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BY EMAIL

Dear Ms MacGregor,

The Advertising Standards Authority response to the Department of Constitutional Affairs Consultation on the Regulation of Claims Management Services under the Compensation Act 2006

1. Introduction

- 1.1 The Advertising Standards Authority (ASA) is grateful for the opportunity to respond to this consultation on the regulation of claims management companies. The response is concerned only with the advertising section of the Model Rules.
- 1.2 The ASA is the UK self-regulatory body for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.
- 1.3 The ASA has been successfully administering the self-regulation of non-broadcast advertising for more than 40 years. In 2004, in recognition of that success, the ASA was entrusted with the responsibility for regulating broadcast advertising by the Office of Communications (Ofcom). This created the ASA 'one stop shop' for advertising complaints.
- 1.4 The ASA is responsible for policing three advertising Codes. These are owned by the Committee of Advertising Practice (CAP), which owns and updates the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code), and the Broadcast Committee of Advertising Practice (BCAP) which owns and updates the TV and Radio Advertising Standards Codes (the BCAP Codes). All three codes can be accessed at www.bcap.org.uk/cap/codes. Further information about CAP and BCAP can be found at www.cap.org.uk.
- 1.5 For non-broadcast advertising the ASA is the 'established means' for enforcing the Control of Misleading Advertisements Regulations 1988 (as amended) (CMARs). The Office of Fair Trading is the legal backstop to the non-broadcast side of the system.

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- 1.6 Ofcom is the ASA's co-regulatory partner for broadcast advertising and therefore acts as a legal backstop to the broadcast side of the ASA system.
- 1.7 All advertisers must comply with the Advertising Codes. Co-operation with the ASA is not voluntary.
- 1.8 The rationale behind creating a 'one-stop shop' for all advertising complaints was to simplify advertising regulation. Dealing with a single regulator makes it easier for consumers to complain and is simpler for advertisers to work with. The ASA one-stop shop is in line with better regulation and Hampton principles.
- 1.9 The one-stop shop also means that decisions on cross-media cases (i.e. campaigns appearing in both broadcast and non-broadcast media) can be considered by the same regulator.
- 1.10 The creation of the one-stop shop was approved by Government, Parliament and Ofcom. More recently, the Gambling Commission has taken the decision to allow the ASA to handle day-to-day regulation of all gambling advertising following the passing of the Gambling Act 2005. The Gambling Commission will act as a backstop to the system and compliance with the Advertising Codes will be a condition of operators' licences. This model of creating a 'licensing backstop' underpins advertising self-regulation in various sectors.
- 1.11 Further information about the ASA can be found at www.asa.org.uk.

2. Background to the ASA's involvement with this issue

- 2.1 During the past eighteen months, the ASA has worked with the DCA on the Government's concerns about advertising in the claims management sector. The ASA has enjoyed a close and helpful working relationship with DCA officials.
- 2.2 The DCA approached the ASA early in 2005 to find out whether the ASA had experienced unusually high numbers of complaints or difficulties with personal injury advertisements. At this time, the DCA was concerned that personal injury compensation ads: falsely represented the claims process; encouraged members of the public to pursue spurious claims; and fuelled a perception of a compensation culture in the UK.
- 2.3 However, the ASA's data did not indicate any particular problems with advertising in the sector. The data showed that when personal injury ads first began to appear in 1995 and 1996, the ASA did investigate a number of complaints about misleading advertising; this prompted CAP to produce a HelpNote for advertisers

on 'No Win, No Fee' advertising¹ to clarify what was acceptable. However, by the late nineties, public complaints had fallen to a relatively low level, where they have remained.

