

Complaints process

- 5.1 An accessible complaints and investigation process is key to a robust self-regulatory system. A great deal of the evidence received by the Committee demonstrated concerns about the Advertising Standards Bureau (ASB) complaints process.
- 5.2 This chapter discusses the complaints process, including public awareness of the process, timeliness of ASB determinations, the lack of sanctions, and the Independent Review process.
- 5.3 The current advertising self-regulatory system is complaints-driven, meaning that the ASB only investigates advertisements after a complaint has been made. The ASB (or the Australian Association of National Advertisers) does not pre-vet advertisements prior to their production or monitor the standard of existing advertisements.
- 5.4 The ASB accepts complaints in writing via their online form, mail or facsimile. Anonymous complaints are recorded but not accepted as formal complaints.¹ Complaints about alcohol advertising are forwarded by the ASB to the Alcohol Beverages Advertising Code Scheme for assessment against that code by an adjudication panel.
- 5.5 The ASB secretariat forwards legitimate and eligible complaints to the Advertising Standards Board (the Board). Only one complaint is required to launch an investigation into an advertisement. Complaints are assessed for determination by the Board, which meets twice a month. In instances where there is 'significant community concern' or a likely breach, the

1 Advertising Standards Bureau (ASB), 'Complaint Process Steps' <<http://adstandards.com.au/process/theprocesssteps/initiatingacomplaint>> viewed 28 April 2011.

Board can convene by teleconference and reach a determination in 24–48 hours.²

- 5.6 The number of complaints for a particular advertisement is not factored into the Board's decision. All legitimate complaints are investigated by the Board, even when an advertiser independently withdraws an advertisement that has been subject to complaints.
- 5.7 The Board determines, by simple majority, whether a complaint breaches any of the advertising codes, and is upheld or dismissed on that basis. The Chair, a position that rotates between Board members, has a casting vote in the event of a tied vote.
- 5.8 During the determination of a complaint, the complainants and the advertiser are informed of the process by the ASB, and when a determination is reached, the case report is published on the ASB's website.³

Receipt of complaints

- 5.9 The robustness of any complaints process must in part be determined by public awareness of the process, accessibility to the complaints process and trust in its independent operation. The ASB conducted a survey in 2006 to determine community awareness of where to direct complaints about advertising and found that only 10 per cent of the respondents could identify the Board or the ASB.
- 5.10 This finding is corroborated by a University of Wollongong study conducted soon after, which found that only 12.6 per cent of respondents knew of the ASB.⁴ The authors of the study note that 'community awareness of the complaints body ... [is] a necessary part of the self regulation system for advertising and promotion of this should be ongoing and widespread.'⁵

2 ASB, *Submission 27*, p. 8.

3 ASB, *Submission 27*, p. [7].

4 K Van Putten and SC Jones, 'Amplified Voices, but they are speaking to the Wrong People: Why the complaint system for unacceptable advertising in Australia is not working', 2008, p. 3, ANZMAC <http://www.anzmac2008.org/_Proceedings/PDF/S01/van%20Putten%20&%20Jones_S2%20S1%20P4.pdf> viewed 10 March 2011.

5 K Van Putten and SC Jones, 'Amplified Voices', 2008, p. 3.

- 5.11 The low rate of community awareness prompted the ASB to run an awareness campaign in 2008 in television, radio and print media.⁶ A subsequent survey in 2010 found that 63 per cent of respondents were aware of the ASB.⁷
- 5.12 Some submitters, such as Mr Richard Andrew, advise that 'a public awareness raising campaign needs to be run in regard to the complaints process'.⁸
- 5.13 The ASB notified the Committee that its awareness campaign would be extended to the outdoor medium in the later part of 2011.⁹
- 5.14 The Department of Health and Ageing conducted a survey of consumer awareness of the Alcohol Beverages Advertising (and Packaging) Code (ABAC) Scheme in 2005 and found that:
- 28 per cent of respondents were aware that restrictions on alcohol advertising existed (up from 20 per cent in 1994);
 - 14 per cent had heard of ABAC, but more than half of these respondents did not know what ABAC covered; and
 - only 15 per cent knew to direct complaints about alcohol advertising to the ASB or the ABAC Scheme.¹⁰
- 5.15 There are many alternative avenues that complaints about outdoor advertising may be directed to: the advertiser itself, the third-party outdoor media company that is displaying the advertisement, the local council, the local newspaper, and local and federal members of parliament.
- 5.16 Therefore, in light of the low level of public awareness of the ASB and the many alternative avenues for complaints, the number of complaints that the ASB receives may not represent the true number of complaints actually lodged.
- 5.17 The ASB itself does not appear to have investigated how many complaints may be directed elsewhere. Although the ASB advises that relevant

