

# Chapter 5

## Advertising

5.1 Advertising standards in Australia are governed by a system of industry self-regulation that is funded by a voluntary levy paid by advertisers. The Advertising Standards Bureau (ASB) submission states that the self-regulation system of advertising standards in Australia:

...recognises that advertisers share a common interest in promoting consumer confidence and respect for general standards of advertising.<sup>1</sup>

5.2 The system was established in 1998 by the Australian Association of National Advertisers (AANA) the industry body representing some 85 per cent of Australian advertisers. The AANA established the ASB as an independent authority to set and administer standards and to hear complaints with regard to advertising.

5.3 Advertising is regulated through a voluntary system of compliance with industry codes that establish the relevant standards for various types of media and is given effect through determinations on public complaints by the Advertising Standards Board (the board). The board is administered by the ASB.

5.4 The ASB submission states that it was established for the purposes of:

- establishing and monitoring a self-regulatory system to regulate advertising standards in Australia;
- promoting confidence in, and respect for, the general standards of advertising on the part of the community and the legislators;
- explaining the role of advertising in a free enterprise system; and
- running other regulatory systems as contracted from time to time.<sup>2</sup>

5.5 The ASB system is a broad one insofar as it effectively applies to all product and service advertising regardless of medium and including promotional activities. However, it does not cover program promotions or particular advertising for broadcasters.

### *Coverage*

5.6 The board considers complaints about all advertising in Australia.<sup>3</sup> At the Melbourne hearing of the inquiry, Ms Alison Abernethy, Chief Executive Officer,

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1 ASB, *Submission 89*, p. 5.

2 Ibid.

3 However, see paragraph 5.33 for exceptions to complaints accepted for consideration by the board.

ASB, advised that the system administered by the ASB is premised on the 'universality' of its application to 'all advertising' and support by 'advertisers, [advertising] agencies and the media'.<sup>4</sup>

5.7 The ASB code covering advertising and marketing to children contains a broad definition of advertising that applies to all forms of media and advertising, and also captures promotional activity:

Advertising or Marketing Communication means:

(a) matter which is published or broadcast using any Medium in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct; or

(b) any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct...<sup>5</sup>

5.8 The board considers complaints about material that constitutes an 'advertising or marketing communication' under one of the codes administered by the ASB. The codes relevant to this inquiry are:

- section 2 of the AANA Code of Ethics (the Ethics Code); and
- the AANA Code for Advertising & Marketing Communications to Children (the Children's Code).

5.9 Ms Abernethy advised that in practice the ASB '[looks] at all advertising, whether the advertiser is...[an AANA] member or not'.<sup>6</sup> The board may still consider a matter that falls outside the code(s) if it is unable to be referred to any other regulatory or self-regulatory body and is the subject of a 'number of complaints'.<sup>7</sup>

### ***Complaints about sexualisation of children in advertising***

5.10 The ASB submission states that complaints about the sexualisation of children are dealt with according to:

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4 *Committee Hansard*, 29 April 2008, p. 2.

5 AANA, *Submission 89*, Attachment B, Code for Advertising and Marketing Communications to Children, p. 1.

6 *Committee Hansard*, 29 April 2008, p. 2.

7 ASB, *Submission 89*, p. 10.

- section 2.3 of the AANA Ethics Code, which relates to matters of 'sex, sexuality and nudity'; and
- the AANA Children's Code.<sup>8</sup>

5.11 Section 2.3 of the Ethics Code provides that:

Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone.<sup>9</sup>

5.12 Section 2.4 requires advertisements that are directed or have appeal to children to comply with the Children's Code:

Advertisements which, having regard to the theme, visuals and language used, are directed primarily to children aged 14 years or younger and are for goods, services and facilities which are targeted toward and have principal appeal to children, shall comply with the AANA's [children's code]...

5.13 Since 18 April 2008, the revised Children's Code has applied. Unlike the previous code for advertising to children, the new code makes specific provision for complaints about the issue of sexualisation of children. The ASB submission states that the new code:

- provides the board with a clearer mandate to uphold complaints about advertisements which sexualise children;
- provides the public with a specific code provision against which they can make complaints about advertisements that allegedly sexualise children; and
- provides advertisers with the clear message that advertisements which sexualise children are unacceptable.<sup>10</sup>

5.14 The new provisions concerning sexualisation of children are contained in section 2.4 of the Children's Code:

Advertising or Marketing Communications to Children:

(a) must not include sexual imagery in contravention of Prevailing Community Standards;

(b) must not state or imply that Children are sexual beings and that ownership or enjoyment of a Product will enhance their sexuality.

5.15 More generally, section 2.1 requires that:

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8 Ibid p. 2. This code came into operation on 18 April 2008, replacing the AANA's Code for Advertising to Children.

9 AANA, Advertiser Code of Ethics, p. 1, [http://www.apf.gov.au/senate/committee/eca\\_ctte/sexualisation\\_of\\_children/submissions/sub89atta.pdf](http://www.apf.gov.au/senate/committee/eca_ctte/sexualisation_of_children/submissions/sub89atta.pdf) (accessed 30 May 2008).

10 ASB, *Submission 89*, p. 2.

Advertising or Marketing Communications to Children must not contravene Prevailing Community Standards.

The committee considers the question of community standards below.