- 2.4 The self-regulatory system's approach to regulation is evidence-based and, because the DCA was unable to provide evidence of any particular abuse or articulate its concerns fully, a market research project was commissioned into the 'Effects of advertising in respect of compensation claims for personal injuries'.²
- 2.5 The research concluded that "no straightforward link has been identified between public mistrust of the claims process and advertising for claims companies...exposure to negative press is at least as important a factor as exposure to claims advertising, if not more so"³. The research uncovered two areas that were potential causes of concern: consumer understanding of the use of the phrase 'no win, no fee' and the need for a third party to be at fault for a claim to proceed.
- 2.6 Both are matters of misleadingness and as such are covered by the Advertising Codes and existing legislation, such as CMARs. Indeed the research acknowledges that "the current advertising Codes, administered by the ASA, cover advertising that is likely to mislead...[the Codes] seem(s) to cover the most significant issues to emerge from the qualitative and quantitative research: the absence in some ads of clear information regarding third party liability and the potentially misleading use of the phrase 'no win, no fee'."⁴
- 2.7 In light of the research, the ASA has decided to take special care when handling misleadingness complaints about personal injury advertising; has brought the research to the attention of the TV and radio pre-clearance centres⁵ and CAP has agreed to update its HelpNote for advertisers on 'No Win, No Fee' claims.

3. The DCA's subsequent approach

- 3.1 The ASA appreciates the Government's desire to improve the regulation of this sector overall. However, the ASA's experience is that, where there have been generally poor business practices within a particular sector it can sometimes be

¹ The HelpNote can be accessed at: http://www.cap.org.uk/NR/rdonlyres/712555F5-7744-400B-9D43-CF3AAEB54547/0/No_win_no_fee.pdf

² 'Effects of advertising in respect of compensation claims for personal injuries': http://www.dca.gov.uk/legist/compensation_advertising.pdf

³ 'Effects of advertising in respect of compensation claims for personal injuries' Page 40

⁴ 'Effects of advertising in respect of compensation claims for personal injuries' Page 38

⁵ The Broadcast Advertising Clearance Centre (www.bacc.org.uk) and the Radio Advertising Clearance Centre (www.racc.org.uk)

reflected in that industry's advertising. It is often tempting to view such problems as an advertising issue rather than addressing the root cause of the problem. In our experience, tackling the poor business practice itself often has the desired effect on the advertising, without the need to introduce additional advertising regulation. Cosmetic surgery is a good example of an industry whose advertising has vastly improved with better overall regulation of the industry, without the need for further advertising controls.

- 3.2 Businesses already have a duty to comply with the law and with the Advertising Codes. Although the ASA can understand why the DCA wishes to bring existing legislation to the attention of this sector, it believes that it is wrong to use the Model Rules for this purpose. The appropriate mechanism is that preferred by other statutory regulators: guidance. Indeed, the ASA is unaware of a single other statutory regulator that has duplicated legislation within its own codes or licensing conditions. For example, Ofgem is consulting on removing old license conditions that overlap with existing consumer protection legislation
- 3.3 Duplicating legislation within a new Code suggests that existing consumer protection mechanisms are not working. Yet, as far as the ASA is aware, the DCA has not brought any specific abuses of the existing legislative framework to the attention of statutory enforcers and no examples of current advertising that could be problematic have been passed to the ASA. The Claims Standards Council is also unaware of attempted legal action against any firm operating in this sector.
- 3.4 It is surprising that the DCA considers that the Advertising Codes; the Consumer Protection Act 1987; the Trade Descriptions Act 1968; CMARs; the Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987; the Consumer Protection (Distance Selling) Regulations 2000 (as amended), to name but a few, are ineffective against this sector, when they are used successfully amongst all other business sectors.
- 3.5 To date the DCA has largely taken a 'better regulation', evidence-based approach to this issue. The ASA would argue that it is sensible to continue this approach by utilising existing mechanisms before creating another layer of identical regulation. The Better Regulation Task Force report 'Less is More. Reducing Burdens, Improving Outcomes'⁶ noted that Government should be making efforts to consolidate regulation and make it consistent. As they currently stand, the DCA's model rules on advertising do not comply with this aim.
- 3.6 It is also worthy of note that the DCA has not deemed it necessary to restate the law anywhere else within the Model Rules: advertising alone has been singled out.