6 ASB, *Submission 27*, p. 13.

7 ASB, *Community Perceptions of Sex, Sexuality and Nudity in Advertising*, June 2010, p. 46.

8 Mr Richard Andrew, *Submission 5*, p. 2.

9 ASB, *Submission 27a*, p. 2.

10 Department of Health and Ageing, 'Consumer Perceptions of Alcohol Advertising and the Revised Alcohol Beverages Advertising Code', October 2005, pp. 14–16, <<http://www.alcohol.gov.au/internet/alcohol/publishing.nsf/Content/consum-percept>> viewed 28 April 2011. Complaints against the ABAC should be directed to the ASB.

industry bodies direct consumers to the ASB from their websites and forward on complaints to the ASB, this process is informal.

- 5.18 One submission claims that a council member in Victoria received more than 1 000 complaints about a particular outdoor advertisement.¹¹ These complaints do not show up in the ASB statistics, indicating that those complaints were not referred on to the ASB for consideration.
- 5.19 The Committee notes that it is not only awareness of the complaints process that is essential to the proper functioning of the self-regulatory system. Members of the public must have the time, incentive and means to translate a potential objection to an outdoor advertisement into a written complaint. Mrs Celeste Sell told the Committee that 'a majority of people are complaining, but not officially. Why is that? Who has the time?'¹²
- 5.20 One submission comments that:
- It must be kept in mind that one formal complaint represents many complaints which have not been formalised. Many people in today's society are very time-poor and will often complain to their work colleagues, friends or neighbours but not take the time to make a formal complaint.¹³
- 5.21 The Australian Council on Children and the Media (ACCM) advises that:
- It would be deceptive to use [complaint rates] as a measure of community concern. It will not reflect, for example, widespread but relatively low-level concern. It must also be noted that consumers can become inured to certain kinds of advertising if these are ubiquitous, and also be afraid of appearing to be a 'wowser'. They might not know where to complain, or may simply think it won't do any good to complain.¹⁴
- 5.22 Mrs Marion Smith told the Committee, 'I have not tried for a long time to make any complaint. It was really very pointless.'¹⁵ Collective Shout agreed with Mrs Smith, saying that:

It is pointless to make a complaint. When they make a complaint about an ad which, in their judgement, is inappropriate for viewing by children because it objectifies women and is sexist,

11 Kids Free 2B Kids (KF2BK), *Submission 44*, p. 13.

12 Mrs Celeste Sell, *Committee Hansard*, Sydney, 25 March 2011, p. 59.

13 Mr Ian Moller, *Submission 7*, p. 1.

14 Australian Council on Children and the Media, *Submission 28*, p. 4.

15 Mrs Marion Smith AM, *Committee Hansard*, Sydney, 25 March 2011, p. 56.

they get knocked back. So why would they bother complaining again?¹⁶

- 5.23 Market research conducted by the Victorian Portrayal of Women Advisory Committee:

... identified the psychology of complaints as a significant issue. In particular the low rate of conversion from seeing something inappropriate to wanting to complain, and then from wanting to complain, to actually making a complaint. Of the female respondents who had seen something inappropriate in outdoor advertising (37%), almost two in every three (62%) had thought about complaining, but only 4% of those who thought about complaining did so.¹⁷

- 5.24 The Coalition on Food Advertising to Children suggests that 'the relatively low rate of successful complaints and the reasoning given for the dismissals act as a deterrent for members of the public to complain' about food and beverage advertising.¹⁸

- 5.25 The Alcohol Policy Coalition raised an additional concern about the added media attention that is given to controversial complaints or determinations which may then increase the exposure of a potentially inappropriate advertisement:

From a public health perspective ... we are often at the crossroads of whether we complain about an ad and that then gives it more notice, or we sit back and allow the ad to run its course without making that sort of song and dance about it.¹⁹