5.16 Given the recent introduction of the Children's Code, it is too early to make any judgement concerning its effectiveness. It is to be hoped that it has the effect of removing overtly sexualising images from advertising. However, the committee cannot help but feel that some parts of the Children's Code lack real substance and fail to address the broader issue of advertising that, while not explicitly sexualising, promotes atypical or unrealistic stereotypes. For example, sub-paragraphs 2.4(a) and (b) do not preclude advertising in magazines specifically produced for and directed at girls which, almost without exception, feature images of slim, glamorous young women—the type of images that have been identified as contributing to problems of low self-esteem and eating disorders in girls.<sup>11</sup>

### **Recommendation 7**

**5.17 The committee recommends that, in 18 months, the Senate review the effectiveness of the operation of the Australian Association of National Advertisers' Code for Advertising and Marketing Communications to Children, introduced in April 2008.**

### **Complaints procedures**

5.18 The advertising standards are voluntary and the ASB does not engage in pre-vetting of advertising. Thus complaints to the ASB are both the earliest and clearest indicator that an advertisement may have breached the code and an opportunity to test the extent to which the code is being observed. In view of this, the committee believes that the process of making complaints should be simple, accessible and user-friendly.

### ***Fragmentation and complexity of regulation***

5.19 Many submissions, from both private submitters and organisations, observed that the variety of regulatory systems in Australia has led to a fragmentation of responsibility that makes it difficult and complex to lodge complaints. It was felt that this leads to low numbers of complaints, meaning that complaints do not adequately or accurately reflect and represent prevailing community standards or concerns about the exposure of children to potentially inappropriately or prematurely sexualising material.<sup>12</sup>

5.20 Ms Julie Gale, Director, Kids Free 2B Kids, observed:

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11 Readers who may doubt this statement are directed to any copy of magazines such as *Dolly* or *Girlfriend*, where the clothes and cosmetics advertisements and the beauty and style sections are almost indistinguishable.

12 Figures provided to the committee by the ASB show that, in the years 2004 to 2007, between one-quarter and one-third of complaints received fell outside the advertising codes.

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The general complaints I get from so many people are (1) people feel powerless, so they do not bother, and (2) if they do bother they give up fairly quickly. It is not an easy system. They do not know where or who or what to complain to, so I do not believe that we have a true indication of prevailing community standards because no-one has bothered to go out and ask, fundamentally.<sup>13</sup>

5.21 Some submissions called for a one-stop shop or single body for the administration of media codes and the hearing and determination of complaints. Conversely, there was recognition by some critics of the current system that reform and improvement of the self-regulatory model is the best strategy to pursue. Appearing before the committee in a private capacity, Dr Lauren Rosewarne, who made substantial criticisms about the performance of the ASB, observed:

There is no impetus in Australia, from my perspective, to abandon self-regulation and move towards government regulation. This is not done anywhere except in countries like Saudi Arabia.<sup>14</sup>

5.22 Whilst the committee recognises the basic appeal of a single system of regulation and complaint for all media and advertising, it is not convinced that such an approach would deliver a cost-effective and better system. The cost and complexity of establishing the broad administrative structures and expertise that would be necessary for such a system would likely be prohibitive.

5.23 All the complaints systems have at their core a requirement to consider community standards when addressing a complaint. It is preferable to have a range of different bodies performing this task simply because it is an arrangement likely to introduce a greater diversity of views into the process. A single body would have to be limited in size to allow it to function efficiently, its workload would be very large and it would, because of these factors, be more dependent on a supporting secretariat to enable it to manage the demands made on it.

5.24 In addition, apart from requirements of and efforts by broadcasters and advertisers to promote the existence and working of standards and complaints regimes, organisations such as Young Media Australia (YMA) offer services to help complainants identify appropriate bodies and processes for the lodgement of complaints.<sup>15</sup>

5.25 However, the committee notes that television and radio broadcasters, as the bodies that receive complaints about their content and programming in the first instance, have a particular obligation to ensure complainants are not frustrated by overly complex or difficult-to-access complaints systems. As the committee heard in the recent inquiry into broadcasting regulation, broadcasters and ACMA have an

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13 *Committee Hansard*, 29 April 2008, p. 17.

14 *Ibid* p. 30.

15 See Young Media Australia, *Submission 141A*.

understanding that misdirected complaints will be forwarded to the appropriate recipient.

5.26 There may be advantages in creating a single clearing-house for complaints—a body with a post-box and email address to receive complaints about all media and whose sole responsibility would be to transmit them to the appropriate broadcaster/regulator. Such a body would be in addition to the existing complaints administrations such as the ASB. This body would be widely advertised and would remove the requirement for complainants to have a clear understanding of the confusing and sometimes overlapping responsibilities of the existing systems.

5.27 The committee endorses the current self-regulatory systems for the maintenance of advertising and media standards in Australia as both cost-effective and appropriate. However, the committee is sympathetic to the views expressed in submissions that the system can be confusing because of the need to approach different bodies according to medium or form of content about which a complaint is to be made. The main areas of confusion are between advertising, commercial television content and program promotions.

