

Advertising Standards Bureau Submission:

Regulating the advertising of therapeutic goods to the general public

July 2013

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1. Executive Summary

- Successive reviews of the complaint handling process supporting the regulation of advertising of therapeutic products to consumers have concluded that the system has significant flaws and needs to change.
- Problems with the current system identified in those reviews include:
 - Lack of timeliness
 - Confusion for complainants because of multiple lodgement points and complaint-handling bodies
 - Lack of public awareness of the process and the complaint handling bodies
 - Duplication of effort
 - Lack of compliance with determinations
 - Perceptions of bias and potential conflicts of interest
 - Lack of transparency overall.
- The Consultation Regulation Impact Statement on Regulating the advertising of therapeutic goods to the general public (Consultation RIS) makes the proposal that “All complaints about advertising of therapeutic goods to the general public to be handled by a single body”, identifying only the TGA or an independent statutory office holder as options for taking on this task.
- The Advertising Standards Bureau (Bureau) proposes that it assume responsibility for all complaints about advertising of therapeutic goods to the general public.
- The Bureau’s proposal would bring the complaint resolution processes applying in Australia and New Zealand into closer alignment and is timely given the current work of the Australia New Zealand Therapeutic Products Agency (ANZTPA) in developing a joint regulatory scheme for the regulation of therapeutic products.
- The Bureau is responsible for the administration of the complaint resolution component of the advertising self-regulation system.
- The advertising self-regulation system effectively regulates advertising and marketing communications in all media across Australia.
- Advertising of therapeutic products is one of very few exceptions to the advertising and marketing communications covered by the advertising self-regulation system.

- The Bureau supports the work of the Advertising Standards Board (Standards Board), which is the independent body established to consider complaints about advertising and marketing communications against the provisions set out in the relevant advertising codes.
- The complaint resolution process managed by the Bureau is an effective and efficient way to respond to consumers' concerns about advertising.
- The Bureau complaint process is transparent and accessible to all consumers, with easy to follow steps and support throughout the process provided by Bureau staff.
- If required, the Bureau is supported in enforcing compliance with Standards Board determinations by the media and media industry associations, such as the Outdoor Media Association.
- The vast majority of advertising and marketing communications in Australia comply with the relevant codes and do not receive any complaints, while the majority of those complained about are found to be not in breach of the codes. Where a breach is found, the Bureau has a record of nearly 100 per cent (currently 99.4%) compliance by industry with Standards Board determinations – demonstrating the commitment of the vast majority of advertisers to the system and to maintaining high standards of advertising.

2. Introduction

The Bureau appreciates the opportunity to provide comments in regard to the Therapeutic Goods Administration (TGA) Consultation RIS.

The Bureau is responsible for the administration of the complaint resolution component of the advertising self-regulation system in Australia. The Bureau supports the work of the Standards Board and Advertising Claims Board (Claims Board), the bodies established to consider public and competitor complaints respectively about advertising and marketing communications against provisions set out in the relevant advertising codes. A brief description of the current system of advertising self-regulation and the Bureau's role within that system is provided as an appendix to this submission (**Appendix 1**).

The Bureau is particularly concerned about the issues identified in the Consultation RIS with the current process for handling complaints about advertising of therapeutic products and the proposals the TGA has outlined for addressing those issues.

As the TGA is aware, the Bureau made a submission in February in response to the ANZTPA Discussion Paper: *Description of a possible joint regulatory scheme for therapeutic products under ANZTPA* (ANZTPA Discussion Paper). In that submission, the Bureau proposed that future arrangements for processing complaints about advertising of therapeutic products be brought within the advertising complaint process managed by the Bureau to provide a 'one-stop-shop' for all advertising complaints, including advertising of therapeutic products. Our submission noted that this would offer clarity and consistency for consumers and will benefit industry by bringing the processes

in Australia and New Zealand into closer alignment, benefiting from the strong relationship the Bureau already has with its New Zealand counterpart, the Advertising Standards Authority (ASA NZ).

This submission reiterates that proposal. That is, we consider that the Bureau's independent, well-recognised and proven complaint resolution process offers a practical and cost-effective solution to the problems with the current complaints process highlighted in the Consultation RIS. We recognise that in making this submission, we are proposing a new alternative to those set out under Option 2 of Proposal 2 in the Consultation RIS. However, we emphasise that this alternative is entirely consistent with the proposal made in Option 2. Option 2 is for "all complaints about advertising of therapeutic products to the general public to be handled by a single body". Bringing complaints about advertising of therapeutic products within the complaint resolution process managed by the Bureau achieves this goal, but with the advantage that efficient processes and procedures for complaint handling are already in place.

3. Background

The Consultation RIS makes clear that there are significant flaws in the current system for regulating advertising of therapeutic products in Australia and that successive reviews have identified the need for a change.

3.1 The current system for regulating advertising of therapeutic products

Advertising of therapeutic products to consumers is currently regulated through a system of shared or co-regulation involving a combination of statutory measures and self-regulation. Advertisements for therapeutic goods must comply with:

- the *Therapeutic Goods Act 1989* (the Act) and Regulations and other relevant legislation including the *Competition and Consumer Act 2010*
- the *Therapeutic Goods Advertising Code* (the Code), which is itself a legislative instrument, made under Section 42BAA of the Act, and administered through the Complaints Resolution Panel (CRP) and under the guidance of the Therapeutic Goods Advertising Code Council (TGACC), and
- the voluntary Codes of Practice applying to members of, and administered by, various industry associations operating within the therapeutic goods industry – including Medicines Australia, the Australian Self Medication Industry (ASMI) and the Complementary Healthcare Council of Australia (CHC).

The Act includes requirements for both the approval of advertisements before publication or broadcast in prescribed circumstances as well as making it an offence for an advertisement to be published or broadcast if it does not comply with the Code. The Regulations contain detailed provisions regarding the approval of advertisements as well as the establishment, functions and membership of both the TGACC and the CRP. Procedures for complaints handled by the CRP about advertisements and generic information are also prescribed in the Regulations.

In addition to these various compliance instruments that advertisers or sponsors must consider, there are also several layers to the complaints process. Complaints may be made in a number of

ways, depending on the nature of the complaint and the media in which the relevant advertisement is broadcast. The TGA website lists several avenues for complaints to be lodged, including to:

- the CRP
- the Complaints Resolution Committee of the CHC
- the ASMI Complaints Panel, or
- the TGA.

3.2 *Flaws identified in the current system*

Successive consultations and reviews assessing the current system of regulation of advertising of therapeutic products have found significant flaws in the current system, resulting in problems with timeliness, consistency, and public and advertiser confidence.

The Consultation RIS identifies the following problems with the current complaints handling process for advertising of therapeutic goods, based on findings of past consultations and reviews:

- delays in consideration of complaints
- multiple lodgement points and complaint-handling bodies
- multimedia advertising campaigns considered by multiple complaint-handling bodies
- lack of public knowledge of complaint-handling bodies and processes
- capacity of the peak body delegates and the Complaints Resolution Panel (CRP) to assess efficacy (performance) claims
- duplication of effort by the CRP and the TGA, where complaints are made to both
- lack of compliance with requests made by the CRP after determination of non-compliance
- perception of bias may discourage complaints from the public
- potential conflicts of interest arising from the representative nature of membership of the CRP.