Committee comment

- 5.26 The Committee is concerned that anonymous and telephone complaints are not investigated as formal complaints by the ASB. In contrast, the Australian Competition and Consumer Commission (ACCC) accepts complaints by telephone, even anonymous calls.²⁰ While there is an increased chance that anonymous complaints are vexatious, they should

16 Ms Melinda Liszewski, Representative, Collective Shout, *Committee Hansard*, Sydney, 25 March 2011, p. 61.

17 Victorian Government, *Portrayal of Women in Outdoor Advertising*, February 2002, p. 13.

18 Coalition on Food Advertising to Children, *Submission 31*, p. 4.

19 Ms Sondra Davoren, Legal Policy Adviser, Alcohol Policy Coalition, *Committee Hansard*, Melbourne, 4 April 2011, p. 22.

20 Mr Scott Gregson, General Manager, Enforcement and Compliance, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 3 March 2011, p. 6.

not automatically be precluded from an initial investigation. The Committee does not consider that a complaints phone line, to be an onerous one for the ASB to implement.

- 5.27 In addition, the Committee appreciates that the number of complaints about an advertisement cannot be used solely to determine its acceptability. However, when an advertisement does elicit a disproportionately large number of complaints, the Board should give due consideration as to whether the volume of complaints are from a single lobby group and thus representing only one sector of society, or whether they are a true indicator of widespread community concern.

Recommendation 15— Advertising Standards Bureau

- 5.28 **The Committee recommends that the Advertising Standards Bureau amend its complaint process to also accept complaints about advertising by telephone and email and accept and investigate anonymous complaints. These changes should be implemented by 30 October 2011.**
- 5.29 The Committee heard anecdotally that members of the community are not aware of the complaints process should they have objections to outdoor advertising. Moreover, it was evident from some of the submissions that it is not clear to the general public that the advertising standards body is not a government body.
- 5.30 The number of complaints received and considered is important in validating the low rates of upheld decisions that the industry relies on to demonstrate the efficacy of the self-regulation system. However, questions about the accessibility and reach of the complaints system raise doubts as to whether the small number of advertisements found to be breaching advertising codes does in fact represent community satisfaction with advertising standards.
- 5.31 The Committee commends the ASB for running an awareness campaign in response to poor survey results of community awareness of the complaints process, and believes that it is timely to extend this campaign to the outdoor media. The Committee encourages the ASB to run its awareness campaign on a continuing cycle across all forms of media.
- 5.32 The Committee also considers it vital that the ASB is more proactive in ensuring that all advertising complaints are brought to their attention by liaising with other bodies that may have complaints directed to them, such

as advertisers, outdoor media display companies, and local, state or territory, and federal governments.

- 5.33 In particular, the Committee recognises that local governments and councils are often the recipient of complaints about advertisements in public spaces. While not determining the content of these advertisements, in many instances local governments are responsible for the approvals for a structure to be erected or displayed.
- 5.34 The Committee suggests that the ASB undertake to present seminars on an annual basis to the Australian Local Government Association about the advertising complaints system to ensure effective referral of local advertising complaints to the Advertising Standards Bureau.
- 5.35 The Committee is aware that the ASB does undertake some liaison and education roles with other agencies. However the Committee considers that the ASB should undertake to provide to local governments and parliamentarians with more information on appropriate advertising guidelines and complaints procedures, especially in regard to outdoor advertising.

Recommendation 16— Advertising Standards Bureau

- 5.36 **The Committee recommends that the Advertising Standards Bureau establish regular nation-wide information and awareness campaigns about the advertising complaints system across all forms of media, including outdoor, television and print.**

In particular, information on the outdoor advertising code, once it is developed, and the complaints process should be provided to:

- **all federal and state or territory elected representatives; and**
- **the Australian Local Government Association for distribution to local governments.**

Recommendation 17— Advertising bodies

- 5.37 **The Committee recommends that the Australian Association of National Advertisers require its members to forward any complaints from the public about their advertising to the Advertising Standards Bureau.**

The Committee also recommends that the Outdoor Media Association require its members to forward any complaints from the public about their advertising displays to the Advertising Standards Bureau.