### **Recommendation 8**

**5.28 The commissioner recommends that the Advertising Standards Board and Free TV Australia consider establishing a media and advertising complaints clearing house whose functions would be restricted to:**

- **receiving complaints and forwarding them to the appropriate body for consideration;**
- **advising complainants that their complaint had been forwarded to a particular organisation; and**
- **giving complainants direct contact details and an outline of the processes of the organisation the complaint had been forwarded to.**

5.29 In its report on broadcasting regulation, the committee made a number of recommendations and suggestions with regard to improving the operation of complaints systems, particularly:

- that all broadcasters and ACMA should ensure that the homepage of their websites have a clearly marked 'complaints' icon;
- that the complaints page be accessed by only one key-stroke or mouse click; and
- that complaints should be received electronically and by email in addition to written or faxed complaints.<sup>16</sup>

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16 The committee's report, *Inquiry into the effectiveness of the broadcasting codes of practice*, was tabled in the Senate on 19 June 2008. It is available at [http://www.aph.gov.au/senate/committee/eca\\_ctte/broadcasting\\_codes/index.htm](http://www.aph.gov.au/senate/committee/eca_ctte/broadcasting_codes/index.htm) (accessed 23 June 2008).

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### *Form of complaints*

5.30 A number of submitters felt that the complaints system is not accessible enough and should be improved by allowing complaints to be lodged by telephone. The committee does not support a system whereby the complaints process is initiated merely on the basis of a telephone call. However, it does believe that the ASB should consider establishing a 1800 number where the public can receive advice, if necessary from a recorded message, on how to make a complaint.

5.31 The committee notes that the ASB website already carries a very visible red 'Lodge a Complaint' button and that the process is reasonably simple. However, the committee believes that wider public knowledge of the complaints process is important. The committee notes from its submission that the ASB is seeking to raise public awareness of its existence and its responsibilities.

5.32 The committee believes that the ASB should on a regular basis place advertisements specifically publicising its complaints procedure in all media. Given the amount of comment about billboard advertising and the difficulty of regulating children's access to it, the ASB should also consider placing details of how to access its complaints procedures on billboards.

### *Exceptions under complaints process*

5.33 One element in the complexity of the complaints system is the number of matters that are excluded from it. The following matters are not forwarded to and considered by the board:

- a complaint that would involve determining questions of law or truth and accuracy;
- a complaint that concerned trivial issues;
- a complaint that involved public advocacy issues;
- a complaint that concerned a communication that is local advertising;
- a complaint that concerned a communication that is the subject of litigation or order of a court or government agency;
- a complaint that concerned unlawful business practices;
- a commercial that is complained about has been withdrawn or discontinued; and
- a complaint that concerns highly technical issues.

5.34 The ASB website seeks to deal with this by requiring complainants to answer a short questionnaire which clarifies whether their complaint can be accepted by the board. Attachment C to the ASB submission shows that, between 2004 and 2007, the proportion of complaints that were classed as 'outside charter' and therefore did not proceed to a determination by the board ranged from around 30 to over 50 per cent.

5.35 There is no suggestion that legitimate complaints are being weeded out by this system. However, it would be useful to know whether the system weeds out dual complaints, in which part of the complaint falls within the charter and part falls outside; for example, a complaint might easily combine an issue of content and an issue of accuracy or truth. The committee suggests that the ASB analyse a representative sample of 'outside of charter' complaints and determine whether some part of those complaints could be accepted. Such a study might assist in refining the questionnaire which determines whether a complaint can be accepted in the first place.

### **Effectiveness of regulation of advertising standards**

5.36 The performance of the ASB complaints system was central to the committee's consideration of how effectively advertising is regulated in Australia. The following areas and factors were relevant or raised by submitters concerning the effectiveness of the ASB's management of complaints about premature sexualisation of children in advertising. The committee has looked at complaints to the ASB generally and notes that there are very few complaints about advertising directed to children. Those that there are usually relate to matters other than sexualisation—product or consumer safety, for example.<sup>17</sup>

5.37 It may be that the combination of the debate over the Australia Institute's *Corporate paedophilia* report and the development of the Children's Code has resulted in a tightening of standards in advertising directed at children. Whatever the reason, concerns about sexualisation of children in the media seem to focus on other areas.

5.38 Complaints which may fall within the definition of inappropriate or premature sexualisation more commonly relate to advertising targeted at adult audiences that is easily accessible by children. The assumed impact on children is usually a subset of a general complaint. For example, a number of complaints about Advanced Medical Institute advertising make the point that the adult complainant finds the material personally offensive *and* that it is inappropriate for children.

5.39 Similarly, complaints about advertising for women's underwear and other clothing often make a general point about unrealistic presentations of female body shapes and objectification of women, and then add that such images make it hard for girls to develop healthy attitudes to their body shapes or see themselves as individuals free from a sexual stereotype. Some complaints also mention the advertisement's impact in terms of shaping boys' attitudes towards women.<sup>18</sup>

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17 *Bratz* dolls have been the subject of some adverse comment in submissions to the committee for their sexualising impact. The only recent complaint to the ASB with regard to *Bratz* dolls related to light sensitive accessories and whether they might encourage inappropriate exposure to the sun.

18 The ASB's website lists complaints and their outcomes at [http://www.advertisingstandardsbureau.com.au/pages/casestudy\\_a.asp?PageIndex=1](http://www.advertisingstandardsbureau.com.au/pages/casestudy_a.asp?PageIndex=1).

