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Senate Standing Committee on Environment,
Communications and the Arts
Department of the Senate
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[By email]

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Dear Dr Holland,

**Advertising Standards Bureau response to submissions:
Inquiry into the effectiveness of the broadcasting codes of practice**

The Advertising Standards Bureau (ASB) appreciates the opportunity to respond to submissions made to this Inquiry that refer to the role of the ASB in accepting complaints about advertisements for determination by the Advertising Standards Board (AS Board).

The ASB is committed to providing an effective complaints resolution process as part of the advertising self-regulation system. This response aims to provide information to the Committee about the ASB's role and procedures, within the context of this Inquiry's terms of reference.

1. ASB role and self-regulation

The ASB plays an important role within the advertising self-regulation system. The current system of industry regulation came into operation in 1998.

The self-regulation system depends on a number of layers that work together to maintain high standards of advertising in Australia. A brief outline of these layers is set out below.

1.1 Industry Codes

The system rests on the industry's voluntary adherence to industry and community standards. These are set out in the Australian Association of National Advertisers (AANA) Code of Ethics.

The AANA Code of Ethics aims "to ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors".

The AANA Code of Ethics applies to advertising or marketing communications, as defined in the AANA Code of Ethics. Examples of material that are not considered

advertising or marketing communications for the purposes of the AANA Code of Ethics are promotions produced by television or radio stations to promote their own programs and unpaid community service announcements. Such communications fall outside the definition as they are not broadcast “for payment or other valuable consideration”.

The AANA Code of Ethics is divided into two sections. Section 1 concerns questions of law and truth or accuracy of advertising (and is outside the scope of this response). Section 2 covers issues including the discriminatory portrayal of people, the use of language, portrayals of violence, sex, sexuality and nudity, concern for children and health and safety.

Section 2 of the AANA Code of Ethics includes requirements that advertisers comply with other industry codes of practice in relation to particular types of advertising and marketing communications. These codes are:

- The AANA Code for Advertising & Marketing Communications to Children (AANA Children’s Code);
- The Federal Chamber of Automotive Industries Code of Practice relating to Advertising for Motor Vehicles (FCAI Code); and
- The AANA Food & Beverages Advertising & Marketing Communications Code (AANA Food & Beverages Code).

In addition to the broad application of the AANA Code of Ethics, a specific code exists to cover alcohol advertising. This is the Alcohol Beverages Advertising Code (ABAC).

Specific industry codes also exist in certain industries, including slimming/weight management products and services, and therapeutic goods.

1.2 Complaint handling process

The ASB administers the complaints resolution component of the advertising self-regulation system and is independent of the AS Board. The ASB is an administrative mechanism to raise funds from industry to allow the business of the AS Board to proceed. It takes no part in the deliberations of the AS Board. The ASB administers complaints under the following codes of practice:

- AANA Code of Ethics
- AANA Children’s Code
- AANA Food and Beverages Code
- FCAI Code
- ABAC management scheme (complaints under this scheme are accepted by ASB as a single receiving point and forwarded for consideration by the ABAC chief adjudicator).

Complaints received by the ASB which fall within section 1 of the AANA Code of Ethics are referred to the ACCC and state and territory fair trading bodies and for consideration

by the Advertising Claims Board. The role of the Advertising Claims Board is outside the scope of this response.

Complaints received by the ASB which fall within section 2 of the AANA Code of Ethics are referred for consideration by the AS Board. As noted above, section 2 also requires advertising and marketing communications to comply with the AANA Children's Code, AANA Food and Beverages Code and the FCAI Code. Accordingly, the AS Board also considers complaints which fall within these codes. Complaints received by the ASB about alcohol advertising are considered by the AS Board in relation to their compliance with section 2 of the AANA Code of Ethics and at the same time are independently considered by the chief adjudicator of the ABAC Adjudication Panel to determine if the complaint raises issues under the ABAC.

The AS Board complaint resolution process is a free service. Complaints may be made via an online complaint form, by post or facsimile. A single written complaint is sufficient to initiate the complaint process.

Complaints are promptly assessed as to their appropriateness for submission to the AS Board for determination. The ASB, as secretariat for the AS Board, replies to all complainants informing them of the status of their complaint.

Complaints are not forwarded to the Board if they do not fall within section 2 of the AANA Code of Ethics or the other codes. An example would be complaints about unpaid community service announcements.