Timeliness of determinations

- 5.38 Timeliness in reaching determinations about complaints is another component that is integral to the effectiveness of a complaints process. Given that outdoor advertising occupies public spaces and continues to be viewed by a large and unrestricted captive audience, this issue is particularly important with regard to outdoor advertising.
- 5.39 The Board meets twice a month to make determinations on complaints. Time periods for determining complaints vary, with the majority of determinations completed within 45 calendar days and only five per cent of cases taking between 60 and 90 days.²¹
- 5.40 Within 10 business days of reaching a determination, the ASB sends a draft case report to the advertiser, advising of their decision.²² Advertisers who have had complaints upheld against their advertisements are given an additional five working days to respond to the determination by modifying or removing the advertisement.²³ The complaint, the advertiser's response, the Board's determination, and, where applicable, the advertiser's response to an upheld complaint, are published together as a case report on the Bureau website.
- 5.41 The ASB claims that 'in the vast majority of cases where Code breaches are found, advertisers quickly ensure that their advertisement is removed or modified'.²⁴

21 ASB, *Submission 27*, p. [7].

22 ASB, 'Complaint Process Steps' <<http://adstandards.com.au/process/theprocesssteps/initiatingacomplaint>> viewed 28 April 2011.

23 ASB, 'Complaint Process Steps' <<http://adstandards.com.au/process/theprocesssteps/initiatingacomplaint>> viewed 28 April 2011.

24 ASB, *Submission 27*, p. [10].

- 5.42 Several submissions criticised the length of time taken to resolve complaints about an advertising medium that generally relies on short-term campaigns to reach a wide audience. The Pedestrian Council of Australia questions:

But why, when it comes to the ASB, are there six weeks ... when they all know that, for most motor vehicles, 90 per cent of the campaigns are for a maximum of four weeks, sometimes for a week, and then the ad is over? By the time the complaint is upheld, it is pointless, so that is a farce.²⁵

Most outdoor advertisements have very short cycles and by the time the advertisement has had the complaint lodged and acted upon, the view cycle may be over anyway, or the advertisement may have had little time left to run by the time it has been axed. Therefore advertisers could resort to short runs thereby effectively avoiding being axed.²⁶

- 5.43 Mrs Kristen Butchatsky states in her submission that 'once a complaint is lodged, the length of time it takes to have an offending billboard removed is so long it practically negates the point of complaining in the first place'.²⁷

- 5.44 Collective Shout cites a specific case where an advertiser did not agree to remove an offending advertisement until the end of the season, which was likely the original end date for that campaign, and states that:

One of our big problems is that often [advertisers] will withdraw but, by the time the complaints process is finalised, they have finished their campaigns anyway. It does not hurt them to withdraw, because they were going to finish up anyway.²⁸

- 5.45 The Castan Centre for Human Rights Law suggests that even 'when complaints are upheld, advertisers are still afforded sufficient time to get their message to a broad general audience'.²⁹

25 Mr Harold Scruby, Chair and Chief Executive Officer, Pedestrian Council of Australia (PCA), *Committee Hansard*, Sydney, 25 March 2011, p. 43.

26 Mr Richard Andrew, *Submission 5*, p. 2.

27 Mrs Kristen Butchatsky, *Submission 21*, p. 2.

28 Ms Melinda Tankard Reist, Founder, Collective Shout, *Committee Hansard*, Melbourne, 4 April 2011, p. 43.

29 Ms Tania Penovic, Associate, Castan Centre for Human Rights Law, *Committee Hansard*, Melbourne, 4 April 2011, p. 26.

- 5.46 The Communications Council defends the time it takes to remove outdoor advertisements, citing 'logistical issues associated with removing billboard advertisements, which in many cases requires the blocking of roads for example'.³⁰
- 5.47 The Outdoor Media Association (OMA) also advises that 'it can be a complex logistical operation to remove an advertisement at short notice'.³¹
- 5.48 However, Adshel's internal approval process notes that the receipt of complaints will result in an advertising campaign being 'removed from the offending area(s) or completely within 24 hours'.³²
- 5.49 FamilyVoice Australia raises the logistical issues of removing outdoor advertising and how this may undermine any determination:
- Even after a determination is made, given the physical nature of billboard advertising, it may take some time to remove all such advertisements. In the AMI's *Want Longer Lasting Sex?* case it was accepted by the Board that it could take AMI up to 30 days to remove all the relevant advertisements. Naturally thousands of people have seen the offending advertisements before they are removed.³³
- 5.50 Mrs Claire Boyd queries in her submission why outdoor advertisements are not removed during the complaints process: 'Surely this is putting the advertiser first above the community. They are still able to advertise in an inappropriate way until the complaint is processed thereby achieving their goal.'³⁴