It cannot be ignored that a fundamental part of the problem relates to the existing structure of the current system. There are too many avenues for lodgement of complaints, leading to a lack of public awareness of, or identification with, a particular complaint mechanism. This also has the potential to deter consumers from lodging a complaint at all, as the process of identifying *where* to complain in the first place appears too difficult. There is a lack of consistency in the treatment of complaints depending on where the advertisement appears (i.e. the type of media). There is a perception of a lack of independence in the membership of the CRP from the TGACC and the industry.

In addition and perhaps compounding some of the other problems, there is the rigidity of the complaint handling procedures applying to the CRP, because procedures are captured in Regulation rather than being allowed to be developed and managed by the administrators of the process at an operational level. Capturing the procedures in Regulation in this way means that the process administrators are unable to respond quickly to such things as product developments; new forms of media; any perceived problems with the procedures; or simply as a matter of continuous improvement. This issue is referenced in the Consultation RIS at page 37 under *Proposal 3: Provision of advice in relation to advertising matters*, in discussing the role of the CRP. It says the CRP “is

established in the regulations and has to follow complex regulatory procedures that can often lead to delays in effective outcomes arising from complaints”.

3.3 *Proposals for change in the Consultation RIS*

At page 35, the Consultation RIS sets out proposals to address the concerns raised about the timeliness and inconsistencies associated with the current complaints handling mechanisms for advertising of therapeutic goods to the general public (Proposal 2).

Two options are listed under Proposal 2:

- Option 1: Status quo – maintain the current system.
- Option 2: All complaints about advertising of therapeutic products to the general public to be handled by a single body, either:
 - the TGA; or
 - an independent statutory office holder.

The Consultation RIS makes clear that Option 1 does not address the concerns raised about lack of clarity, timeliness or the potential for conflict of interest in the existing process.

Option 2, providing for a single body responsible for handling complaints about therapeutic products advertised to the general public, is clearly the preferred option, although it is noted that the “statutory office holder option would potentially be more expensive than TGA conduct of complaints handling and the additional costs would need to be cost-recovered from industry”.

4. Comparisons with New Zealand and United Kingdom

Previous reviews have made reference to the approaches taken in other jurisdictions in regard to the regulation of therapeutic products. The approaches taken in New Zealand and the United Kingdom to the regulation of advertising of therapeutic products seem pertinent and are briefly summarised below.

4.1 *New Zealand*

The advertising of therapeutic products in New Zealand is regulated through the advertising self-regulation system administered by the ASA NZ.

Two codes of practice apply to therapeutic products – the *Therapeutic Products Advertising Code* and *Therapeutic Services Advertising Code*. The codes were introduced in 2005, with the Therapeutic Products Advertising Code modelled on the principles and requirements set out in the then proposed Australia New Zealand Therapeutic Products Advertising Code (developed following recommendations in the *Report on the Review of Advertising Therapeutic Products in Australia and New Zealand* by Mike Codd (the Codd Report)).

Complaints made under the codes are administered by the ASA NZ through its advertising complaint resolution process. Complaints are adjudicated by the Advertising Standards Complaints Board and

the Appeal Board. Both Complaints Boards have a majority of public members and are chaired by public members. The Complaints Board currently includes a member with a medical background and, while it is possible to obtain an expert opinion, this is not a regular part of the process. If a complaint is upheld, requests are made to the advertiser, media and advertising agency to remove the advertisement.

Competitor complaints received by the ASA NZ generally involve more highly technical issues and are addressed separately through the ASA NZ's competitor complaint process.

In addition, the Association of New Zealand Advertisers (ANZA) administers a comprehensive therapeutic advertising pre-vetting service (TAPS), for advertisers making therapeutic claims. The TAPS process provides assistance and certification to the industry.

The ASA NZ has a good relationship with the government regulator, Medsafe, and the regulatory system works as a cooperative process between Medsafe, the ASA NZ, the ANZA and the industry, promoting efficient and effective regulation. The ASA NZ process is working well, with a strong record of voluntary compliance by the participants in the system.

4.2 United Kingdom

The Advertising Standards Authority (ASA UK) is the United Kingdom's independent regulator of advertising across all media. The ASA UK administers two advertising codes, prepared by the Committee of Advertising Practice (CAP).

The two codes apply separately to broadcast and non-broadcast advertising. Each code has a section setting out requirements for advertisements relating to medicines, medical devices and health, which are administered by the ASA UK. The codes make clear that the rules set out in these sections apply to advertisements and not to the products or services, which are regulated by health regulators such as the Medicines and Healthcare products Regulatory Agency, the European Medicines Agency and the UK Department of Health.

In relation to broadcast advertising, preclearance is available through separate bodies (Clearcast and the Radio Advertising Clearance Centre) which each retain a panel of consultants to advise on health and medical aspects of advertising before broadcast. Additionally, the ASA UK may seek a medical opinion if there is a significant challenge to an advertisement that has been accepted by a broadcaster on the advice of a member of those panels.

In relation to non-broadcast advertising, CAP has a copy advice team, who can offer an informed view of the likely acceptability of non-broadcast marketing communications under the CAP code.

Under the codes, it is the responsibility of advertisers to ensure they hold appropriate evidence to support any claims made in the advertisements. Where such evidence is of a highly technical or specialised nature, such as in relation to health claims, the ASA UK or CAP may appoint an independent expert to give an impartial and confidential view on whether the evidence supports the claim being assessed (either as part of a determination or in relation to copy advice). The ASA

maintains a pool of experts who are used regularly, but can also seek out an expert with new, relevant expertise as needed.

5. Proposed joint regulatory scheme

The New Zealand model described above is relevant at present to Australia, given the current work of the ANZTPA in developing a possible joint regulatory scheme for therapeutic products. Any proposed changes to the current system for regulating advertising of therapeutic products in Australia should take into account the need to bring the systems applying in the two countries into closer alignment as the proposed date for introduction of the joint regulatory scheme approaches. This would enable a smoother transition to the joint regulatory scheme.

The introduction to this submission notes that the Bureau made a submission in February in relation to the ANZTPA Discussion Paper. Our submission noted that the ANZTPA's involvement in the regulation of the advertising of therapeutic products will be the subject of further development and consultation, as indicated in the Discussion Paper. However, the Bureau considered it important in the preliminary stages of development of a joint regulatory scheme to register our interest in offering our services to provide a transparent and efficient complaint resolution process for the regulation of advertising of therapeutic products, within the future joint regulatory scheme. Our submission proposed that such a process would be undertaken as a part of the Bureau's existing complaint resolution process and noted that this proposal would bring the processes in Australia and New Zealand into better alignment.

6. Bureau Proposal

Australia already has a well-developed advertising complaint management system, operated by the Bureau. This complaint resolution process applies broadly to complaints about the content of advertising and marketing communications across all media sectors. The Bureau manages the complaint resolution process for the advertising codes and initiatives developed by the Australian Association of National Advertisers (AANA), the Federal Chamber of Automotive Industries (FCAI) and the Australian Food and Grocery Council (AFGC), and receives complaints about alcohol advertising on behalf of the Alcoholic Beverages Advertising Code (ABAC) Management Committee.