The ASB also notifies the relevant advertiser/marketer of the complaint and requests a written response. The complaint and this response, along with copies of the relevant advertising or marketing communication, are dealt with at the next meeting of the AS Board.

The AS Board determines complaints through a panel of public representatives from a broad cross-section of the Australian community. The AS Board represents a diverse cross-section of views and skills, a broad range of age groups and is gender-balanced. Individual AS Board members do not represent any particular interest group and are individually and collectively clearly independent of the industry.

The AS Board meets on a monthly basis. The AS Board will also meet between meetings, usually by teleconference if the ASB, as secretariat, considers that a matter should be considered as a matter of urgency.

The AS Board discharges its responsibilities with fairness, impartiality, detailed discussion and thorough consideration of all issues, and with a keen sense of prevailing community values in its broadest sense. Its task is often a difficult one and the outcomes of its determinations will not and cannot please everyone.

If an advertisement is found to breach section 2 of the AANA Code of Ethics and the advertiser does not respond to the opportunity to modify or discontinue the advertisement within the allowed time frame, the AS Board can do any or all of the following:

- Include the advertiser's failure to respond in the case report;
- Forward the case report to media proprietors;
- Post the case report on the ASB's website; and
- If appropriate, refer the case report to the appropriate government agency or industry organisation.

Since the ASB was established, there has been only one advertiser who has declined to comply with the Board's determination and remove the advertisement. In this case, the relevant media agency (the Outdoor Media Association) arranged the removal of the advertisement. There is therefore 100% compliance by advertisers and affiliated organisations with AS Board determinations.

From April 2008 original complainants and advertisers are also able to request an independent review of an AS Board decision regarding a particular advertisement.

1.4 Ongoing research and consultation

The system of self-regulation of advertising is constantly evolving, having regard to changing societal expectations. Consistent with this, participants in the self-regulatory process are involved in activities that ensure the system remains responsive to those changing societal expectations.

At the industry code level, this includes undertaking a process of review to ensure codes of practice keep pace with prevailing community standards. For example, the AANA undertook a review in 2007 into the AANA Children's Code, with extensive public consultation. Issues considered included sexualisation of children and food and beverage advertising and marketing. Following this review, a revised code was released by the AANA in April 2008.

Ongoing industry commitment to the voluntary codes is essential. This, of course, includes the substantial financial contribution made by advertisers to fund the complaint handling process via a voluntary levy. It also includes an ongoing commitment to education within the industry in regard to the codes of practice.

For example, under the Advertising Federation of Australia (AFA) Accreditation program, the AFA, the AANA, the ASB and Free TV collaborated to present the AFA's Advertising Codes and regulations workshops in September 2006. The workshops aimed to address the need for agency staff to remain up to date with an increasingly complex regulatory environment. More than 300 agency staff across five states participated in the workshops, which were instrumental in helping agencies meet their compliance requirements. The next round of seminars is scheduled for mid-2008. They will cover

the AANA Food and Beverages Code, the AANA Children's Code, FCAI Code and the AANA Code of Ethics.

In relation to the complaint handling process, the ASB has undertaken a number of initiatives over the last three years to further strengthen its commitment to a fair and transparent system, to improve the efficiency, timeliness and effectiveness of the process, and to raise community awareness about where and how to make a complaint. These include:

- Initiating a policy in 2006 to ensure the AS Board membership continued to be representative of the broad professional, cultural and community interests in Australian society. This policy of regenerating the membership of the AS Board involved fixing the term of serving members and staggering new appointments to ensure the AS Board retains strong knowledge of past AS Board deliberations while regularly introducing people with different experience and skills.
- Undertaking research in 2006 to test public awareness about advertising self-regulation and the process for lodging complaints about advertising.
- A public education campaign will be launched in July 2008 to increase awareness of the public complaints process administered by the ASB and to encourage consumers to visit the ASB website.
- In a world-first, the ASB conducted research during 2007 to determine if the AS Board's decisions are in-line with prevailing community standards on advertising in Australia. The research is to be conducted every two to three years. The research is part of an ongoing commitment to best practice in advertising self-regulation and shows the commitment of the ASB and the AS Board to revisiting community standards. The AS Board has occasionally faced criticism that its decisions are out of step with prevailing community standards. The research in 2007 examined the validity of these claims and demonstrated that they are generally unfounded. Where the research did show a gap between AS Board positions and views of the community, the AS Board has taken on this feedback and applied it to its subsequent decisions. The research is an important way for the AS Board to survey the community and reassess their understanding of ever-changing community standards. It serves as a benchmark against which existing AS Board members can make determinations and as an important educational tool for future AS Board members.
- A major ASB website redevelopment has increased the amount of information available, providing the community with a valuable and user-friendly resource. The changes include publishing every case report online, introducing a screening and referral page (designed to reduce the number of complaints received outside the ASB charter) and automating many of the processes which were previously undertaken manually to reduce response time.