Committee comment

- 5.51 The Committee understands that outdoor advertisements cannot be removed before a decision has been made about its acceptability. Equally the Committee agrees that having a complaint upheld against an advertisement some weeks after its installation does little to prevent its intended purpose – broad exposure – from being achieved.
- 5.52 Outdoor advertising, in this regard again differs from other forms of media, such as print and television, where advertisements can be

30 Communications Council, *Submission 34*, p. 2.

31 Outdoor Media Association (OMA), *Submission 32*, p. 18.

32 OMA, *Submission 32*, p. [111].

33 FamilyVoice Australia, *Submission 1*, p. 4.

34 Mrs Claire Boyd, *Submission 38*, p. 1.

withdrawn immediately from air or the next print run once found to breach advertising standards.

- 5.53 While physical structures can take some time to remove or modify, the OMA provides example scenarios of short deadlines that the industry appears to be capable of meeting despite the need to physically install and uninstall advertisements.³⁵
- 5.54 The Committee considers that the most effective means of dealing with complaint regarding outdoor advertising that causes public concern during the determination process is to prevent content that is likely to cause offence from being displayed in the first place.
- 5.55 However it is recognised that, regardless of the most stringent codes and best efforts of the ASB and the OMA, some outdoor advertising will be the subject of complaints.
- 5.56 In recognition of the special nature of outdoor advertising, including the growing use of electronic signage, the Committee strongly urges the Board to ensure that its investigations and determinations are expedited. The Board should make full use of teleconference facilities in order to provide an immediate response where required to outdoor advertising complaints. This is of particular importance where the advertisement is in multiple locations, near an area where children would be expected to congregate, or of a large or imposing form in a public space.

Sanctions for upheld complaints

- 5.57 The ASB advises the Committee that 'a determination that an advertisement breaches community standards means the immediate removal of the advertisement and prohibits use of the advertisement in the future.'³⁶
- 5.58 Ms Fiona Jolly, Chief Executive Officer of the ASB, explained that if an advertiser is reluctant to accept a Board determination against them, she first advises them that 'really it is in the interests of industry and of the self-regulation system for them to do the right thing'.³⁷

35 OMA, *Submission 32*, p. [116].

36 ASB, *submission 27*, p. 17.

37 Ms Fiona Jolly, Chief Executive Officer, ASB, *Committee Hansard*, Canberra, 24 February 2011, p. 6.

5.59 Furthermore:

An advertiser's failure to respond will always be included in the final case report which is made public on the Bureau's website. This is generally unwelcome publicity for the advertiser and for most advertisers such publicity is a threat to brand reputation and is to be avoided. In a similar fashion, an advertiser's failure to respond can feature in information released to the media which follows the relevant Standards Board meeting, and the Bureau Chief Executive Officer will respond to all media requests with a full account of the particulars of the case, including the timeliness of the advertiser's compliance.³⁸

5.60 The Communications Council acknowledges that:

It is in the interests of the industry to remain in step with prevailing community attitudes. Failure to remain in step with community standards can result in brand damage and serious financial cost, and undermines the confidence the community, and government, has in the self-regulatory system.³⁹

5.61 However, the ASB has no power to impose formal sanctions for advertisers who do not comply with Board determinations. The ASB does have a number of options available to them to engage others to enforce their ruling in the following situations:

- If the advertisement breaches government regulations, the ASB can refer the case to the relevant government body
- If the advertisement is on a third-party outdoor media site, the ASB can request that the Outdoor Media Association ask their member to remove the advertisement
- If appropriate, the ASB can refer the case to local law enforcement bodies or local councils.⁴⁰

5.62 Regarding upheld complaints for all types of advertising, the ASB claims 'nearly 100 per cent compliance by industry'.⁴¹ Ms Jolly advised the Committee that of 15 upheld complaints for outdoor advertisements in 2010, the ASB had compliance problems with two of them.⁴² Neither of

38 ASB, *Submission 27*, p. 10.

39 Communications Council, *Submission 34*, p. 7.

40 ASB, *Submission 27*, pp. [10-11].

41 ASB, *Submission 27*, p. [10].

42 Ms Jolly, ASB, *Committee Hansard*, Canberra, 24 February 2011, p. 9.

these advertisements was on a third-party site.