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*Complaints about sexualisation of children*

5.40 Due to the absence of an explicit ground of complaint concerning sexualisation of children prior to 18 April 2008, the ASB was unable to provide the committee with the number of specific complaints received on the issue. It advised that, in the past, such complaints have been considered under section 2.3 of the Ethics Code relating to sex, sexuality and nudity.

5.41 The ASB submission nevertheless reported that it had received 'very few complaints relating to advertisements that could be described as sexualising children',<sup>19</sup> describing the number of complaints about this issue as 'negligible'.<sup>20</sup> An example of an upheld complaint about sexualisation of children was provided in attachment G to the ASB submission.

5.42 The committee observes that the Children's Code prior to 18 April 2008 was clearly inadequate, lacking as it did an explicit ground of complaint relating to sexualisation of children. The statistics provided in attachment C to the ASB submission show that between 2005-07 numbers of complaints under the Children's Code ranged from between 0.20 per cent and 2.95 per cent, while those relating to the 'sex, sexuality and nudity' category were generally the highest (comprising, for example, 37 per cent in 2007).

5.43 It therefore seems likely that more than a 'negligible number' of this class of complaints involved, at least in part, concerns about the sexualising effect of certain material on children. Whilst a search of the ASB's complaints archives on the term 'sexualisation' shows only 10 complaints involving sexualisation since 2003, it is clear that many other complaints relate to this issue without using the term 'sexualisation'. For example, a search on the term 'children' returns 41 pages of complaints.<sup>21</sup> Among these can be found complaints that are based on grounds of sexualisation of children as defined for the purposes of the inquiry. Complaint 73/99, for example, clearly concerns the effects of sexually suggestive material on children during a program and time likely to include children as the relevant audience.<sup>22</sup>

5.44 Furthermore, the committee notes that complaints concerning the sexualisation of children appear under the category of 'Discrimination or vilification' (section 2.1 of the Ethics Code). Complaint 130/08, for example, clearly concerns the effects of sexual innuendo and sexual objectification of women on children,

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19 ASB, *Submission 89*, p. 3.

20 *Ibid* p. 4.

21 ASB, [http://www.adstandards.com.au/pages/casestudy\\_search.asp](http://www.adstandards.com.au/pages/casestudy_search.asp) (accessed 2 June 2008).

22 ASB, complaint no. 130/08, March 1999, [http://www.adstandards.com.au/pages/casestudy\\_search.asp?keyword=children&PageIndex=37](http://www.adstandards.com.au/pages/casestudy_search.asp?keyword=children&PageIndex=37) (accessed 2 June 2008). See also, for example, CRN 173d/06 (May 2006) and CRN 16/08 (February 2008).

particularly young girls, in respect to a billboard advertisement to which children are obviously exposed.<sup>23</sup>

5.45 As noted above, complaints are an important indicator of community attitudes towards particular advertisements or classes of advert. Thus it is important that there should be a clear indicator of the number of complaints that relate in whole or in part to children.

### **Recommendation 9**

**5.46 The committee recommends that the Advertising Standards Board produce a consolidated half-yearly list of all complaints, including those received by 'phone, where the impact of an advertisement on children, however described, is a factor in the complaint.**

#### *Board determinations and enforcement processes*

5.47 The board is able to uphold or dismiss a complaint. The board may also decline to consider a complaint if it believes that it is outside its jurisdiction or is trivial. Board decisions are confirmed by vote requiring a simple majority. In reaching a determination, the following factors are considered:

- the complaint;
- all relevant advertising and marketing communications submitted by the advertiser or marketer;
- the advertiser or marketer's response, if any;
- all relevant provisions of the codes; and
- any other relevant supporting materials, representations or submissions.<sup>24</sup>

5.48 Advertisers or marketers are usually informed of a board determination within 12-14 days. Where breach of a code is found, the advertiser or marketer is asked to modify or discontinue the advertising or marketing communication within five days. If there is a failure to comply with or respond to such a request, the board will pursue the following options:

- refer the determination report to a government agency (where appropriate);
- include the advertiser or marketer's failure to respond in the case report;
- forward the case report to media proprietors; and
- post the case report on the ASB's website.

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23 ASB, complaint no. 73/99, May 2008, [http://www.adstandards.com.au/pages/casestudy\\_search.asp](http://www.adstandards.com.au/pages/casestudy_search.asp) (accessed 2 June 2008).

24 ASB, [http://www.adstandards.com.au/pages/images/Complaints\\_%20process.pdf](http://www.adstandards.com.au/pages/images/Complaints_%20process.pdf) (accessed 20 June 2008).

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### *Review of board determinations*

5.49 Both complainants and advertisers or marketers can seek review of board determinations on three possible grounds:

- that new information has become available;
- that there is a substantial flaw in the board's decision; and
- that there was a substantial flaw in the process by which the decision was made.<sup>25</sup>

5.50 Requests for review are considered by an independent reviewer, who must make a recommendation to the board within 10 days as to whether a review should be undertaken.

5.51 A small proportion of complaints made are actually upheld. Excluding complaints that are outside the board's jurisdiction and those that are withdrawn, approximately 15 per cent of complaints were upheld in 2007; although this figure was considerably higher than for the previous three years, in which approximately five per cent were upheld.<sup>26</sup>

5.52 The committee notes that, although there is an apparent lack of penalty or powers to enforce board determinations, the industry's compliance with instructions to modify or take down advertisements found to have breached the codes is excellent. There has been only one instance of a product advertiser refusing such an order, and in that case the offending advertisement was in any case removed by action of the company that controlled the advertising space.

