures that ownership in the company does not change each time an eligible employee leaves.

Shares issued by a company to its employees by virtue of their employment constitute equity instruments that are subject to s8C of the Income Tax Act. Any gain determined in respect of the vesting of such a share in an employee must be included in the employee’s income for the year of assessment in which vesting takes place. Depending on the specific circumstances, vesting may take place on the acquisition of the share, when the restrictions in respect of the holding or disposal of the share are lifted or on the disposal of the share.

In addition to these tax consequences on the vesting of the share, in certain circumstances dividends received from the share (subject to s8C) are not exempt from income tax in terms of s10.

Dividends paid by a resident company to its shareholders are generally exempt from tax in terms of s10(1)(k). However, this exemption will not apply to any dividend in respect of a “restricted equity instrument” as defined in s8C, to the extent that the “restricted equity instrument” was acquired in the circumstances contemplated in the section, unless:

- the “restricted equity instrument” constitutes an equity share other than

an equity share that would have constituted a hybrid equity instrument as defined in s8E(1) but for the three-year period requirement contemplated in that definition;

- the dividend constitutes an equity instrument as defined in that section; or
- the “restricted equity instrument” constitutes an interest in a trust and, where that trust holds shares, all those shares constitute equity shares, other than equity shares that would have constituted hybrid equity instruments as defined in s8E(1) but for the three-year period requirement contemplated in that definition.

These three points are exceptions to the circumstances in which the dividend exemption will not apply (that is, if one of these three circumstances is applicable, the s10(1)(k) dividend exemption will apply).

The definition of “equity instrument” in s8C specifically includes “any contractual right or obligation the value of which is determined directly or indirectly with reference to a share or member’s interest”. This would include participation rights set out in the trust deed of a trust that holds shares in a company, such as an employee share incentive trust. Whether or not the participation rights will be regarded as “restricted equity instruments” will depend on the provisions of the trust deed and the rights attaching to the shares in question.

In Binding Private Ruling 199, issued by SARS on 20 July, the question was whether the participation rights held by beneficiaries of an incentive trust are “restricted equity instruments” as contemplated in s8C and, accord-



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