5.63 The advertising industry claims that because self-regulation is in the industry's interest, advertisers will strive to adhere to the rules. The ASB notes that 'advertisers share a common interest in promoting consumer confidence and respect for general standards of advertising'.⁴³

5.64 The Communications Council points out that 'there are also substantial costs ... if they need to remove or take down a campaign'.⁴⁴ Furthermore, creative advertising agencies risk the loss of business if they provide inappropriate content to advertisers:

... the reality is that if an agency puts up creative that is knocked back it has a significant flow-on effect in costs for the company. And that has a significant flow-on effect on whether the agency is used again in the future. There have been a number of cases where major accounts have been lost, so it has been at costs of millions of dollars to particular businesses because they got it wrong.⁴⁵

5.65 However, several submissions argue that advertiser interest in 'pushing the envelope' to attract attention to their brand is stronger than any negative publicity that might arise from disregarding Board decisions. There are no penalties arising from disregarding a Board decision, and some argued that negative publicity may still benefit an advertiser.

5.66 The Australian Christian Lobby claims that:

... the 'honour system' is not working because there are no disincentives or penalties to discourage the display of offensive outdoor advertisements. In fact, placing an offensive advertisement, knowing that it will offend and draw both complaints and media exposure, will have achieved its objective of brand or product awareness.⁴⁶

5.67 Mrs Butchatsky argues 'the fact that there are no penalties in place for breaching ethical codes means there is nothing to deter companies from running further ads in a similar vein'.⁴⁷

43 ASB, *Submission 27*, p. 2.

44 Ms Linde Wolters, Media and Public Affairs Officer, Communications Council, *Committee Hansard*, Sydney, 25 March 2011, p. 17.

45 Mr Daniel Leesong, Chief Executive Officer, Communications Council, *Committee Hansard*, Sydney, 25 March 2011, pp. 17–18.

46 Australian Christian Lobby (ACL), *Submission 24*, p. 9.

47 Mrs Kristen Butchatsky, *Submission 21*, p. 2.

- 5.68 Ms Jenna Weston agrees in her submission that 'there is no incentive for advertisers to change their behavior, because there is no penalty for breaching the code. This results in repeat offending'.⁴⁸ Mrs Boyd compares the lack of penalties to 'speed limits without speeding fines'.⁴⁹
- 5.69 There is concern that breaches of the self-regulatory system are not taken seriously. In their submission, Collective Shout points out that APN Outdoor, an outdoor media display company that is a member of OMA, included in its online gallery a Calvin Klein advertisement about which the ASB upheld complaints.⁵⁰
- 5.70 Kids Free 2B Kids (KF2BK) notes that a complaint about an advertisement that appeared on the side of a bus was upheld by the Board, but the advertiser simply moved the bus into storage, which is open-air and no less visible than before.⁵¹
- 5.71 The advertiser then transferred the image to smaller vehicles, eliciting complaints that were again upheld by the Board six months later. The advertiser did not respond to the second case determination.⁵² According to KF2BK, the offending vehicle was still on display three months after the Board upheld the complaint: 'The owners know the image is not allowed in the public space – what are the penalties for continuing to ignore the ASB?'⁵³
- 5.72 As the ASB does not have the power to enforce its decisions, the ASB referred this particular case to the Victorian Government to 'take appropriate action'.⁵⁴
- 5.73 The Australian Christian Lobby suggests that 'a system to control rogue elements, especially repeat offenders is necessary'.⁵⁵ Mr Richard Andrew suggested banning advertisers from outdoor advertising for a period of time if they breach the codes several times in several years.⁵⁶

48 Ms Jenna Weston, *Submission 6*, p. 1.

49 MRs Claire Boyd, *Submission 38*, p. 2.

50 Collective Shout, *Submission 43*, p. 4; APN Outdoor, 'Campaign Gallery' <<http://www.apnoutdoor.com.au/Interact/Gallery/>> viewed 10 March 2011.