5.53 Given the high level of compliance with board determinations, the committee sees little benefit in the board being granted greater enforcement or penalty powers. This would of necessity require significantly higher levels of legality and procedure. Such an approach would risk the introduction of additional expense and delay to the system for little discernible benefit.

### ***The ASB board***

#### *Function and composition*

5.54 The ASB board plays the central role in the regulation of advertising in Australia. Thus its appointment, membership and processes are of considerable importance. The inquiry received a number of complaints that the qualifications or interests of some board members reflect advertising and/or media industry interests too closely, and that the board was thus subject to 'industry capture'. It was felt that

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25 The independent reviewer process was introduced in April 2008.

26 ASB, answer to question on notice, 29 April 2008 (received 23 May 2008).

this may have arisen due to involvement of the Australian Association of National Advertisers (AANA) in the selection of board members.

5.55 There may have been some grounds for this concern in the early years of the ASB's existence, when the board's original membership was appointed by the AANA. However, the selection processes for appointments to the board described below appear to guarantee a membership that is both independent and broadly representative.

5.56 Operations of the board were also criticised:

[The board's]...problems include the voluntary nature of the participation of advertising agencies, the board's low profile, the lack of pre-vetting of advertisements, the lack of media monitoring, the weak code of ethics, the flawed complaints procedure, the flawed notion of community standards, inappropriate board composition, regulatory capture, flawed funding mechanisms, and the board's inability to punish recalcitrant advertisers.<sup>27</sup>

5.57 The ASB submission explains that the sole function of the board is 'to decide complaints about advertisements by applying the relevant codes'.<sup>28</sup> The board has 16 members who, according to the ASB submission, represent:

...people from different walks of life with a diverse cross-section of views and skills. It also represents a broad range of age groups and is gender-balanced.<sup>29</sup>

5.58 The ASB claims that board members are 'individually and collectively clearly independent of the industry'.<sup>30</sup> Mr Collin Segelov, Executive Director, AANA, asserted that, despite the AANA's role in establishing and corporate ownership of the ASB, it is 'managed at arm's length by its own administrative board and its own management'.<sup>31</sup>

5.59 The committee heard that board members must disclose any personal interests in a matter that is the subject of a complaint, and any conflict in their duties of loyalty and confidentiality to the board that might arise from other memberships or employment.<sup>32</sup> Members must withdraw from a determination or from their board duties where any such interest or conflict arises.

5.60 The rules governing the appointment of the board were revised in 2006 to 'ensure...board membership continued to be representative of the broad professional,

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27 Dr Lauren Rosewarne, *Committee Hansard*, 29 April 2008, p. 29.

28 ASB, *Submission 89*, p. 9.

29 Ibid. Attachment H to the ASB submission describes the backgrounds of current board members.

30 ASB, *Submission 89*, p. 9.

31 *Committee Hansard*, 30 April 2008, p. 81.

32 AANA, *Submission 89*, Attachment B, 'Advertising Standards Board Complaints Process', p. 6.

cultural and community interests in Australian society'.<sup>33</sup> New members are appointed for a period of three years and appointments are staggered to refresh the membership on a regular basis.

5.61 The ASB, which oversees the appointments process, seeks people who 'ideally have an interest in, and views on, advertising and community standards', while not being advertising insiders or experts. Members are intended to be broadly representative 'of the age, gender, cultural and geographic make-up of the Australian community'.<sup>34</sup>

5.62 The recruitment process for 2008 is managed by a recruitment agency and involves extensive public advertising seeking expressions of interest in becoming a board member. Applicants are required to submit a short response to the selection criteria set out in the advertisement and are chosen by a panel drawn from the ASB and the board. In selecting new members, the panel has regard to the overall make-up of the board and must seek to maintain the overall balance of its membership.

5.63 The ASB reserves the right to invite applications where it is considered necessary in order to retain balance on the board. Membership of the board 'comprises individuals who do not represent industry, consumer or special interest groups' and who have:

- ability to interpret codes;
- demonstrated involvement in the community;
- the ability to apply reason, commonsense and sensitivity when assessing a wide variety of material; and
- demonstrated ability to work as part of a team.<sup>35</sup>

5.64 The committee acknowledges that the recent reforms to board selection procedures to ensure a regular turnover in membership and community understanding, and to avoid any 'desensitising' of members, should ensure that the board is both representative and independent.

### ***Prevailing community standards***

5.65 The concept of prevailing community standards (PCS) plays a critical role in board determinations on complaints:

Advertising or Marketing Communications to Children must not contravene  
Prevailing Community Standards.<sup>36</sup>

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33 ASB, answer to questions taken on notice, 29 April 2008 (received 23 May 2008).

34 Ibid.

35 Ibid.

36 AANA, *Submission 89*, Attachment B (Children's Code), p. 2.

5.66 The AANA Children's Code provides the following definition of PCS:

**Prevailing Community Standards** means the community standards determined by the Advertising Standards Board as those prevailing at the relevant time, and based on research carried out on behalf of the Advertising Standards Board as it sees fit, in relation to Advertising or Marketing Communications to Children.<sup>37</sup>

5.67 The committee heard that PCS are not prescribed in a list or set of rules that describe what these standards are, but are intended to be reflected in the composition of the board. It is important to note that 'community standards' are a reflection of what people actually do—the language they use, the preferences they express by their actions, the television programs they watch, the products they purchase, et cetera—and are not an expression of how individuals or sections of the community might wish them to be.