Introducing a new complaints handling process either within the TGA or in the form of a new statutory authority is unnecessary and inappropriate when the Bureau already offers an established, independent and effective complaint resolution process for advertising in all media throughout Australia.

Our proposal is for the Bureau to manage all public complaints about advertising of therapeutic products to consumers within our existing complaint resolution process on an annual fee for service basis (see further detail below). This would effectively establish a 'one-stop-shop', not only for the

advertising of therapeutic products, but for almost all advertising complaints in Australia.¹ This would greatly improve clarity and consistency for consumers and would provide a single point of contact for those responsible for advertising therapeutic products.

We would propose to utilise the existing adjudication processes provided through the Standards Board, but with some modifications. For example, it would be appropriate to have a pool of independent experts from which the Bureau would request an opinion to be provided in relation to efficacy/performance claims. In this regard, we would look at a model similar to that currently used in relation to the food industry initiatives managed by the Bureau, under which a Healthy Choice Arbiter (an independent expert) is contracted to provide an opinion on nutritional and health claims and this opinion is provided to the Standards Board along with the complaint and advertiser response, before a determination is made. The Standards Board has found this process to be a useful and effective way of dealing with technical claims in the food industry. Alternatively, it may be appropriate to establish a sub-panel of the Standards Board, comprising a mix of laypersons and members with health experience, having regard to the special case that advertising of therapeutic products presents.

We also note that the Bureau is not involved in any approvals or copy advice functions. Copy advice is, however, provided by some of the media and advertising industry associations. We would not seek to be involved in any approvals function applying to therapeutic advertising, which we consider is more appropriately kept separate from the complaints function and could be managed through the industry.

The proposal is cost-effective, as the Bureau already has in place systems and procedures that enable it to administer an effective, efficient and transparent complaint resolution process. Some modifications would, of course, be required to enable our systems to process complaints made under the Code and to ensure adequate resourcing to cover the additional volume of complaints. Additionally, there would be some additional resourcing costs associated with introducing members with health experience to the Standards Board (or sub-panel) if that is determined to be appropriate, and in relation to using independent experts. However, there are still likely to be significant cost advantages in utilising the Bureau's existing processes and procedures for complaint management, rather than developing new systems either within the TGA or under an independent statutory office holder.

Our proposal also has advantages over the existing procedures which, as noted above, lack the flexibility to respond quickly to changing needs. Operating procedures for administering a complaint handling process need to be responsive and allow for continuous improvement. One of the key benefits of a self-regulatory system is its flexibility, allowing it to respond quickly to changing needs and to evolve.

The Bureau's process is flexible enough to allow some modifications, recognising that the advertising of therapeutic products presents a special case, because of the products' therapeutic effect on

¹ The issue of a one-stop-shop for all advertising complaints has been raised in past Senate inquiries. For example, the Senate Inquiry into the Sexualisation of Children in the Contemporary Media (2008).

people and the potential risk to public health and safety that can result from false or misleading claims. We understand that the Government should continue to play a role in ensuring the public is protected from such claims. However, if oversight becomes too closely involved in the management of the process itself, then the benefits of flexibility, timeliness and participant cooperation that self-regulation can provide will be lost.

While our proposal recommends utilising the existing self-regulatory processes for the resolution of complaints managed by the Bureau, we consider the following are key areas where the TGA could continue to play an important role:

- *Code registration* – similar to the role of the Australian Communications and Media Authority (ACMA) in the registration of the broadcasting codes of practice, the therapeutic industry associations, together with the advertising and media associations, would develop and maintain the Code, seeking input from industry and consumers, before submitting the code for registration by the TGA.
- *Enforcement on referral from Bureau* – providing legislative underpinning to the process and an avenue for referral of complaints if there is non-compliance with a determination (consistent with the Bureau's current approach to referring matters to appropriate government agencies in the event of non-compliance) or where further action is sought following determination or independent review.
- *Expert recommendations* – providing independent experts from within the TGA itself or providing recommendations of appropriate, impartial experts in consultation with the Bureau for the purpose of providing opinions on efficacy/performance claims.

Registering the Code would still involve a form of co-regulation that we understand the TGA would seek to retain, without the rigidity of the current process in which the Code is itself a legislative instrument and where procedures are set down in the Regulation.

7. Funding arrangement

As mentioned above, the primary income stream for the Bureau is the voluntary advertiser levy paid by responsible advertisers. In addition to this levy income, the Bureau has entered into code administration agreements with both the FCAI and the AFGC.

These code administration agreements establish the operational, administrative and financial bases for the complaint adjudication system to consider complaints against the provisions of the FCAI's motor vehicle advertising code and the AFGC's two responsible children's marketing initiatives as referred to above.

The Bureau's proposal to deliver the complaint adjudication system for TGA is based on a similar code administration arrangement which includes an agreed fee for service. We understand that a fee for service arrangement is similar to the current funding arrangement under which TGA provides funding to ASMI for the secretariat services of the CRP.

We would expect that the fee, as well as any implementation costs, would be negotiated and agreed once we understand more fully the scope of the workload and the detail of your requirements.

8. Benefits of utilising the Bureau's complaint resolution process

The process we would be able to provide TGA, as described in the flow chart at **Appendix 2**, and the principles underpinning the self-regulation complaints system, as set out in **Appendix 1**, address many of the concerns raised in the Consultation RIS and in previous reviews.

More specifically, we note that the Consultation RIS discusses the problems with the current system (at pages 18-30) under the following headings:

1. Pre-publication approvals of advertisements
2. The complaints handling processes
3. Compliance and enforcement tools
4. The Therapeutic Goods Advertising Code
5. The Therapeutic Goods Advertising Code Council
6. Advertising of high risk medical devices
7. Advertising directed to health professionals
8. Advertising of Pharmacist-Only Medicines
9. The Price Information Code of Practice

We discuss below the benefits of utilising the Bureau complaint resolution process to address the issues raised under each of those headings from 1 to 6. We do not have any specific comments in regard to the issues raised under headings 7, 8 or 9.

8.1 Pre-publication approvals of advertisements

The Consultation RIS notes the following issues with the current pre-approval process applying to particular kinds of advertisements:

- complaints about pre-approved advertisements upheld by the CRP
- perceptions of bias
- concerns about the capacity (technical expertise) to assess claims as part of approvals process
- multimedia campaigns requiring approval from two separate bodies, resulting in inconsistencies
- advertising of medical devices not covered
- limited media coverage.

We do not have specific comments in regard to the current pre-approval process. As stated earlier, the Bureau does not currently perform any approvals or copy advice functions and we consider it is appropriate to keep the approvals and complaints handling functions separate, similar to the approach currently taken in New Zealand.

Additionally, we note that transparency in the decision process and timely reporting of decisions (discussed below at 8.2.9) is an effective means for ensuring parties to the approvals process have

up to date information that can reduce instances of inconsistency between approvals decisions and complaint determinations.

