
COMMENTS ON THE DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT

Background

Introduction

1. The Department of Communications has requested public comment on the Draft White paper on Audio and Audio Visual Content by 15 February 2021.
2. The Advertising Regulatory Board hereby provides such comment.
3. In providing such comment, we are limiting our comment to section 5.4.1 and 5.4.2 of the White Paper, which deals with the role of the Advertising Regulatory Board and the idea of co-regulation. We are of the opinion that other organisations are better positioned to give meaningful input on the remainder of the Paper, and will limit our comments to our area of expertise.
4. Section 5.4.1 and 5.4.2 read:

5.4.1 Television advertising and online video advertising compete for the same budgets and the same advertisers in the same way, even if the services do not play the exact same function for advertisers. There are differences in the rules around advertising which creates a regulatory imbalance as advertisers may be able to do things online which the rules would not permit on television. There is a need to harmonise rules for all audiovisual content services on misleading and comparative advertising and a need to address disclosure and disinformation for political advertising online. The draft white recommends self-regulation and co-regulation, that is the combination of industry self-regulation with the active support of the national regulator/legislator.

5.4.2 Advertising Standards

5.4.2.1 Currently, a self-regulatory body regulates the content of television advertisements, namely the Advertising Regulatory Board (ARB) which replaced the Advertising Standards Authority(ASA). Legislation provides that broadcasting licensees must abide with the Code of Advertising Practice administered by the ASA or an entity that replaces it but has the same function and with any advertising regulations in respect of scheduling of adverts, infomercials and programme sponsorships. These coregulatory provisions legislation should extend to include all AAVCS licensees.

5.4.2.2 The legislative framework is effective and co- regulation is working. However, the framework applied by the regulator does need to expand to include all AAVCS. The regulator in respect of limitations on the amount of advertising on AAVCS can relax limitations and allow

services to be flexible. The draft white paper proposes that to protect children, the regulator must in respect of the scheduling of adverts make regulations for all AAVCS licensees on the advertising of alcoholic beverages and harmful foods that are high in salt, sugars, fat, saturated fats or trans-fatty acids or that otherwise do not fit national or international nutritional guidelines.

5. In submitting our comments we seek to:
 - Clarify the current role and reach of the Advertising Regulatory Board, and correct some misapprehensions reflected in the White Paper;
 - Propose relevant wording for inclusion in a Bill to reflect and enable Government's vision of effective co-regulation while preserving the independence and viability of the Advertising Regulatory Board.

The existing nature of the ARB

6. The ARB is an independent, self-regulatory organisation. We attach the MOI of the ARB as annexure A.
7. What is important to take out of the MOI is the following:
 - The ARB is binding on members by virtue of the MOI. This is contractual in nature.
 - The ARB is binding on broadcasters in terms of s55 of the ECT Act, which we will discuss in more detail below.
 - The ARB is NOT binding on non-members. However, it has a contractual duty to make a decision on any advertising that falls within its jurisdiction *for the guidance* of members. Members and broadcasters should therefore not carry non-member advertising that the ARB has ruled against.

The existing mandate of the ARB

8. The mandate of the ARB is found in Section I of the Code of Advertising Practice. This can be accessed here [Microsoft Word - GS Section01.doc \(arb.org.za\)](#)
9. The important provisions in this for discussion purposes are twofold. Section 2 provides the SCOPE of the ARB's mandate and the excluded areas; and Section 4.1 provides a definition of "advertising" giving meaning to the scope.
10. What is important is that the ARB is charged with considering the CONTENT of advertising, and NOT the scheduling thereof, as reflected in 5.4.2.1 above.
11. The only exception to this is that when the advertising content is unsuitable for children, the ARB may issue a decision around the placement of said advertising in terms of timing or venue or publication. For television commercials, for example, the ARB may issue a decision stating that a particular commercial should only be shown after watershed, in appropriate programming.
12. Issues such as the number of advertisements allowed per hour fall within the ambit of ICASA.

The existing ARB position on alcohol, “junk” food and children

13. The White Paper highlights concerns around these issues and as such it is appropriate to briefly draw attention to the existing ARB rules in this regard.
14. These are all issues that the advertising and marketing industry have long had in their sights, and the vehicle of self-regulation allows for a faster response than regulation. As such, the following provisions are included in the Code:
 - Clause 14 of Section II provides general protection to children vis-à-vis advertising ([Microsoft Word - GS Section02.doc \(arb.org.za\)](#))
 - Appendix A, which is administered by Aware.org, regulates the advertising of alcohol ([Microsoft Word - New Appendix A.docx \(arb.org.za\)](#))
 - Appendix J regulates advertising of “junk” food to children ([ADVERTISING STDS Issue15.PDF \(arb.org.za\)](#))
15. The entire Code is reviewed every year. In an emergency, it can be changed at very short notice. In this manner it is far more flexible and dynamic than regulation, and encompasses the fact that the world, especially in marketing and advertising terms, is fast paced, and unpredictable.