5.68 The board's determinations on individual complaints are thus taken to be a contemporaneous expression of these standards. The underlying logic of this approach was explained by Ms Abernethy:

Community standards are always subject to change. I think to qualify or quantify a community standard would be a very difficult task. Also, different sectors of the community have different standards, so a prevailing community standard is a holistic approach rather than a factional approach.<sup>38</sup>

5.69 There is an element of confusion in this position—on the one hand community standards cannot be quantified or qualified yet on the other they are sufficiently clear to inform the board's decision making. Clearly more work needs to be done on the questions of determining and applying community standards.

5.70 The ASB advised the committee that a research project it undertook on the question of community standards found that the board was in fact out of step with the community in two areas, which included issues of 'sex, sexuality and nudity'. The project demonstrated:

...that Board decisions generally reflect community standards on the key provisions of the Ethics Code. However, the research also showed that the community is more broadminded about politically incorrect statements when used with humour, but were more conservative than the Board in their attitude towards sex, sexuality and nudity. Board members have embraced the community feedback and since the research was released at the end of 2007, Board members have taken the results into account in their consideration of complaints under the Code.<sup>39</sup>

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37 Ibid.

38 *Committee Hansard*, 29 April 2008, p. 13.

39 ASB, *Submission 89*, p. 10.

5.71 The committee supports Dr Rosewarne's endorsement of the use of regular research to inform the board's approach to making determinations:

I have suggested...the use of focus groups in order to gauge community standards, which is something that is done overseas and has not been done frequently in Australia.<sup>40</sup>

5.72 The various regulatory bodies in Australia employ a common approach, which recognises that community standards are constantly shifting and that, in order to have regard to those standards in decision-making, regulatory organisations must be engaged in constant monitoring, and must regularly test their decisions against, those standards. In evidence from the Classification Board some insight into the question of community standards was provided (see Chapter 4).

5.73 In its recent report on broadcasting regulation, the committee recommended that ACMA, in addition to its other research and testing of community standards, develop and conduct an annual poll on community standards with regard to the content of television and radio.<sup>41</sup> With greater uniformity in the various industry codes, such a poll could have general relevance across content and advertising in all media, particularly by exploring community attitudes to the issue of sexualisation of children.

5.74 The committee also took the view in that report that the business realities of commercial television meant that TV channels would inevitably push the limits of the codes in their pursuit of audience share and hence advertising revenue. The same consideration holds true for the advertising industry itself. The imperatives of getting attention in an ever more competitive market leads advertisers and their agencies to push the boundaries of what is acceptable.

5.75 There is some evidence that deliberately provoking public controversy in this way is, in a small number of cases, part of the advertising strategy. If an advertising campaign moves on to the news pages because the response to it becomes a story in its own right then the campaign's impact is massively increased.<sup>42</sup> Given these pressures, the committee believes that all regulators should be acting as a brake on this tendency by interpreting their own guidelines and community standards in a conservative way.

## **Recommendation 10**

**5.76 The committee recommends that the Advertising Standards Bureau consider adopting a process of pre-vetting advertisements either (a) at the**

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40 *Committee Hansard*, 29 April 2008, p. 30.

41 The committee's report, *Inquiry into the effectiveness of the broadcasting codes of practice*, was tabled in the Senate on 19 June 2008. It is available at [http://www.aph.gov.au/senate/committee/eca\\_ctte/broadcasting\\_codes/index.htm](http://www.aph.gov.au/senate/committee/eca_ctte/broadcasting_codes/index.htm) (accessed 23 June 2008).

42 Two examples of this are discussed in Lauren Rosewarne, *Sex in public: women, outdoor advertising and public policy*, 2007, pp 178-199.

**request of the advertiser where they are concerned that the content of the material may be pushing the boundaries of the codes or (b) where an advertiser or agency has regularly produced advertising material that has been the subject of complaints.**

5.77 The committee notes that the design/composition of the board in seeking/appointing members without specific industry expertise is a model also employed by, for example, the Classification Board. While the membership and decisions of the board may be criticised and contested, the approach is one that properly seeks to achieve a contemporaneous reflection of the diverse views that comprise prevailing community standards. However, there was evidence that demonstrated it is possible for the board to be out of step with those standards.

### **Recommendation 11**

**5.78 The committee recommends that, to ensure that the Advertising Standards Board is able to make determinations that are in keeping with prevailing community standards, the Advertising Standards Bureau should develop a formal schedule or process for community consultation, including the use of focus groups, and research to act as a benchmark for board determinations.**

5.79 Committee members raised with witnesses the question of seeking advice from specialists in child development when considering complaints about advertising directed at children. In general, the board does not seek expert advice, which is in keeping with the concept of applying PCS. The committee has also noted earlier in the report that research establishing clear causal relationships between particular content and harm to children is lacking.