8.2 Complaints handling process

The problems identified with the current complaints handling process in the Consultation RIS were listed above at 3.2.

Our proposal addresses each of those issues as follows:

8.2.1 Timeliness in consideration of complaints

The Consultation RIS states that “the volume of complaints is such that the average time taken by the Complaints Resolution Panel to make a final determination about a complaint was 85 days in 2011-2012”. Further, the TGACC Annual Report for 2011/2012 indicates that 405 complaints were considered by the Complaints Resolution Panel in 2011/2012 and the time taken from receipt of complaint to determination sent in the 2012 financial year was 135 calendar days.

The Bureau has invested significant resources into its complaint management system to ensure the system is efficient and determinations are made on a timely basis. This is important to promote public confidence in the system’s ability to deliver a quick response.

Since early 2009, the Standards Board has met at least twice per month (face-to-face and via teleconference), which also contributes to the timely turnaround of complaints. The Standards Board can also meet between scheduled meetings, if it is determined that a case warrants an urgent meeting.

In 2012, the Bureau received 3,640 complaints and the Standards Board considered 473 advertisements (cases). Timeliness statistics for the 2012 calendar year are provided at **Appendix 3**. 72.4 per cent of cases in 2012 were completed within 42 calendar days and over 90 per cent were completed within 56 calendar days (covering the period from receipt of complaint until resolution and publication of the final case report on the Bureau website).

Considerably shorter timeframes apply where it is considered likely that the advertisement will breach the relevant codes or it appears there is immediate and significant community concern about the advertisement. In such cases, urgent meetings of the Standards Board may be called to expedite consideration of the complaint.

This approach could address concerns raised in the Consultation RIS that the current regulatory framework does not allow for a quick decision to be made when considered necessary, for example, to prevent harm to consumers. The process could incorporate an ability to refer the matter to the TGA after the Standards Board has given it urgent consideration, should there be concerns with either non-compliance with the determination or where there are other matters that would be more appropriately dealt with by the TGA.

The Bureau’s processes also have flexibility for dealing with straightforward complaints. The Bureau introduced a “consistently dismissed” category to its complaints system in 2010, to streamline the

process and ensure that Bureau resources are devoted to the work that is most likely to be upheld. A similar issue for the current therapeutic products advertising complaints process was identified in the TGA's May 2012 report, *Advertising Regulatory Framework – Options for Reform*, which noted that straightforward complaints could be resolved more quickly without going to the Complaints Resolution Panel. The Bureau's approach to consistently dismissed complaints seems consistent with this proposal.

The Bureau is committed to continuous improvements to its complaint handling processes and procedures. As a result, the Bureau has a robust process, with a sophisticated complaint management system and experienced staff resources, making it unnecessary for the TGA to seek to 'reinvent the wheel' in relation to complaints about the advertising of therapeutic products.

8.2.2 Single complaint-handling body as 'one-stop-shop'

The Consultation RIS highlights the difficulty consumers experience in finding out how to make a complaint, as a result of multiple lodgement points for complaints as well as the low profile of complaint-handling bodies and lodgement mechanisms.

A single point of lodgement for complaints about advertising of therapeutic products would remove the confusion and complexity of the multiple lodgement points and complaint handling bodies under the current process.

The Bureau already acts as a single lodgement point for complaints about advertising in all media throughout Australia, under several codes and initiatives which apply generally to all advertisers and marketers (the AANA codes), or more specifically to different industry sectors (eg the alcohol, motor vehicle, food and beverage and quick service restaurant industries).

The Bureau is well-recognised as the body for complaints about advertising (discussed at 8.2.4 below) and it makes sense for the Bureau to be the one-stop-shop for all advertising complaints, including advertising of therapeutic products. In 2012, 8 complaints received by the Bureau related to therapeutic products and the complainant was informed that he/she should submit a complaint through the Therapeutic Goods Advertising Code Council (TGACC). We also note that many advertisers of therapeutic products would already be familiar with the Bureau process.

8.2.3 Single complaint process/body for multi-media campaigns

Under the current system for advertising of therapeutic goods, complaints about "non-mainstream" media are administered separately by the therapeutic industry associations. Responsibility for handling complaints about the same advertisement in different media can fall on different bodies, with the potential for confusion, duplication of effort and inconsistency. To improve clarity of the complaint lodgement process, the same process should apply to complaints about advertising in all forms of media.

The Bureau already accepts complaints about all types of advertisements in all forms of media. This would include complaints about advertising or marketing communications in "non-mainstream" media. The Standards Board considers complaints about advertisements appearing in different

forms of media as separate cases, as different types of media have different audiences and different levels of impact.

Further, the Bureau process and the codes currently administered by the Bureau allow flexibility to enable advertising in new and emerging forms of media to be considered, as evidenced by recent decisions of the Standards Board regarding advertising in social media and “Apps”. The same flexibility should be extended to advertising of therapeutic products.

8.2.4 Public awareness and accessibility

The Bureau invests in both public awareness activities and regular research to measure community awareness of where to complain about advertising. The most recent public awareness campaign was conducted in outdoor media in 2011, following on from a successful television, radio and print campaign in 2008. The most recent community perceptions research undertaken in 2012 found a high level of unprompted recognition of the Bureau as a complaints organisation, at 62% (remaining stable since 2010 research which reported 63% unprompted awareness). The Bureau is committed to continuing to improve the level of public awareness of the organisation and the complaints process and is currently planning its next public awareness campaign.

The Bureau also works closely with industry bodies, such as the AANA, the Outdoor Media Association, FreeTV and the Communications Council, to ensure their members are familiar with the Bureau’s role and complaints received by their members are promptly forwarded to the Bureau.

The complaint process administered by the Bureau is free, accessible and easy to use. The Bureau has invested significantly in creating a quick and easy-to-follow complaint lodgement process on its website to reflect increasing internet use throughout Australia. The Bureau continues to work to improve the accessibility of its complaint lodgement process, for example, with efforts taken this year to ensure the online complaint form is also compatible with mobile and tablet devices.

In 2012, the Bureau received a total of 3,640 complaints, a slight increase from 2011 (3,416 complaints). Complaint statistics are published annually in the Bureau’s Review of Operations, also available on the Bureau website.

The majority of complaints received by the Bureau are now lodged through the Bureau’s online system, with 93.7 per cent of submissions lodged online in 2012. In 2012, complaints were also submitted by post (6.3 per cent) and fax (0.01 per cent). Postal complaints include referrals from industry groups, broadcasters and local Members of Parliament.

8.2.5 Assessing performance claims

In regard to claims about efficacy and performance where independent expert advice may be required, the Bureau and Standards Board already have experience and processes that may be applied.

The Standards Board deals with issues of substantiation and false and misleading claims under some of the codes and initiatives it already administers. The Standards Board has always had the

opportunity to request independent expert advice or for research of a topic to be undertaken, if this is required.