⁶ The report can be accessed at: <http://www.brc.gov.uk/downloads/pdf/lessismore.pdf>

This is regardless of the findings of the market research on advertising and despite Government fears of other abuses in different areas of this sector.

- 3.7 A further concern is that the legal responsibilities highlighted within the rules are not exhaustive. It would be problematic if businesses believed that compliance with the Model Rules was all that was required of them. The rules exclude key pieces of consumer protection legislation, e.g. the Trade Description Act and CMARs, but include legislation with which there does not appear to have been a specific problem, for example the 'Distance Selling Regulations'.
- 3.8 The ASA would favour a simple approach to the Model Rules. The rules could be used to provide licensing backstop powers to the new regulator for existing Codes and contain DCA's additional requirements e.g. Rules 6c and 6d. Any further information supplied by the DCA on existing legislation should be in the form of guidance.⁷

4. Enforcement

- 4.1 The ASA is also concerned about the way in which advertising will be regulated under the new system. At a recent meeting of the Regulatory Consultative Group (July 2006), it was suggested that advertising should be a primary concern for the new regulator because the task would be comparatively straight forward. The ASA rejects that as a suitable approach to regulation, particularly as the market research did not reveal any particular, current problems.
- 4.2 Furthermore, if the DCA were really interested in better regulation and using the resources available to it efficiently and wisely, it would target its resources at those areas in most need of regulation rather than 'easy targets'. The ASA recommends that the new regulator should refer any advertising that may be in breach of the Advertising Codes to the ASA and consider only advertising that breaches its own 'specific' model rules.

5. Specific Comments on the Model Rules – Advertising and Sales

- 5.1 *"2. A business must not engage in 'high pressure selling'."*

The ASA agrees with the intention of this rule, but would highlight that this requirement is included in the Unfair Commercial Practices (UCP) Directive, which

⁷ See the Medicines and Healthcare products Regulatory Agency's Blue Guide:
http://www.mhra.gov.uk/home/idcplg?IdcService=GET_FILE&dID=17493&noSaveAs=0&Renderit on=WEB

will be transposed into UK law on 12 December 2007. For this reason, we would recommend that this rule is removed once the Directive comes into force.

- 5.2 *“3. Cold calling potential clients in person is prohibited. Any other cold calling (by telephone, by email, by fax, by text) shall be in accordance with the appropriate industry code.”*

It should be noted that the Advertising Codes already contain rules on direct marketing and distance selling and that advertisers should comply with existing legislation relating to e-commerce and distance selling. The ASA recommends that this rule includes the name of the appropriate industry code, which we assume would be the Direct Marketing Association’s Direct Marketing Code of Practice.⁸

- 5.3 *“4. Business must not be solicited in any way in or in the immediate vicinity of public or private medical facilities (hospitals surgeries etc) and other public buildings other than through advertising which has been specifically approved by the facility concerned.”*

The acceptance of advertising is a matter for the media owner / owner of the premises and not the ASA. However, the ASA has three general points to make about this rule:

- i. ‘Immediate vicinity’ - it is not clear what DCA means by immediate vicinity. As currently drafted it could prevent poster site advertising on another media owner’s site, which appears to be excessively restrictive.
- ii. ‘Public Buildings’ - this is an extremely broad phrase. There are probably thousands of public buildings up and down the country, including museums, galleries and libraries. It would be practically impossible for media owners (for example poster site owners) to know whether their sites are in the ‘immediate vicinity’ of a public building (or indeed what constitutes an ‘immediate vicinity’).
- iii. In any case, if the rule is only aimed at preventing cold calling or ‘field marketing’ then this mischief appears to be captured by Model Rule 3.

- 5.4 *“5. All advertising must conform to the British Code of Advertising, Sales Promotion and Direct Marketing or the relevant code covering broadcast advertising and any other code of advertising practice or statutory requirement.”*

The ASA would recommend that the rule requiring all advertisers to comply with the Advertising Codes should be the first rule in the advertising section.