#### *Billboard and radio advertising*

5.80 Complainants in submissions frequently referred to the difficulty of avoiding advertising considered inappropriate for children, particularly in the case of billboards and, to a lesser extent, radio. Billboard advertising is, necessarily, large, highly visible, designed to attract attention and placed where it will be seen by large numbers of people. It is also distinct from other forms of advertising in that it is, literally, 'in your face'. Magazines can be left on the shelf, radio and television can be turned off, but billboards in a heavily trafficked public area are very hard to avoid. Submitters to the committee and complainants to the ASB were particularly incensed when questionable billboard advertising was placed near schools.

5.81 As mentioned above, radio does not produce any programming for children and thus does not have G or PG restricted time zones. Thus advertising with a sexual or adult content may be heard at any time of the day. Complainants to the ASB acknowledged that they could turn the radio off but clearly felt 'ambushed' by advertising which contained offensive language or adult themes relating to men's sexual health (the most common complaint).

5.82 Billboard advertising as a source of children's exposure to sex-related messages and concepts was consistently raised in submissions to the inquiry. It might be argued that this type of exposure is not actually sexualisation of children but falls more in the area of exposure to offensive and inappropriate material. Nonetheless, it serves as an instructive case study.

5.83 Private submissions offered many examples of parents concerned by the exposure of their children to sexual innuendo and material contained in billboard advertisements. A particular aspect of concern was that, due to their high visibility and location in public spaces, billboards are essentially unavoidable:

...children...are forced to digest inappropriate messages simply on a trip to the local shops. One billboard screams out in giant letters "Want Longer Lasting Sex" and another depicts a 'soft' pornographic image regarding a drug for premature ejaculation.<sup>43</sup>

5.84 Dr Rosewarne characterised the problem as the forcing of billboard content on:

...a captive audience of public space users who have not chosen to see these images and who are in fact completely unable to avoid exposure to them.<sup>44</sup>

5.85 Dr Rosewarne explained:

...[people's] need to commute and our desire to participate in public life means that we...are faced with highly sexualised images that we did not solicit and which we are completely unable to avoid. We cannot turn the page or change the channel and we cannot avoid seeing these images. I identify this as a significant public policy concern.<sup>45</sup>

5.86 Many parents felt that such advertising effectively removes their ability to make and effect choices about their children's sexual awareness and development. Ms Gale offered the following example:

As I was wandering around the community, I was seeing billboards at the end of my own street which read 'Sex for life', 'premature ejaculation problems', 'erection problems', and it was a problem for me that my young kids were asking questions about male sexual dysfunction before I had even had the opportunity to discuss their own naturally emerging sexuality with them...<sup>46</sup>

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43 Sophie Eley, *Submission 1(a)*. See also Kym Keady, *Submission 53*, p. 1; Gerard and Andrea Calilhanna, *Submission 82*, p. 1-2; Rosalind Hecker, *Submission 88*, p. 1; Dr David van Gend, *Submission 119*, p. 1; Gillian Sofatzis, *Submission 125*, p. 2.

44 *Committee Hansard*, 29 April 2008, p. 28.

45 *Ibid.*

46 *Ibid* p. 13.

5.87 Complaints to the inquiry about billboard advertisements centred on those promoting the products and services of the Advanced Medical Institute (AMI), a company that specialises in the treatment of male erectile dysfunction. AMI's billboard advertisements are characterised by blunt references to sex and erection problems, including the terms 'erectile dysfunction' and 'sex'.

5.88 Dr Christopher Fenton, Senior Doctor on Staff, AMI, justified the blunt references used in AMI's advertisements as necessary to overcome both men's general disinclination to seek professional assistance for health matters and their particular reluctance to seek treatment for erectile dysfunction. He explained:

I do not think a proper census has been done, but only 11 per cent of sufferers seek medical help and that means 89 per cent do not...AMI gets men to act because of its bold messages which men do respond to.<sup>47</sup>

5.89 It should be noted that AMI's 'Corporate Adviser and major shareholder', Mr Richard Doyle, acknowledged that, with regard to a particular AMI advertisement:

I am not responsible for every ad that is done by the company. I do not like that particular advertisement. I do not think it is an appropriate advertisement. It is not one that is currently run, as far as I am aware, nor is it one that I believe should be run in the future.<sup>48</sup>

This suggests a degree of uncertainty in the company about what is and is not appropriate or necessary.

5.90 In answer to a question on notice taken at the Sydney hearing, AMI advised that the ASB received 211 complaints about AMI billboard advertisements in the 18 months ending 16 May 2008.<sup>49</sup> An example of one such complaint is ASB complaint 20/07, which concerned the advertisement mentioned in the quote reproduced at paragraph 5.83. Representative comments on which the complaint was grounded include that the 'blatant sexual content is offensive and inappropriate' and that it is 'not appropriate to plaster sex-related information on billboards, in front of our children'.<sup>50</sup>

5.91 In answer to these complaints, AMI submitted that to prevent the use of the word 'sex' on such grounds amounted to a form of 'censorship...[that denies] legitimate medical services to large numbers of men'.<sup>51</sup> He also pointed to the widespread use of the word in a forthcoming film title.

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47 Ibid.

48 Ibid p. 35.

49 AMI, answer to question on notice, 30 April 2008 (received May 23 2008).

50 ASB, complaint no. 20/07, [http://www.advertisingstandardsbureau.com.au/pages/casestudy\\_search.asp](http://www.advertisingstandardsbureau.com.au/pages/casestudy_search.asp) (accessed 5 June 2008).

