

ALCOHOL POLICY COALITION AND OTHERS

Submission to Advertising Standard Bureau:

Community perception of the Independent Reviewer process

The various bodies making this submission (the Group) support a comprehensive approach to the minimisation of alcohol-related harm. The Group considers the introduction of independent regulation of alcohol advertising a fundamental aspect of this approach.

A good system of independent review is one that is transparent in terms of process and affords a quick, inexpensive and impartial review of decisions.¹ Its aim should be to encourage better primary decision making in the first instance, and the delivery of a cost effective and independent review process to applicants.²

In the Group's opinion, features of the Independent Reviewer process do not support the proposition that the Independent Reviewer offers a truly independent and impartial - real or perceived - process for the review of a primary decision.

Effective regulation of alcohol advertising – including limiting the overall exposure of alcohol advertising - is a key step to shift cultural attitudes towards more responsible drinking patterns. This is because the effects of alcohol advertising go well beyond an individual's drink preferences, to influence how we perceive alcohol and its place in society.

The *National Alcohol Strategy 2006-2009* notes, “the wide-ranging ways in which alcohol is promoted is a major force behind Australia's drinking culture.”³ Research has demonstrated that exposure to repeated high level alcohol promotion inculcates pro-drinking attitudes and alcohol advertising has been found to promote and reinforce perceptions of drinking as positive, glamorous and relatively risk-free.⁴ Such advertising also undermines public health strategies that aim to shape the information environment to enable people to make appropriate alcohol consumption choices.⁵

Alcohol advertising is subject to a system of self-regulatory codes and guidelines. Yet, self-regulation does not adequately control the content or limit the exposure of alcohol advertising, particularly in relation to children and young people. Research has shown attempts to restrict alcohol advertising and promotion primarily through voluntary codes are inadequate.⁶

Australia's experience with an ineffective self-regulatory advertising system is consistent with international research that indicates that attempts to restrict alcohol marketing primarily through voluntary codes are inadequate.⁷ Experiences in other countries show that these kinds of codes work best where the media, advertising and alcohol industries are all involved and an

independent body has powers to approve or veto advertisements, rule on complaints and impose sanctions. Few countries currently have all these components.⁸

In accordance with the Group's goal to reduce the levels of alcohol harm in Australia, we make this submission to reiterate our concerns with the self-regulation of alcohol advertising. A review of the independent reviewer process will have limited value, so long as the self-regulatory codes (that form the context of an independent review) remain weak.

The Group supports measures to effectively and independently regulate all alcohol advertising and promotion – and it is the Group's view that improved regulation should be overseen by an independent statutory body, rather than self-regulated through voluntary industry codes.

Regulation must not only be done, but it must be seen to be done. This means that the public must have confidence that the institutions charged with administering the advertising regulatory framework are fair, impartial and independent. The Group does not consider that the current alcohol advertising regulatory framework instils that confidence in consumers.

The key points and recommendations that the Group wishes to make are presented below, by reference to the relevant questions numbers in the issues paper.

Timeframe for requesting a review (Q.2) – is the timeframe an appropriate length?

Requests for a review of a Board determination must be received within 10 business days of the date of the ASB's final letter of notification of a determination and must relate to a determination taken by the Board within the previous month.

The Group agrees with the importance of time frames for requesting reviews, in order to not unfairly open up participants in the advertising review process to complaints for an indeterminate time. However, we think that the current time limits may impact unfairly on complainants, who may not be aware of their review rights, or may have difficulty in requesting a review within the time limits.

We are of the opinion that the framework for the review process should include an option for parties to apply for an extension of the time limit. Applications for an extension of the time limit should be considered on a case-by-case basis, and should take into account reasonable efforts by the parties to comply with the stated time frame.

Recommendation one:

An extension to the time frame for requesting a review should be available to both parties. The decision to grant an extension of time should be discretionary, and may only be granted in circumstances where the parties have made reasonable efforts to meet the stated time frame.

Grounds for review and the review process (Q.4/Q.5)

Reviews may be undertaken if the request is about at least one or all of the following grounds.