- Introducing an independent review process which can be accessed by both complainants and advertisers from April 2008.

2. ASB relationship with broadcast media and industry bodies

2.1 *Adherence to industry codes*

As noted earlier, advertising self-regulation is supported through a number of layers. This includes the commitment of media owners and their representative associations to adhering to the codes of practice applying to the advertising industry and to determinations of the AS Board in regard to complaints made under those codes.

For example, Clause 1.10 of the Commercial Television Industry Code of Practice states:

- 1.10 Television advertisers are expected to ensure that their commercials comply with the Advertiser Code of Ethics and the Code for Advertising to Children, as amended from time to time (set out as appendices 1 and 2 to this Section). Section 5 of this Code sets out restrictions on the amount of advertising and other non-program matter that stations may carry at different times of the day, and Section 6 of this Code sets out placement restrictions on certain types of television advertising which are recognized as being sensitive.

Additionally, networks undertake to withdraw from broadcast any advertisement which breaches an AANA Code.

Complaints received by broadcast media which relates to issues falling within the AS Board responsibility are referred to the ASB. The ASB also refers complainants to the relevant broadcast media body when it receives a complaint outside the AS Board's responsibility.

2.2 *Review of advertisements prior to broadcast or publication*

Any advertiser wishing to advertise on commercial free to air television must comply with the classification regime and placement restrictions in the Commercial Television Code of Practice and the Children's Television Standard (CTS).

The time zones in the Commercial Television Code of Practice and the advertising restrictions in the CTS impose limits on the scheduling and content of advertisements during the broadcast day. This is to ensure that advertisements are screened during appropriate times and programs, so that advertising material which is not appropriate for children is not screened during children's programs or during programs likely to be viewed by children.

There are also special pre-vetting requirements in relation to alcohol advertising. The Alcohol Advertising Pre-Vetting system is part of the ABAC Scheme and pre-vetting is

conducted by independent pre-vetting adjudicators. It provides a valuable, confidential user-pays service to alcohol advertisers by assessing proposed advertisements against the ABAC at an early stage of campaign development. This provides some level of assurance, but no guarantee, against the possibility (and costs) of an advertisement being later ordered out of the marketplace – via the independent ABAC complaint processes.

3. ASB response to concerns raised in submissions

Some of the submissions to this Inquiry have raised specific concerns regarding determination of complaints by the AS Board. We have addressed these specific concerns below.

3.1 *Submission 15*

Submission number 15 to this Inquiry referred to a case which raised an issue of health and safety in relation to a young person eating popped potato balls. The case was number 378/06, a copy of which is at **Attachment A**.

The AS Board made its decision in this case, as it is charged with doing, on the basis of the advertisement’s compliance with section 2 of the AANA Code of Ethics and, in the context of the relevant subsection on health and safety, by reference to prevailing community standards.

The complainant in this case was not satisfied with the decision and wrote to the ASB making reference to advice obtained from a third party that had also been forwarded directly to the advertiser in question.

At the time the case was decided, there was no provision for review of the AS Board’s decision. Accordingly, the ASB informed the complainant that there was no avenue for the AS Board to reconsider the case.

Since that time, the ASB has introduced a new independent review process, effective from April 2008. The process provides complainants who were unhappy about an AS Board decision with an opportunity to request a review of the decision. The grounds for review include:

“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)”

The introduction of the independent review process is part of the ASB’s commitment to international best practice, and further strengthens the already robust system of self-regulation.

3.2 *Submission 71*

Submission 71 states that “the ASB has 60 days to reply to a complaint and that after that ACMA could take up to 12 months to reply”. This statement confuses the complaints process for broadcast content with the role of the ASB in administering complaints about advertisements covered by the AANA Code of Ethics.