The ARB’s workload

16. In view of considering the effectiveness of the ARB it is interesting to look at the ARB’s performance in 2020, a year in which we faced many constraints:
 - We received 486 complaints
 - 86% of these were resolved without a need for formal decision

17. Those that went to formal decision break down as follows:



The ARB's funding

18. Given our submissions below, it is also important that we outline how the funding of the ARB works.
19. The ARB is funded by a voluntary funding system. We approach marketers directly, and solicit funding from them. While we request 0,1% of their ad spend, because the system is voluntary, we basically "take what we can get".
20. This system is not ideal in many ways. However, it is the only system of the possible solutions that the South African marketing community had an appetite for.
21. This said, the ARB is functioning with financial health, and is under no immediate financial threat.

The challenges facing the ARB

22. The proposed Bill presents an opportunity for Government and the ARB to work together to address the challenges that the ARB faces to ensure that the ARB is in a position to co-regulate with government effectively.
23. These challenges are threefold:
 - Inability to enforce decisions beyond broadcasters;
 - Refusal to participate by non members;
 - Inconsistent funding.
24. It is with the issues raised in the White Paper and these challenges in mind that we now set out our proposals.

ARB proposals

The challenge of bringing the audio visual space within the regulated space

25. It is proposed that the wording of s55 of the ECT is adapted to include the entire "broadcasting" space.
26. **Proposed wording, reflecting s55 exactly:**

All broadcasting service licensees¹ must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Regulatory Board.

¹ As defined by the new Bill to include all players

27. In relation to this, the following definitions are proposed:

“Advertising Regulatory Board (ARB)” means The Advertising Regulatory Board NPC with registration number 2018/528875/08, and is the self-regulatory entity which regulates the content of advertising, or any entity that replaces it but has the same functions².

“Advertisement” means any visual or aural communication, representation, reference or notification of any kind

- which is intended to promote the sale, leasing or use of any goods or services; or
- which appeals for or promotes the support of any cause.

Promotional content of display material, menus, labels and packaging also fall within the definition.

Editorial material is not an advertisement, unless it is editorial for which consideration has been given or received.

The word “advertisement” applies to published advertising wherever it may appear. It does not apply to editorial or programming publicity³.

The challenge of marketer non-compliance and non funding

28. While the wording proposed in 26 will bring all broadcasters under the ARB umbrella, it does not bring all marketers into the ARB’s jurisdiction.

29. In practice, this means that the ARB has to resort to the broadcaster to enforce decisions, rather than having the marketer themselves accountable in the first instance.

30. To combat this, the ARB proposes the following wording:

- 1. All advertising marketers placing advertising with broadcasting service licensees⁴ must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Regulatory Board.**
- 2. To this end, all advertising marketers placing advertising with broadcasting service licenses will be required to provide a certificate of current membership of the ARB to the broadcast service licensee on placement of any advertising, or on request.**

² The wording of this definition mirrors the wording in the definition section of the Electronic Communication Act

³ The wording of this definition reflects that in the Code of Advertising Practice exactly, ensuring that the scope of the Act and the Code are the same. This definition has proven robust over many years, capable of absorbing new media without need for amendment.

⁴ As defined by the new Bill to include all players

31. This will require the following definition:

“Advertising Marketer” means any entity offering any goods or services, or promoting the support of any cause, which places paid for advertising with any broadcasting service licensee⁵.

32. These submissions preserve the mechanism of self-regulation – allowing Government and the ARB to work together when quick responses are needed to a new situation (eg Covid). At the same time, it ensures that the system of self-regulation is sustainable and properly funded.

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⁵ As defied by the new Bill to include all players.

Proposed inclusions for the Bill, in summary:

As outlined above, the ARB proposes the following section for inclusion in the Bill:

Definitions

“Advertising Regulatory Board (ARB)” means The Advertising Regulatory Board NPC with registration number 2018/528875/08, and is the self-regulatory entity which regulates the content of advertising, or any entity that replaces it but has the same functions¹.

“Advertisement” means any visual or aural communication, representation, reference or notification of any kind

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The word “advertisement” applies to published advertising wherever it may appear. It does not apply to editorial or programming publicity¹.

“Advertising Marketer” means any entity offering any goods or services, or promoting the support of any cause, which places paid for advertising with any broadcasting service licensee¹.

X. Advertising Regulation

- X.1 **All broadcasting service licensees¹ must adhere to the Code of Advertising Practice as from time to time determined and administered by the Advertising Regulatory Board.**
- X.2 **All advertising marketers placing advertising with broadcasting service licensees¹ must adhere to the Code of Advertising Practice as from time to time determined and administered by the Advertising Regulatory Board.**
- X.3 **To this end, all advertising marketers placing advertising with broadcasting service licenses will be required to provide a certificate of current membership of the ARB to the broadcast service licensee on placement of any advertising, or on request.**