- *Where new or additional relevant evidence which could have a significant bearing on the decision becomes available (an explanation of why it was not submitted previously will be required).*
- *Where there was a substantial flaw in the Board's decision (decision clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).*
- *Where there was a substantial flaw in the process by which the decision was made.*

And

*If the Independent Reviewer decides to accept the request, the Independent Reviewer will undertake appropriate investigation and ...make a **recommendation** to the Board, stating whether the original determination should be reviewed or confirmed.*

Challenges for parties requesting a review

As noted above, the request for a review must be in relation to new or additional material; a substantial flaw in the Board's decision; or where there was a substantial flaw in the decision making process.

No guidance is given about the quality or type of new evidence that may trigger a review; nor is any guidance given on what constitutes a flaw in the Board's decision, nor a procedural flaw.

The complaints provision should operate to meet the needs, expectations and rights of all complainants.⁹ Importantly, the complaints procedure should be easy to use, and accessible to all.

We consider that the ability for most complainants to satisfy the grounds for review presents a particular challenge, especially where a complaint relates to a particular style or approach to advertising. For groups who are not able to access professional and/or legal advice, the capacity to present evidence that satisfies the grounds for review will be low, notwithstanding that their concerns may be highly valid.

We think it highly likely that bona fide complainants will be dissuaded from requesting a review, because of the high level of technical skill implicit in the permitted grounds for review, and the significant cost for submitting a review request (see further discussion below).

The ASB should provide materials and assistance to groups who wish to make a request for a review. For example, the ASB may choose to provide pro-forma request documents, outlining the manner in which a request should be framed, and providing a non-exhaustive list of documentation that may be lodged in support of an application.

Finally, the charge for requesting a review should be scrapped, in accordance with recommendation eight below.

Recommendation two:

Guidance on the minimum standards of evidence that will trigger a review should be provided. Clear policy guidelines setting out what constitutes a 'substantial' or 'procedural' flaw in the Board's decision should be made available to complainants. These guidelines should accompany notice of the initial decision.

Merits review

As noted in the issues paper, the independent review system 'does not provide a further merit review of a case determined by the Board. The role of the Independent Review is to consider the process followed by the Board and to recommend whether the Board's original decision should be confirmed or reviewed.'

This is because, in accordance with the review fact sheet, '[i]t is inappropriate to set up one person as a decision maker in place of a 20 member Board that makes determinations on the basis of community standards.'

However, it is further stated that 'the Independent Reviewer will first consider whether the application for review sets out a prima facie case for review and will decide to accept or not accept the request'.

The independent review presents the only avenue for appeal for persons unhappy with the primary decision of the ASB. However, this review is limited to matters of procedure (for example, whether the Board followed the correct process in reaching a determination), and not for further consideration of the merits of the complaint.

It is unclear how the independent reviewer may make a determination as to whether an application for review sets out a prima facie case, without first considering the merits of additional material. We think that the effect of this is to do exactly the opposite of the stated objective; that is, to set up one person as a decision maker in place of a Board making decisions based on prevailing community standards.

Accordingly, and if indeed the independent reviewer is not responsible for a merits based consideration of additional material, then situations where new evidence is presented should automatically result in the matter being reconsidered by the Board.

Recommendation three:

The Board, who can make a determination of the whole complaint based on the merits, should automatically reconsider a request for a review where that request is accompanied by new or additional material.

Board to be bound by a recommendation of the independent reviewer

The Independent Reviewer was appointed by the ASB in 2008. As noted in the issues paper, the Independent Reviewer can only recommend whether the Board's original decision should be confirmed or reviewed. The emphasis on the word recommend seems to suggest that the IR is not in a position to compel the Board to confirm or review the primary decision.

In general terms, regulation can only work well where primary decision makers are held to account for their decisions, whether procedurally and/or on the merits. Complainants should have the ability to enforce their rights through a truly independent reviewer, or alternatively have the right for their complaint to be reconsidered on the merits and/or process to an institution outside of the self-regulatory process. This is particularly important in instances where self-regulatory processes are seen to be inadequate, such as in the current self-regulatory framework for advertising.

Recommendation four:

A recommendation from the Independent Reviewer should be binding on the Board.

Achieving independence

The Group notes that the Independent Reviewer process requires a complainant to produce new evidence, which is then considered by the same body for a determination (that is, the ASB Board makes a final determination).

As noted by the issues paper, the 'aim of this review is to understand community and industry perceptions about the Independent Reviewer system as it currently operates...' The ASB Board is an acknowledged self-regulatory institution, and the ASB Board appoints the Independent Reviewer. The Group is of the opinion that this perpetuates a perception that the review process is captured by an industry culture, and will result in few variations of primary decisions. The Independent Reviewer should, at the very least, be organisationally distinct from the primary decision makers.