If a complaint is made that an advertisement is misleading or deceptive it is the responsibility of the advertiser to provide the Bureau with sufficient information to enable the Standards Board to assess the accuracy of claims or statements made in an advertisement. For example, in relation to food products, the information requested will usually be substantiation of the composition or nutritional profile of the food, but this will depend on the claims and statements made in the advertisement. On occasions the information provided by the advertiser will be highly technical and it will be beneficial for the Standards Board or Bureau to obtain independent expert advice on the information so that it is able to be presented to the Standards Board in 'lay' terms. In such circumstances the Bureau will engage the assistance of an independent expert. The Bureau seeks expert advice on food science matters and advisors are engaged should issues raised require expertise. Expert advice is similarly available to the adjudicators determining complaints in the UK.

Further, the food industry initiatives (RCMI and QSR) administered by the Bureau and adjudicated by the Standards Board contain provisions that require certain claims to be considered as to whether they have been substantiated.

Under these initiatives, the Bureau enlists independent advice from a *Healthy Choices Arbiter*, who has the specific role of providing such advice for use in the Standards Board's determination. The Healthy Choices Arbiter will advise the Standards Board whether the product or meal advertised represents a 'healthier choice' (in the case of the QSR Initiative) or 'healthy dietary choices' (in the case of the AFGC Initiative). This has proven an effective way of ensuring timely advice on more technical matters relating, for example, to nutritional criteria which can be provided to the Standards Board along with the complaint(s) and advertiser responses for its determination.

The Bureau has also established a good relationship with the Australian Competition and Consumer Commission and shares information about our approach to false and misleading claims where appropriate.

8.2.6 No duplication of effort

Centralising all complaints about advertising, including advertising of therapeutic products, within the Bureau process would provide far greater clarity for the general public as well as advertisers and media proprietors.

It would also remove the issue of duplication of complaint handling. This could be effectively reinforced through ensuring that the TGA and industry bodies provide information on their websites linking to the Bureau website and that any complaint enquiries are directed to the Bureau.

The option would be retained to refer non-compliant advertisers/marketers to the TGA (or if appropriate to the member's industry association) for further action, as noted above, but all complaints should still in the first instance go through the Bureau complaint process and we are confident in a high level of compliance.

8.2.7 *Compliance by advertisers*

The Bureau has a strong record of compliance with Standards Board determinations, reflecting a high level of support and respect for the complaint resolution process. Industry support is fundamental to the success of Australia's world-class system of advertising industry self-regulation and is demonstrated as follows:

- Participating advertisers demonstrate their support for self-regulation by instructing their advertising agencies to adhere to its various codes of advertising standards, by agreeing to the levy being applied to their media expenditures, and by complying with decisions of the Standards Board.
- Participating advertising agencies support the system by monitoring the various codes and determinations made by the Standards Board and consulting with their advertiser client.
- Participating media buyers support the system by collecting and remitting the levy which funds the system through their accounting systems.
- Participating media operators support the system by promoting self-regulation through information and advertising material prepared by the Bureau and by assisting with the removal of advertisements where appropriate.

As a voluntary system, self-regulation relies very much on the good will, good sense, and commitment of advertisers to provide consumers with appropriate advertisements and through this promote consumer and government confidence in the general standards of advertising.

In order to achieve a high level of voluntary compliance, it is important that determinations are transparent, consistent and impartial. The Standards Board has the complex and sometimes difficult task of making determinations in relation to a wide range of issues covered by the various codes and initiatives it administers. Care is taken to ensure the Standards Board has the support it needs to make effective determinations.

The Bureau and Standards Board work hard to ensure robust decision-making applies to all complaints and that determinations recorded in the published case reports are articulated clearly, logically and concisely. Our record of compliance with Standards Board determinations is nearly 100 per cent (currently 99.4%). This is supported by relationships the Bureau has established with media industry associations and media proprietors.

The Bureau undertakes regular research to ensure the Standards Board is continuing to meet community expectations regarding the provisions of the codes. The research results are also made available on the Bureau website and are communicated to the Standards Board so they can apply the findings to their decisions. The Bureau also supports the work of the Standards Board through training sessions, held twice yearly.

The Standards Board is extremely careful to follow appropriate process in making its determinations. The introduction of the Independent Reviewer process in 2008, which allows for a request for review on the basis of a flaw in the determination, a flaw in the process the Standards Board followed, or

the provision of new evidence, increases the Standards Board's resolve to ensure sound decision making.

8.2.8 Enforcement

When a complaint is upheld by the Standards Board, the advertiser is requested to remove or amend the offending advertisement as soon as possible after receiving a copy of the draft case report. The advertiser is asked to advise whether it agrees to modify or discontinue the advertising or marketing communication via an 'Advertiser Statement' within 5 business days of receiving written advice of the outcome and the draft case report. The Advertiser Statement is included in the final case report, including any failure to provide a response.

In the vast majority of cases where an advertising or marketing communication is found to breach a provision of a code or initiative we administer, advertisers quickly act to remove or modify the advertising or marketing communication following request by the Bureau. Very few advertisers require more encouragement to comply.

In the event the advertiser/marketer does not modify or discontinue the advertising or marketing communication within the allowed time frame, the Bureau will:

- include the advertiser/marketer's failure to respond in the case report
- forward the case report to media proprietors
- post the case report on the Bureau's website, and
- if appropriate, the Bureau can refer the case report to an appropriate government agency.

It should also be noted that, if it appears from a complaint that an advertisement may breach government regulations or has broken the law, the Bureau can (even before the case goes to the Standards Board for determination) refer the case report to an appropriate government agency or industry body that has the authority to withdraw the advertisement.

8.2.9 Perceptions of bias and transparency of complaint process and decisions

Perceptions of bias are addressed through ensuring the independence of the Standards Board (discussed in the next section); by applying principles of natural justice and procedural fairness to the complaint resolution process; and through transparency of both the process and decisions of the Standards Board.

The complaint adjudication process is based on the principles of natural justice. That is, following receipt of a valid complaint (i.e. a complaint that raises an issue that falls within the provisions of one or more of the advertiser codes), the advertiser is asked to address the concerns raised by the complainant against the provisions of the prevailing advertiser codes. The Standards Board will consider the content of the complaint, the response provided by the advertiser and any other

relevant material in considering the complaint. There is no lesser or greater weight given to the complainant's concerns or the advertiser's response.

The Bureau is committed to a high standard of transparency in regard to its administration of complaints and the complaint adjudication process undertaken by the Standards Board. Complaint process steps are clearly set out on the Bureau website, along with information about how the Standards Board makes its determinations. Members of the public without access to the internet are able to contact the Bureau and request information about the complaint process.

Bureau staff promptly assess complaints as to their appropriateness for submission to the Standards Board for determination. The Bureau, as secretariat for the Standards Board, responds to all complainants, informing them of the status of their complaint and keeps complainants and advertisers informed of the progress of complaints throughout the process via written correspondence.

All case reports are made publicly available via a searchable database on the Bureau website promptly after determination, which itself can be an effective deterrent for non-compliance. Case reports contain details about the complaint, a description of the advertisement, the advertiser response and the Standards Board's determination, along with a summary of the reasons for its decision.