As noted in section 1 to this response, the ASB accepts written complaints and promptly assesses them as to their appropriateness for submission to the AS Board for determination at its next meeting. The ASB promptly acknowledges receipt of a complaint in writing to the complainant, informing them that their complaint may be submitted to the AS Board and that the advertiser has been notified and requested to respond. The Advertiser is requested to provide a written response and copies of the relevant advertising material within sufficient time to allow the complaint to be dealt with at the next meeting of the AS Board.

Meetings of the AS Board are held monthly, but additional meetings can also be held where the matter is considered urgent.

Following the AS Board determination, the ASB prepares a draft case report for approval by the Chair of the AS Board. The ASB notifies the advertiser of the outcome and in the case of upheld decisions, requests the advertiser to advise the AS Board whether it agrees to modify or discontinue the advertisement (this response is called the Advertiser Statement) within five business days. Consequences of failure by an advertiser to modify or discontinue an advertisement where a complaint is upheld are detailed in section 1 to this response. The ASB writes to the complainant and advertiser advising of the outcome in writing and enclosing a copy of the final case report. The process from receipt of complaint to notification of a decision would generally take a maximum of six weeks, but some complaints are resolved within 10 days (depending on when the complaint is received in the monthly cycle). The average time taken is about four weeks.

Submission 71 claims the ASB has a “libertarian agenda” and as an example attributes a quote made by an advertiser in Case 148/06 to the ASB as though it were the ASB’s response in Case 368/04. Copies of the relevant case reports are attached at **Attachments B and C**.

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I would appreciate the opportunity to elaborate on the comments provided in this response, if required by the Committee.

Yours sincerely

Alison Abernethy
Chief Executive Officer

Attachment A



**ADVERTISING
STANDARDS
BOARD**

CASE REPORT

- | | |
|--------------------------------------|---|
| 1. Complaint reference number | 378/06 |
| 2. Advertiser | McCain Foods Asia Pacific (Potato Popcorn) |
| 3. Product | Food & Beverages |
| 4. Type of advertisement | TV |
| 5. Nature of complaint | Health & Safety |
| 6. Date of determination | 10 October 2006 |
| 7. DETERMINATION | COMPLAINT DISMISSED |

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement is set on a potato farm where a farmer is proudly surveying his crop. Suddenly a potato explodes from under the ground, starting a chain reaction throughout the field. He throws a potato in his hand into a box where other potatoes start exploding, and we then see a McCain truck expanding as potatoes start exploding inside it. Later in the farmhouse a young boy tosses Potato Popcorn into the air and catches it in his mouth. More popping is heard from the big shed outside as the wooden shed expands and boards pop off the shed. A voiceover announced "So delicious, they'll go off with a bang! Ah McCain...you've done it again!"

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

A young boy is seen throwing one of these large items up in the air and then letting it fall into his mouth. This is a practice which is very dangerous. If the article falls before the person closes off their windpipe fast enough, choking (sic) will result. I am aware of several instances where this has happened with death being the result in one case. A doctor had warned me against this practice and the results confirm the danger.

Portraying this activity as enjoyment of a food item is irresponsible and imitation could lead to serious consequences for others who follow this example.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

In depicting behaviour that is common amongst children when eating popcorn, McCain are not breaching Section 2 of the Advertising Code because we are not portraying or promoting dangerous behaviour or promoting this product in an offensive manner.

Nor are we breaching the codes of advertising to children, because we are not misleading them, frightening them, or promoting harmful behaviour.

In this instance we believe viewers will clearly understand we are simply showing how kids like to have fun eating their food.

THE DETERMINATION

The Advertising Standards Board ("Board") considered whether this advertisement breaches section 2 of the Advertiser Code of Ethics (the "Code").

The Board viewed the advertisement and considered whether the advertisement contravened the section of the code dealing with health and safety.

The Board considered the comments from the complainant that the practice of throwing food into the air and catching it in one's mouth is dangerous.

The Board agreed that there was a level of risk involved in the practice. The Board also noted that the practice is probably not uncommon among children. The Board also noted that the child who catches the popcorn in its mouth is an older child and that the image is one of many images in the advertisement, is not a feature of the advertisement and, in the Board's view, is not presented in a manner that glorifies or encourages the behaviour. On this basis the Board determined that the advertisement did not depict material that contravenes prevailing community standards on health and safety.