However, in a self-regulatory scheme, the ability for a review body or person to be truly distinct from the primary decision maker is almost impossible – the result being that the perception from the community and stakeholders is that the decision process is at no stage subject to actual independent review.

The Group recommends the ASB adopt a model in which the Independent Reviewer is a separate board with distinct representation from the ASB Board, so that a different and independent body may consider a complaint independently from the primary decision maker.

Recommendation five:

An advertising complaints appeals body should be established. This body must be independent of the ASB, both organisationally and in terms of membership.

Openness

It is essential to the operation of any decision making body, that such decisions are made and delivered in an open and transparent manner – as noted above, regulation should not only be done, but be seen to be done. As key part of this concept is that all decision makers have a duty to give reasons for their decision.

It is our experience that some decisions by the ASB, whether following an independent review or not, take some time to be published on the website. Disclosure of the material matters of a decision is an important aspect of openness, and therefore the Group recommends that changes be implemented to ensure the timely publishing of decisions.

Recommendation six:

Priority should be given to determinations being published on the website as soon as possible after the decision.

While the review is underway (Q.7)

During the review process, the original decision (and any subsequent remedial action or withdrawal of the advertisement) will stand. The ASB will not delay publication of the relevant decision pending the outcome of the review.

While a review is underway:

- *The original decision stands*
 - *If the complaint is dismissed, the advertisement runs*
 - *If the complaint is upheld, the advertisement must be discontinued or modified*
- *The relevant decision is published pending outcome of the review*

The Group are concerned about the principle adopted by the ASB to allow an advertisement to run pending the outcome of a review. Because of the primacy afforded to this principle, the advertiser gets to profit from the ‘buzz’ created by the advertisement and the controversy surrounding a complaint.

When a valid complaint is lodged, an advertisement is permitted to run until determination by the Board; if the decision is made to dismiss the complaint, and a complainant wishes to request review by the Independent Reviewer, then the advertisement continues to run pending a recommendation from the Independent Reviewer and reconsideration by the ASB.

If a complaint is upheld following the Independent Reviewer process and reconsideration of the complaint, an advertisement may be modified or discontinued. It is our view that the effect of such a determination is nullified by the fact that discontinuing or modifying an advertisement at that late stage has long since lost any punitive effect. Considering that many of the harms associated with inappropriate advertising content occur in a short and immediate period of time, the need for effective penalties and prompt regulatory intervention is essential.

Additionally, because an advertisement continues to be broadcast pending the outcome of a complaint, or request for review and determination, the penalty of requiring an advertisement to be discontinued or modified has little or no deterrent effect, because the advertisement has generally run its cycle. The operation of this penalty provision provides little incentive for advertisers to comply with advertising standards.

Therefore, if an advertisement is permitted to remain in circulation while a review and reconsideration by the ASB (if recommended) is ongoing, then the ASB should have the ability to impose meaningful penalties that encourage advertisers to comply with the spirit and intent of advertising standards.

For example, advertisers who are found to have breached the code (whether in the first instance, or following a request for a review) should be fined, in addition to the requirement to discontinue or modify their advertisement. The fine should be substantial, capped at a set amount, or a fixed proportion of the amount spent by the advertiser on the campaign, whichever is greater. The ASB retains discretion to impose the set fee or the proportion of the advertising spend; the latter is likely to be effective for high-spend campaigns, while the set fee will be more appropriate for cheaper viral campaigns.

Recommendation seven:

Allowing an advertisement to continue to run pending the outcome of a review is unfairly advantageous to advertisers, who get the benefit of the advertisement even if ultimately their advertisement is found to breach advertising standards.

Penalties where an advertisement breaches the standards must be meaningful, and offer some form of deterrence – for example, in addition to the discontinuation or modification of an advertisement, a fine should be imposed that is proportionate to the offence and which counteracts the benefit to the advertiser.

Cost of making a request (Q.8/Q.9):

*The cost of lodging a request for review is \$500 for complainants, \$1000 for complainants from Incorporated Associations and \$2000 for advertisers. This payment must accompany a request for review and is **not refundable** if the Independent Reviewer decides that the request does not meet the grounds for review.*

The cost for lodging a review request is significant; and this cost is compounded by the following factors.