The Bureau also publishes 'Determination Summaries', which provide a general overview of Standards Board determinations on complaints about particular issues covered by the codes. The Determination Summaries are available from the Bureau website. Determination Summaries are currently available on the topics of *Discrimination and vilification in advertising*, *Use of sexual appeal in an exploitative and degrading manner*, *Portrayal of gender in advertising*, *Violence in advertising*, *Health and safety*, and *Language*. These summaries are designed to assist advertisers, advertising agencies, media proprietors, consumers and the Standards Board itself in understanding how the Standards Board has viewed particular issues covered by the codes that have been the subject of complaints in the past.

8.2.10 Independence and conflicts of interest

The Bureau aims to administer a well-respected, effective and independent advertising complaints resolution service and to ensure compliance with relevant codes.

The core functions of the Bureau are funded through a voluntary levy, paid by responsible advertisers and collected and remitted by media buying companies.

The advertiser levy is remitted to the Australian Advertising Standards Council (AASC), the entity established to receive the industry levy. The AASC provide funds to the Bureau for it to operate the complaint resolution component of the advertising self-regulation system. There is a commercial agreement in place between these entities.

Some, but not all media buyers provide remittance information detailing those advertisers who do, or do not pay the voluntary levy. Information about who pays levy is used by AASC to seek to

broaden the range of advertisers who financially contribute to the self-regulation system. However, under no circumstances is information about who pays levy shared with the Standards Board, which adjudicates complaints. This ensures there can be no perception of bias for the Standards Board in determining complaints.

Supporting this policy is a binding Confidentiality Deed in place between AASC, the Bureau and the accountants who are contracted to manage the financial affairs of the self-regulation system (BDO East Coast Partnership). Information about who pays levy is not provided to the Standards Board as this would breach the provisions of the Confidentiality Deed.

The corporate board of the Bureau (Bureau Board) governs the operations and administration of the Bureau and sets the policies and practices of the entire complaint resolution system. There is *no interaction between the functions* of the Bureau Board and the Standards Board, again to ensure no perceived or actual bias for the Standards Board.

Members of the Standards Board consider complaints about advertising and marketing communications against the provisions of the prevailing advertiser codes. Members of the Standards Board are community representatives, independent of the industry and of consumer lobby groups and appointed following a publicly advertised application and interview process. Any person who has a current affiliation with the broad advertising industry or lobby groups is not eligible to be appointed to the Standards Board. There are no industry members on the Standards Board – all are members of the community. This policy exceeds international best practice standards. On the rare occasion an individual member has a connection with a party concerned in a particular determination, that member absents herself or himself from the meeting.

Care is taken by the Bureau to ensure the Standards Board continues to be independent, effective and representative of the Australian community. There are currently 20 members, appointed via a public recruitment process and new members are appointed at staggered intervals to ensure the Standards Board has a mix of experienced and new members. Members are bound by confidentiality in relation to all information they come into contact with in connection with their role on the Standards Board, both during and after their term on the Standards Board.

The complaint adjudication system also allows the Board to consider the complaint if the advertiser declines to provide a response to the complaint and it is not uncommon for the Board to be critical of the content of the advertiser's response in addressing the concerns raised by a complainant.

8.3 Compliance and enforcement tools

The current advertising self-regulation model is effective in maintaining high advertising standards and ensuring consumer trust and protection is met for the benefit of all of the community.

The Bureau's record of compliance and options for enforcement were discussed above at 8.2.7 and 8.2.8. As stated in 8.2.8, an action the Bureau may currently take in the event of non-compliance by an advertiser is to refer the matter to an appropriate government agency, requesting assistance in taking action against the advertiser. Appropriate agencies may, for example, include the Commonwealth Department of Communications, Broadband and the Digital Economy, the

Australian Communications and Media Authority, the Attorney-General's Department, the Australian Competition and Consumer Commission, or State Police Departments. In some cases, local councils may also have relevant authority to assist with the removal of an advertisement, although this varies greatly between different jurisdictions.

Although Government agencies can be of assistance should the Bureau require assistance in facilitating the removal of an advertisement, they do not always have relevant powers or funding to achieve enforcement outcomes or, in some cases, are unable to act quickly or on the basis of community concerns.

In light of this, the Bureau would support the TGA's desire for new enforcement tools that could be used should the Bureau request assistance with removal of an advertisement in the event of an advertiser's failure to comply with a Standards Board determination.

8.4 The Code

The Bureau does not have specific comments on the current drafting of the Code, other than noting our earlier comments that making changes in response to community concerns or changing needs are likely to be more difficult when the Code is captured as a legislative instrument.

8.5 The TGACC

The Bureau does not have specific comments in regard to the TGACC, although we note that it is useful to have a representative group to consider changes to the Code. Additionally, the complaints handling body should be represented in any group responsible for monitoring and developing the Code, in order to provide feedback on any operational issues arising from operation of the Code or changes thereto.

8.6 Advertising of high risk medical devices

If these products are able to be advertised to the public, the Bureau's complaints resolution process would be able to handle complaints about the content of advertisements for these products.

9. Conclusion

Bringing complaints about the advertising of therapeutic products within the complaint resolution process managed by the Bureau is consistent with the proposal for complaint handling made in the Consultation RIS at Option 2 of Proposal 2. It addresses the concerns raised in the Consultation RIS and in previous reviews regarding the timeliness, independence and effectiveness of the complaint resolution process relating to advertising of therapeutic products. It will provide clarity, efficiency and effectiveness for consumers and the industry.

Further, it will bring the approach in Australia into closer alignment with the regulation of advertising of therapeutic products in New Zealand. This would be a timely move, given the current work of the ANZTPA in developing a joint regulatory approach to therapeutic products.

We would appreciate the opportunity to discuss our proposal in this submission in further detail before a final RIS is prepared to assist the Government with its consideration of proposed regulatory reforms.

The advertising self-regulation system

Australia's system of advertising self-regulation is recognised as world class. The current system was established by the AANA in 1998. It recognises that advertisers share an interest in promoting consumer confidence in and respect for general standards of advertising.

Self-regulation of the advertising industry has been achieved by establishing a set of rules and principles of best practice to which the industry voluntarily agrees to be bound. These rules are expressed in a number of advertising codes and industry initiatives. The rules are based on the belief that advertisements should be legal, decent, honest and truthful, prepared with a sense of social responsibility to the consumer and society as a whole and with due respect to the rules of fair competition. Self-regulation of advertising is not designed to set community standards, but rather to reflect community standards.

The system is funded by advertisers agreeing to a levy being applied to their media expenditures and is well supported by all parts of the industry – advertisers, advertising agencies, media buyers, media operators and industry associations.

High standards of advertising are maintained through the interaction of the various parts of the self-regulation system:

- through the existence and development of appropriate codes and initiatives relating to advertising standards;
- the voluntary compliance of advertisers;
- the efforts of other industry stakeholders in ensuring compliance, supporting industry education and public awareness programs, and supporting enforcement where required; and
- the operation of the complaint resolution process.

The system meets world best practice in self-regulation and operates, at no cost to the consumer, on the principles of accessibility, transparency, responsiveness and robust decision making.

1. Role of the Bureau

The Bureau administers the complaint resolution component of the advertising self-regulation system. The work of the Bureau is not underpinned by any Government legislation.