Further finding that the advertisement did not breach the Code on any other grounds, the Board dismissed the complaint.



CASE REPORT

| | |
|--------------------------------------|--------------------------------------|
| 1. Complaint reference number | 368/04 |
| 2. Advertiser | Pickwood Lodge |
| 3. Product | Other |
| 4. Type of advertisement | Outdoor |
| 5. Nature of complaint | Portrayal of sex, sexuality & nudity |
| 6. Date of determination | 8 February 2005 |
| 7. DETERMINATION | COMPLAINT DISMISSED |

DESCRIPTION OF THE ADVERTISEMENT

The advertisement is a print advertisement which states “Sex, Chocolate and Flowers not required. Pickwood Lodge.”

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

“It concerns me because children can read it and be exposed to its message without understanding what it means. The billboard’s portrayal of sexuality is inappropriate for a prominent community location, and children may be distressed by it, or at the very least find it takes away their innocence about human sexuality”

THE ADVERTISER’S RESPONSE

At the time of preparing this case report, the advertiser had not submitted a response to the complaint/s regarding this advertisement.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches section 2 of the Advertiser Code of Ethics (the “Code”).

The Board was of the view that in the context of prevailing community standards, the majority of people would not find this advertisement offensive.

The Board found that the depiction did not contravene the provisions of the Code relating to the portrayal of sex, sexuality & nudity.

Further finding that the advertisement did not breach the Code on any other grounds, the Board dismissed the complaint.



CASE REPORT

- | | |
|--------------------------------------|-----------------------------------|
| 1. Complaint reference number | 148/06 |
| 2. Advertiser | The Grosvenor |
| 3. Product | Sex services |
| 4. Type of advertisement | Outdoor |
| 5. Nature of complaint | Portrayal of sex/sexuality/nudity |
| 6. Date of determination | 9 May 2006 |
| 7. DETERMINATION | COMPLAINT DISMISSED |

DESCRIPTION OF THE ADVERTISEMENT

This outdoor advertisement features a black background imposed with red lips and “The G(rosvenor)” in red bold type. The phrase “Got the urge? Do It Now” appears with address and phone details.

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

The ad is blatantly sexual and crass...the billboard is located (on) a major route for school children.

This encourages men to satisfy instantly there (sic) sexual urges. Potentially it encourages sexual aggression in men and is inappropriate for a suburban shopping strip billboard.

This is disgraceful and confronting.

The innuendo for gratuitous sexual activity being advertised in a public space is offensive and degrading.

THE ADVERTISER’S RESPONSE

Comments which the advertiser made in response to the complaint/s regarding this advertisement included the following:

All advertising for lawful brothel advertising in Victoria is governed by Victorian statute namely the Prostitution Control Act 1994 section 17 controls on advertising by prostitution service providers

and section 18 Advertising Regulations and section 10 of the Prostitution Control Act 1994 Regulations. The billboard advertisement complies strictly with the letter of the law and the spirit of the law. It follows that there is nothing illegal with regard to the advertisement. The billboard advertisement is permitted at law.

The billboard advertisement is not blatantly sexual and crass.

The billboard advertisement does not encourage men to satisfy instantly their sexual urges. It cannot be described as encouraging sexual aggression in men.

It is acknowledged that the billboard advertisement is located in a route for school children before and after school. To claim that this creates a problem is naïve. Such a claim ignores the valuable educational role played by advertising and in this instance will assist in helping to debunk misconceptions that are frequently held by some members of our community with regard to lawful prostitution. The billboard advertisement in fact plays an important educational role.

Further on the issue of the location of the billboard advertisement it is said that the location or the place for the billboard advertisement was an issue determined by local government. The Boorondarra Council has granted planning permission for this space to carry billboard advertising.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches section 2 of the Advertiser Code of Ethics (the “Code”).

In particular, the Board considered whether the advertisement treated sex, sexuality and nudity with sensitivity to the relevant audience. The Board noted that the advertisement was an outdoor advertisement and that therefore the audience viewing it would be broad. However the Board considered that the advertiser treated sex and sexuality very subtly, that there was no nudity or imagery which breached section 2.3 of the Code and that therefore this section was not in fact breached.

Further finding that the advertisement did not breach the Code on any other grounds, the Board dismissed the complaint.