Firstly the fee is non-refundable if the independent reviewer decides that the request does not meet the grounds for review.

As noted above in relation to ‘Grounds for review and the review process (Q.4/Q.5)’ the independent reviewer is not permitted to conduct a merit review, and can only recommend reconsideration of the complaint. The Group is of the opinion that it is highly inappropriate for complainants to have to pay for a process where there is a risk that no additional review on the merits will occur.

While it may be argued that the cost provision is intended to discourage vexatious claims, we believe that the effect of this provision will be to deter genuine requests.

Secondly, the cost of a complainant submitting a review request is disproportionate to the cumulative benefit to the advertiser who can continue to publish their advertisement, pending a recommendation by the independent reviewer and reconsideration of the complaint by the ASB. On a cost/benefit analysis, it is unlikely that complainants would choose to take the step of requesting a review of the primary decision.

This cost is a significant deterrent to applicants seeking review and detracts from the immediate benefits of an independent review system. Accordingly, the Group recommends that the fee for requesting a review is scrapped – alternatively, the ASB should adopt a policy of refunding the fee in the event the Independent Reviewer does not recommend reconsideration of the complaint.

Recommendation eight:

The fee for requesting a review should be removed. As an alternative, the fee should be refunded to the party requesting the review, in the event that the Independent Reviewer recommends no further action.

Any other comments (Q.11): lack of awareness of the right to a review

Steps should be taken to ensure that the public is aware of their right to request a review by the Independent Reviewer. We note that since the Independent Reviewer process was introduced in 2008, only seven requests have been made for independent review¹⁰, which is a surprising number considering there were 1,144 Board determinations in 2008 and 2009.¹¹ This suggests a lack of awareness of the right for a review, and that the Independent Reviewer process is not used as often as it should be.

Information on this right needs to reach all complainants and the general public, and needs to be widely understood. We suspect that the very small number of review requests is at least partly related to the relative obscurity of the service.

Recommendation nine:

The ASB should provide more detailed and more accessible information in relation to the Independent Reviewer process. For example, information about the Independent Reviewer could be more prominent on the ASB website, and a public education campaign about the right to review, and the review process, should be undertaken.

For questions about this submission please contact Sondra Davoren, Legal Policy Advisor, Cancer Council Victoria on (03) 9635 5062 or email Sondra.Davoren@cancervic.org.au.

1 November 2010

¹ Administrative Review Council, *Internal Review of Agency Decision Making* 2000 (Report No 44) 22, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F32F341DBE097801FE\)~report44.pdf/\\$file/report44.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FE)~report44.pdf/$file/report44.pdf) at 1 November 2010

² Ibid.

³ Ministerial Council on Drug Strategy, Australian Government, *National Alcohol Strategy 2006 – 2009: Towards safer drinking cultures*, (2006). p. 26

[http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/B83AD1F91AA632ADCA25718E0081F1C3/\\$File/nas-06-09.pdf](http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/B83AD1F91AA632ADCA25718E0081F1C3/$File/nas-06-09.pdf) at 29 October 2010

⁴ Thomas Babor, et al. *Alcohol – No Ordinary Commodity* (1st ed. 2003), 180.

⁵ Wendy Loxley et al. 'Alcohol policy and harm reduction in Australia' (2005) 24, *Drug and Alcohol Review* 562.

⁶ Sally Casswell and Anna Maxwell, 'Regulation of Alcohol Marketing: A Global View.' (2005) 26 *Journal of Public Health Policy*, 352.

⁷ Ibid. 343.

⁸ Thomas Babor et al., *Alcohol: no ordinary commodity* (2nd ed. 2010), 183.

⁹ 'Key features of an effective complaint handling process' (2009) Ombudsman Victoria, <http://www.ombudsman.vic.gov.au/www/html/99-key-features-of-an-effective-complaint-handling-process.asp> at 14 September 2009

¹⁰ Advertising Standards Bureau, 'Outline of requests for independent review' <http://www.adstandards.com.au/pages/images/Independent%20Review%20outcomes%20-%20website.pdf> at 1 November 2010

¹¹ Advertising Standards Board 2009 complaint statistics <http://www.adstandards.com.au/pages/images/Stats2009Graphs%20-%20finalx.pdf> at 1 November 2010