The Bureau's purpose is that the community, industry and government have confidence in, and respect the advertising self-regulatory system and are assured that the general standards of advertising are in line with community values.

The Bureau aims to administer a well-respected, effective and independent advertising complaints resolution service that regulates advertising standards in Australia, adjudicating both public and competitor complaints, and to ensure compliance with relevant codes.

Currently, the Bureau administers the following codes of practice relating to advertising and marketing communications in Australia:

- AANA Code of Ethics;
- AANA Code for Advertising and Marketing Communications to Children;
- AANA Food and Beverages Advertising and Marketing Communication Code;
- AANA Environmental Claims in Advertising and Marketing Code;
- Federal Chamber of Automotive Industries (FCAI) Voluntary Code of Practice for Motor Vehicle Advertising;
- Australian Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry; and
- Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children.

These codes apply to all advertising and marketing communications across all media. The Bureau also works with the Alcohol Beverages Advertising Code (ABAC) management scheme, and accepts, and forwards to the ABAC chief adjudicator, all complaints about alcohol advertisements.

The Bureau is secretariat for the Standards Board and the Advertising Claims Board (Claims Board), the bodies appointed to adjudicate public and competitor complaints and to ensure compliance with the relevant codes and industry initiatives. The two boards have separate and distinct roles considering public and competitor complaints about advertising against the advertising codes they administer. Members of the Standards Board are community representatives, independent of the industry and appointed following a publicly advertised application and interview process. Members of the Claims Board are legal practitioners sourced from a register of lawyers experienced in advertising and/or competition and consumer law.

2. Role of the Bureau Corporate Board

The Bureau is a limited company headed by a Board of Directors (Corporate Board). Under the Constitution of the Bureau, there must be between three and six directors of the Bureau.

The Corporate Board is responsible for management of the business of the Bureau consistent with the Bureau's objectives and, with the Chief Executive Officer, is also responsible for the corporate governance of the Bureau. The Corporate Board deals with strategic, financial and operational concerns, and works to improve the operation of the Bureau so that it is the foremost complaints resolution body for advertising in Australia.

The Corporate Board has the integrity of the advertising self-regulation system at heart and it insists that the work of the Corporate Board and of the Standards Board be absolutely separate.

3. Role of the Standards Board

The Standards Board is the independent body established to determine public complaints about advertising and marketing communications against the principles set out in the relevant codes. The Standards Board makes determinations on complaints about most forms of advertising in relation to issues including the use of language, the discriminatory portrayal of people, concern for children, portrayals of violence, sex, sexuality and nudity, and health and safety.

The Standards Board comprises 20 members of the community and reflects a diverse knowledge and experience base. The Standards Board is gender balanced and members come from a broad range of age groups and backgrounds. It is independent, dedicated and diverse and as representative of the diversity of Australian society as any such group can be.

Individual Standards Board members do not represent any particular interest group (industry or consumer) and are individually and collectively clearly independent of the industry. On the rare occasion an individual member has a connection with a party concerned in a particular determination, that Standards Board member absents herself or himself from the meeting.

The Standards Board discharges its responsibilities with fairness, impartiality 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.

Membership of the Standards Board is on a fixed term basis. New appointments are staggered to avoid desensitisation and to ensure the Board retains a mix of corporate knowledge and at the same time introducing people with different experiences, views and skills. Profiles of current Standards Board members are available to all on the Bureau website (www.adstandards.com.au).

Standards Board appointments are made following a publicly advertised application and interview process. People sought for appointment to the Standards Board ideally have an interest in, and views on, advertising and have been exposed to a broad range of community activities and interests.

Standards Board Members participate in twice yearly training days to reflect on decision trends under the codes and initiatives, to consider issues impacting on community standards in advertising and increase their knowledge of contemporary advancements in advertising and marketing communications.

4. Role of the Claims Board

The Claims Board provides a separate competitive complaint resolution service and is designed to determine complaints involving issues of truth, accuracy and legality of advertising on a user pays cost recovery basis.

The Claims Board is a system of alternative dispute resolution aimed at addressing and resolving challenges to advertising that might otherwise lead to expensive and time consuming litigation.

The Claims Board considers complaints which breach Part 1 of the AANA Code of Ethics. This includes complaints about: the legality of an advertisement; misleading or deceptive advertisements; and advertisements that contain misrepresentations likely to harm a business.

Complaints received by the Claims Board are considered by a panel of legal advisors with experience and expertise in advertising and/or trade practices law.

5. Role of the Independent Reviewer of Standards Board determinations

As part of its ongoing commitment to international best practice in delivering the advertising self-regulation system in Australia, the Bureau introduced a review process for Standards Board determinations in April 2008.

The Independent Review process provides the community and advertisers a channel through which they can appeal decisions made by the Standards Board in prescribed circumstances. The review process is available to the advertiser and the person(s) who originally made a complaint.

In line with international best practice, the Independent Reviewer's role is to assess the validity of the process followed by the Standards 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 Standards Board's original determination should be confirmed or be reviewed. It would be 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.

There are three grounds for review:

- Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided;
- Where there was a substantial flaw in the Board's determination (determination clearly in error having regard to the provisions of the codes or initiatives, or clearly made against the weight of evidence); and/or
- Where there was a substantial flaw in the process by which the determination was made.

The Independent Reviewer will first consider whether the application for review sets out a prima facie case for review and will decide to accept or not accept the request. If the request is accepted, the Independent Reviewer will undertake appropriate investigation and will make a recommendation to the Standards Board, stating whether the Standards Board's original determination should be reviewed or confirmed.

During the review process, the original determination (and any subsequent remedial action or withdrawal of the advertisement) will stand. The Bureau publishes the initial determination until the outcome of the review is known at which point the revised determination with Independent Reviewer recommendation is published.

Information about the review process is available on the Bureau website. The advertiser and original complainant(s) are also informed about the process when notified of the complaint determination.

6. Principles underpinning the self-regulation complaints system

6.1 Accessibility of complaint process

The complaint process is accessible to all members of the public. Complaints may be made via an online complaint form, by post or facsimile. A single written complaint is sufficient to initiate the complaint process.

The complaint process is a free service and provides fairness for complainants and advertisers. Process steps are clearly set out and available to all on the Bureau website, along with information about how the Standards Board makes its determinations. Members of the public without access to the internet are able to contact the Bureau and request information about the complaint process.

Ensuring consumers know where to complain about advertising is an important issue for the Bureau. In 2006 the Bureau undertook research to gain an understanding of the level of unprompted awareness of the Bureau. Survey participants in 2009, 2010 and 2012 were asked the same question. Spontaneous awareness of the Bureau as a complaints organisation remained high from 2009 through to 2012. Overall, 62% of the general public in the 2012 community perceptions study were aware that they could complain to the Bureau if they had a complaint about paid advertising. This result remained stable since the 2010 sexuality research (63%) and 2009 violence research (67%). The result was also significantly higher than the level of unprompted awareness in the 2006 community awareness research (10%), which drove the development of an awareness raising campaign commencing in 2008 with television, radio and print advertisements. The campaign was extended to outdoor advertising in 2011. The Bureau is supported in its campaign by industry, who have developed the campaign at reduced costs and broadcast the advertisements in relevant media at no charge to the Bureau.