51 KF2BK, *Submission 44*, p. 18.

52 ASB, Case No. 0504/10.

53 KF2BK, *Submission 44*, p. 17.

54 ASB, *Submission 27*, p. [11].

55 ACL, *Submission 24*, p. 9.

56 Mr Richard Andrew, *Submission 5*, p. 2.

Committee comment

- 5.74 The Committee is concerned about the lack of enforcement power in the advertising self-regulatory system, and is conscious that public confidence is difficult to maintain when players who breach the rules are not seen to be disadvantaged in some way.
- 5.75 Noting that the industry relies heavily on peer pressure and threats to brand reputation to ensure advertiser compliance with Board rulings, the Committee recommends that this leverage be used more strongly by the ASB. Although the website publishes all complaint determinations, the names of advertisers and products that have breached advertising codes are not prominently displayed. Visitors to the website must search all case reports for specific advertisers or time periods.
- 5.76 Moreover, the name of the parent company of an advertiser or product is not always known to the general public. For example, searching for Lynx deodorant will fail to bring up any case reports as they are filed under the parent company Unilever Australasia. Searching for Unilever brings up all case reports related to their products and each report needs to be downloaded individually to identify the product and determine whether the complaint was dismissed or upheld.
- 5.77 The Committee notes that two of 15 outdoor advertisements that had complaints upheld against them did not comply with the Board's determinations. This rate is substantially lower than the 'nearly 100 per cent' compliance rate that the ASB boasts overall. In the category of outdoor advertising, the rate of upheld complaints and in particular the two advertisers who did not comply with the Board's decisions are disturbing. These outdoor advertisements may represent the repeated exposure of inappropriate content to an unrestricted audience over a prolonged period of time. The disregard shown to the ASB by 'rogue elements' highlights the failure of industry peer pressure to ensure compliance in all instances.
- 5.78 While recognising the seriousness of a lack of sanctions and some compliance failure, a remedy to this is problematic. The Committee appreciates that legislating some form of enforcement power is a strong response to the low rates of non-compliance. Nonetheless, lack of compliance, no matter how infrequent, is still a significant deterrent to public and governmental approval and acceptance of self-regulation.
- 5.79 The Committee considers that there are many examples of consumers wishing to exercise choice in their buying power, and the clear publication of non-compliant brands and products may enable consumer pressure to

succeed where industry peer pressure is insufficient. The Committee recommends a 'name and shame' type approach to non-compliance through publication on the ASB website.

- 5.80 Further, if the public and the Australian government are to have confidence in the capacity of the industry to self-regulate, then monitoring of compliance rates is essential and should form part of the ASB's reporting regime.

Recommendation 18— Advertising Standards Bureau

- 5.81 The Committee recommends that the Advertising Standards Bureau address instances of advertiser non-compliance by:

- establishing a dedicated webpage, easily accessible from the Advertising Standards Bureau website, that names advertisers, and their products, who have breached advertising standards or refused to comply with Board determinations;
- circulating the names of non-compliant advertisers in industry newsletters and other means of communication;
- providing the names of non-compliant advertisers to the Outdoor Media Association and encouraging their members to consider not accepting advertisements from them;
- providing the names of non-compliant advertisers to the Attorney-General so that the Attorney-General's Department can consider legislation that would require the naming of non-compliant advertisers in Parliament, similar to the *Equal Opportunity for Women in the Workplace Act 1999*; and
- reporting annually to the Attorney-General's Department on the non-compliance rate and steps taken to achieve compliance.

Independent review process

- 5.82 The ASB introduced an independent review process in 2008 for complainants and advertisers who object to the Board's decisions.

Requests for a review must be lodged within 10 working days from the date of the ASB's notification of determination.⁵⁷

- 5.83 A fee is charged for an independent review, and the Committee was pleased to hear that the fees have recently been reduced substantially. In March 2011, the ASB announced that the fees for lodging a review request had been lowered to \$100 for individuals, \$500 for non-profit organisations, \$1 000 for advertisers who pay the ASB levy and \$2 000 for advertisers who do not pay the ASB levy. In addition, the fee will be reimbursed if the Board subsequently changes its determination.⁵⁸
- 5.84 There are three grounds for requesting a review of a Board decision:
- new or additional evidence which was not previously available;
 - a substantial flaw in the Board's determination; or
 - a substantial flaw in the Board's determination process.⁵⁹
- 5.85 At present there are two Independent Reviewers, former Federal Court Justice Ms Deirdre O'Connor and former Australian Federal Police Commissioner Mick Palmer. The ASB states that the role of the Independent Reviewer is to:
- ... assess the validity of the process followed by the Board, or to assess any new material provided by parties to the case. The Independent Reviewer does not provide a further merit review of a case. Their role is to recommend whether the Board's original determination should be confirmed or be reviewed.⁶⁰
- 5.86 Thus the review is only of the decision process, rather than the decision itself or the grounds for complaint. The ASB explains that the rationale for this narrowly-prescribed role is that 'it 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'.⁶¹

57 ASB, 'Independent Review of ASB Determinations', <<http://adstandards.com.au/process/theprocesssteps/independentreviewofasbdeterminations>> viewed 2 May 2011.