51 AMI, answer to question on notice, 30 April 2008 (received May 23 2008).

5.92 Complaint 20/07 was dismissed by the board of the ASB. The following reasoning was provided as the basis of the determination:

The Board noted that the billboard did not contain any graphic images and that the word 'sex' was itself not offensive. ...the size of the billboard's lettering meant that the text of the advertisement would be more visible and hence would be confronting to some people. ...the Board expressed its view that this advertisement was at the 'higher end' of what might be considered acceptable by the Australian community.

On balance however the Board held that the advertisement was not insensitive and did not breach Section 2.3 of the [Ethics] Code [relating to sex, sexuality and nudity].<sup>52</sup>

5.93 The committee regards the ability of parents to make and effect decisions about their children's sexual development as justifying the application of stricter standards to billboard advertising in terms of language and concepts related to sex, sexuality and nudity. The real inability of parents to prevent the exposure of their children to billboard advertising would be a legitimate justification for the ASB and outdoor media advertisers and marketers treating this as a special case under the current system of self-regulation.

5.94 Because parents cannot physically control the exposure of their children to billboard messages in the same way that they can, for example, with advertising delivered by electronic media—such as television, radio or the internet—billboards are clearly a form of unsolicited material. In cases such as the AMI 'Want longer-lasting sex' billboard, where advertisements contain material that is likely to be at the 'higher end' of PCS, the standards should be interpreted to provide greater protection to children from exposure to material inappropriate to their age or stage of development.

5.95 One possible solution that has been suggested is the 'classification' of billboard sites so that sites likely to be viewed by children, particularly those close to schools, would be classified as G and would only display material that was wholly inoffensive. However, while superficially attractive, this proposal seems unrealistic because the whole point of display advertising is that it be positioned in a way that ensures it is seen by the maximum number of people. Thus all billboards can be assumed to readily viewable by children.

## **Recommendation 12**

**5.96 The committee recommends that the Advertising Standards Board rigorously apply standards for billboards and outdoor advertising to more closely reflect community concern about the appropriateness of sexually explicit**

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52 ASB, complaint no. 20/07, [http://www.advertisingstandardsbureau.com.au/pages/casestudy\\_search.asp](http://www.advertisingstandardsbureau.com.au/pages/casestudy_search.asp) (accessed 5 June 2008).

**material and the inability of parents to restrict exposure of children to such material.***Compliance with upheld complaints*

5.97 As noted above, the consequences of a complaint being upheld is a request to the advertiser or marketer to modify or discontinue the advertisement. The ASB submission notes that there has been only one case of an advertiser refusing to comply with such a request. Generally, given the costs involved in producing, for example, a television advertising campaign, the prompt compliance with ASB requests for advertisements to be removed suggests that self-regulation is taken seriously by the industry.

*Timeliness of complaints system*

5.98 Many submitters felt that the board takes too long to process complaints, which acts as a disincentive to potential complainants and effectively frustrates meaningful outcomes where complaints are upheld.

5.99 The committee heard that the board meets monthly, although it is able to convene where the secretariat considers that a matter must be urgently addressed. The ASB has provided the committee with a breakdown of the time taken to handle complaints that were upheld in 2007. In general, the time from a first complaint to a board determination is three to six weeks.

5.100 The figures also suggest that, where there are a large number of complaints, the matter is dealt with relatively quickly. For example, a motor vehicle advertisement which attracted the highest number of complaints for the year 2007 was dealt with in 16 days; and two advertisements for a fast food franchise, which attracted the second and third highest numbers of complaints, were dealt with in 18 and 14 days respectively. These figures compare favourably with complaints resolution in other media.

5.101 The committee notes that advertisements continue to run while determinations are made, and thus it would be desirable if the timeliness of the system was further improved. The committee believes that the ASB should consider more frequent meetings of the board or arrangements for making determinations or convening remotely, particularly where the volume of complaints indicates a high level of community concern.

*Classification of television advertising*

5.102 Advertising on television is subject to the system of classification prescribed by the Commercial Code, which is based on the Office of Film and Literature Classification guidelines for its general categories: G, PG, M and MA15+. The Free TV Australia submission advises that:

All advertisements on commercial free to air television are classified and cleared by Commercials Advice...The advertisements are checked for

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compliance with a range of state and federal legislation and then classified under the Code of Practice. A placement code is assigned to each advertisement and this advises the broadcasters of the times of the day the advertisement can be broadcast.<sup>53</sup>

5.103 For a description and discussion of the classification system see Chapter 4.

### **Other issues**

5.104 The following issues, not covered by a particular industry code or complaints system, were raised with the committee:

#### *Availability of certain merchandise in unrestricted stores*

5.105 Ms Gale presented the committee with examples of merchandise with graphic sexual themes that are available from particular novelty or gift stores. These items included a blow-up doll and picture books describing various sexual acts and positions. These stores also contain products advertised for children. Such matters are clearly analogous to billboard advertising since they can confront children (and adults) with inappropriate or offensive material without warning. However, the committee understands that such issues come under state laws in relation to, for example, minor summary offences (Victoria).

5.106 Similarly the placement of pornographic material in newsagents or DVD rental shops, for example, is a matter for state regulation.

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53 *Submission 139*, p. 8.