All Codes should be named in full along with a link to the Codes:

⁸ The Code can be accessed at: <http://www.dma.org.uk/Content/Pro-Code.asp>

- The British Code of Advertising, Sales Promotion and Direct Marketing
- The BCAP Television Advertising Standards Code
- The BCAP Radio Advertising Standards Code
- The BCAP Code for Text Services
- <http://www.bcap.org.uk/cap/codes/>

5.5 *“6. Advertising by authorised businesses must-”*

5.5.1 *“a) not make misleading or exaggerated statements.”*

Although the ASA agrees with the meaning of this rule, it would question why it is necessary to restate what is an existing legal requirement for all advertisers.

5.5.2 *“b) Not use expressions such as ‘no win, no fee’ without qualification unless there is no possibility of the client having to meet any costs he may have incurred in connection with the claim, including the purchase of an insurance policy or interest on a loan taken out to fund the purchase of an insurance policy.”*

Again, the ASA agrees with the meaning of this rule, as it simply restates the ASA’s position on the use of the term ‘no win, no fee’, as detailed in CAP’s HelpNote⁹. However, it seems illogical to restate this policy when it is a requirement of the Advertising Codes (model rule 5) and non-compliance would be likely to be deemed misleading under existing legislation. However, it would be helpful to emphasise this requirement in Guidance to licensees.

5.5.3 *“a) Clearly identify the name of the advertiser.”*

This is not generally a requirement of the Advertising Codes (although there are specific circumstances where it is required, for example distance selling). However, if a company name were to be omitted with the intention of misleading the consumer, then this would be likely to fall foul of the Advertising Codes and existing legislation. Furthermore, the UCP Directive¹⁰ will explicitly prohibit this practice when it comes into force in December 2007.

Therefore, the ASA recommends that this requirement is removed as soon as the UCP Directive comes into force.

⁹ The CAP HelpNote can be accessed at: http://www.bcap.org.uk/NR/rdonlyres/712555F5-7744-400B-9D43-CF3AAEB54547/0/No_win_no_fee.pdf

¹⁰ 22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

Please also note that the numbering of the rules is incorrect.

- 5.5.4 *“c) Not offer an immediate cash payment or a similar benefit as an inducement for making a claim and;
d) Not seek to imply that compensation may be used in a way that is inconsistent with the cause of the claim.”*

The ASA has no comment to make on these rules. They do not overlap with the requirements of the Advertising Codes or existing legislation, and therefore, the ASA has no objection to these rules being included in the Model Rules, if they are necessary.

- 5.5.5 *“e) Not seek to imply a relationship with any official or other organisation where no such relationship exists.”*

Again the ASA would advise against the inclusion of this rule within the Model Rules, as this practice would already fall foul of the Advertising Codes, existing legislation and the forthcoming UCP Directive.

- 5.5.6 *“f) In the case of all written advertising and promotional material state that the business is regulated under the Compensation Act 2006 and give the authorisation number.”*

The ASA has no comment to make on this rule.

- 5.6 *“7. If the sale or marketing of any service has occurred via the Internet or mail order it must comply with the Consumer Protection (Distance Selling) Regulations 2000.”*

All businesses are already legally required to comply with this legislation. Seeking to ‘reinforce’ the law by making it an authorisation condition simply undermines the status of UK legislation. Furthermore, as far as the ASA is aware, the DCA has neither uncovered any particular compliance problems with these regulations amongst this sector, nor sought to pursue legal action against any business for breach of the regulations. It is especially disappointing that the DCA has chosen to replicate regulation, rather than use existing channels to attempt enforcement, given its departmental responsibility for legal affairs.

- 5.7 *“8. A business must try to ensure that any publicity for its services issued by a third party and which is intended to solicit business for it complies with these Rules.”*

This rule seems sensible to ensure compliance with those rules that are not already binding on third parties.

I do hope that you find this response useful and urge the DCA to give full consideration to the points raised within it before proceeding. I would be happy to provide any further information or clarification about any aspect of this response.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Lynsay Taffe', written in a cursive style.

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