58 ASB, Review of Independent Review Process 2010, March 2011, p. 21.

59 ASB, 'Independent Review of ASB Determinations', <<http://adstandards.com.au/process/theprocesssteps/independentreviewofasbdeterminations>> viewed 2 May 2011.

60 ASB, 'Independent Review of ASB Determinations', <<http://adstandards.com.au/process/theprocesssteps/independentreviewofasbdeterminations>> viewed 2 May 2011.

61 ASB, 'Independent Review of ASB Determinations', <<http://adstandards.com.au/process/theprocesssteps/independentreviewofasbdeterminations>> viewed 2 May 2011.

- 5.87 According to the ASB, an Independent Reviewer's finding that the Board's determination should be reviewed does not necessarily mean that the Board determination would change:

... the independent review might find that there is a flaw in the process or that there is new evidence, so the board has to fix the process or look at the new evidence, but fixing the process does not mean that the board's decision will necessarily be different.⁶²

- 5.88 In these instances, the Independent Reviewer may have determined that the decision-making process was flawed or that new evidence requires consideration. However, in re-considering the case, the Board may or may not arrive at the same decision.
- 5.89 One witness complained to the Committee that independent review decisions should be final, and that the application fee for review should be reimbursed if the Independent Reviewer finds in the complainant's favour.⁶³
- 5.90 Since the introduction of the independent review process, 12 cases have been brought for review, six by the advertiser and six by a complainant.⁶⁴ In only half of these cases, the Independent Reviewer has confirmed the Board's decision. Of the six cases where the Board was recommended to review its original determination, the Board reached a different determination to its original on only one occasion.

Committee comment

- 5.91 The Committee feels that the independent review process is not well understood by the community, and that measures need to be taken to improve public awareness and confidence in the process. The Committee also notes that even though the fees for lodging a request for a review have been decreased substantially, nevertheless \$100 presents a significant barrier to individuals who may object to a Board decision.
- 5.92 In the Committee's opinion, the independent review process as it currently operates is ineffective in providing independent oversight. The role of the Independent Reviewer could be improved significantly by formally empowering them to confirm and monitor Board decisions.

62 Ms Jolly, ASB, *Committee Hansard*, Melbourne, 4 April 2011, p. 11.

63 Mr Scruby, PCA, *Committee Hansard*, Sydney, 25 March 2011, pp. 43, 44.

64 ASB, *Submission 27*, pp. [32-33].

- 5.93 Half of the cases for review thus far were returned to the Board to reconsider due to faulty decision-making processes.⁶⁵ Although this sample is skewed, as it comprises those cases that are subject to appeals, Independent Reviewer recommendations to review 50 per cent of the cases suggest flaws in the integrity of the Board's determination processes.
- 5.94 The Committee expresses concern that the number of appeals lodged is low – potentially due to the cost barrier, a lack of public awareness and the 10-day window of opportunity. The Committee urges the ASB to review to what extent these factors inhibit appeals and potentially undermine confidence in the complaints and appeals processes.
- 5.95 The integrity of the Board's decision-making processes should be confirmed by the Independent Reviewer taking on the role of examining a random sample of Board determinations. The results of such reviews, being independent and transparent, would improve the Board's work and inspire public confidence in the process.

Recommendation 19— Advertising Standards Bureau

- 5.96 **The Committee recommends that the Advertising Standards Bureau strengthen the independent review process by:**
- **providing a comprehensive explanation of the independent review process on its website and in informational material to increase the public's understanding of the role of the Independent Reviewer;**
 - **tasking the Independent Reviewer with checking a random sample of determinations annually to assess the validity of Advertising Standards Board determinations that have not been appealed formally; and**
 - **aiming for 90 per cent or higher Independent Reviewer agreement with Advertising Standards Board determination processes in the random sample.**

65 ASB, *Submission 27*, pp. [32–33].

Graham Perrett MP
Chair