6.2 Transparency of complaint process and decision making

The Bureau is committed to a high standard of transparency with regard to Standards Board determinations.

Complaints are promptly assessed as to their appropriateness for submission to the Standards Board for determination. The Bureau, as secretariat for the Standards Board, responds to all complainants, informing them of the status of their complaint and keeps complainants and advertisers informed of the progress of complaints throughout the process via written correspondence.

In 2010, the Bureau initiated the development of a series of “Determination Summaries”, aimed at providing a general overview of Standards Board determinations on complaints about particular issues covered by the codes. The Determination Summaries are available from the Bureau website and cover topics including *Discrimination and vilification in advertising*, *Use of sexual appeal in an exploitative and degrading manner* and *Portrayal of gender in advertising*.

The summaries are not “how to” guides and are not intended to operate in the manner of binding legal precedents, but are designed to assist the advertising industry, consumers and the Standards Board itself in understanding how the Standards Board has viewed particular issues covered by the codes that have been the subject of complaints in the past.

All case reports are also made publicly available on the Bureau website promptly after determination. Case reports contain details about the complaint, a description of the advertisement, the advertiser response and the Standards Board’s determination, along with a summary of the reasons for its decision.

6.3 Robust decision making

The Standards Board has the complex and sometimes difficult task of making determinations in relation to a wide range of issues covered by the various codes and initiatives it administers.

To assist the Standards Board in its deliberations, the Bureau conducts two training days each year in which issues of topical or general importance and determination precedent are discussed. This often includes presentations from other organisations or experts on matters of current interest. For example, at the May 2013 training day the Outdoor Media Association gave a presentation to the Standards Board on *Understanding who sees outdoor advertising and how*. An update was also provided at the training day from ABAC representatives on recent issues in alcohol advertising.

All community standards research which the Bureau regularly undertakes on behalf of the Standards Board is discussed at training days both during the draft stage and subsequently during a formal presentation of the final research report. The Bureau also involves the Standards Board in the development of the Determination Summaries which provide precedent information regarding previous Standards Board determinations on particular issues.

All case reports following Standards Board determinations are published on the Bureau website. Since these documents are available to the entire community, the Bureau ensures that determinations in case reports are articulated clearly, logically and concisely.

The Standards Board is extremely careful to follow appropriate process in making its determinations. The introduction of the Independent Reviewer process in 2008, which allows for a request for review on the basis of a flaw in the determination or a flaw in the process the Standards Board followed, increases the Standards Board’s resolve to ensure sound decision making.

6.4 Responsiveness of complaints handling

The Bureau’s complaint handling system is efficient. Ongoing improvements to our case management system have allowed us to maintain prompt turnaround of complaints and to more accurately report on timeliness. In 2012, 75% of cases were completed within 42 calendar days (covering the period from receipt of complaint until resolution and publication of the final case report), with considerably shorter timeframes for advertisements that receive a large number of complaints or that are likely to breach the code.

Since early 2009 the Standards Board has met at least twice per month, which contributes to the timely turnaround of complaints. It is also possible to provide a 24 to 48 hour turn around for cases where it is likely that the advertisement will breach the Code or if there is immediate and significant community concern. In the latter case, however, most advertisers would remove the advertisement voluntarily – an example of this is a Target advertisement which depicted an act considered by many in the community to be dangerous. Upon receipt of Bureau notification of complaints, Target immediately withdrew the advertisement, prior to the Standards Board determination (in which the complaints were upheld). This self-regulatory action on the part of the advertiser is an example of the self-regulation system working as it should.

Neither the Standards Board nor the Bureau considers the receipt of complaints a problem. Complaints provide a good test of the self-regulatory system and of the alignment of the codes to community opinion. We do not aim for, or expect to experience a situation where the community does not complain about advertising at all. No system of regulation is failsafe and the role of the complaints process is to act as a safeguard to ensure participants continue to comply with the codes, having regard to changing community standards.

6.5 No cost to the community

The system is funded by industry – it receives no government funding. Responsible advertisers assist in maintaining the self-regulation system's viability and support its administration by agreeing to a levy being applied to their advertising spend. The levy is paid to and administered by the Australian Advertising Standards Council (AASC). The AASC holds the industry funds in an account which is drawn down to pay the costs of managing the Standards Board and the self-regulatory system. Financial management of the funds is outsourced to a chartered accounting firm and the Annual Financial Statements of the Bureau and the AASC are audited by independent auditors.

6.6 Continuous improvement

The Bureau is committed to continuous improvement, taking into account input from the public and the industry, and having regard to international best practices relating to advertising self-regulation.

Since 2005, the Bureau has undergone substantial remodeling, including a range of initiatives to improve the transparency and accountability of its complaint handling service. These initiatives include the following:

- Complaint processing
 - A new case management system was implemented in 2010 and further enhanced in 2012 resulting in improvements in the efficiency and timeliness of complaint processing.
- Public awareness
 - A major public awareness campaign was conducted in 2008 and continued in 2011.
 - Community standards research has included testing of community awareness about the Bureau and advertising self-regulation.
 - A new website was developed in 2006 and further refined in 2010, with improvements to

the presentation of information about the complaint process and role of the Bureau and determination search functionality. Ongoing improvements continue, including the introduction of a blog in 2012 to improve our community engagement.

- Community standards research
 - In 2006, the Bureau commissioned research to determine the level of unprompted awareness of the Bureau
 - World-first research commissioned by the Bureau in 2007 testing the Standards Board's decisions against the views of the community.
 - Research conducted in 2009 on community perceptions of violence in advertising (the full report is available on the Bureau website).
 - In 2009, research was also commissioned into discrimination and vilification in advertising at the request of the Standards Board, to better inform them about issues in this area (the full report is available on the Bureau website).
 - Research in 2010 on community perceptions of sex, sexuality and nudity in advertising (the full report is available on the Bureau website).
 - In 2012, research was again commissioned into community perceptions to assess current community attitudes and seek information about possible shifts in community standards and the Board's alignment with those standards (the full report is available on the Bureau website).
 - Research conducted provides the Standards Board with valuable feedback and Standards Board members have taken the results of such research into account in their consideration of complaints under the codes.
- Maintaining an independent and effective Standards Board
 - Since 2005, a number of changes have been made to the structure and procedural arrangements of the Standards Board, including expansion to a membership of 20 and appointment of new members at staggered intervals to ensure that the Standards Board has a mix of experienced and new members.
 - The frequency of meetings has increased, with the Standards Board now meeting twice a month to consider complaints and also meeting between scheduled meetings, usually by teleconference, if the Bureau considers that a case should be considered as a matter of urgency.
- Introduction of an Independent Review process
 - An Independent Review process was introduced in April 2008 as part of the Bureau's efforts to meet international best practice. The process enables original complainants and advertisers to appeal determinations made by the Standards Board.
 - There are currently two Independent Reviewers, Emeritus Professor Dennis Pearce AO and Ms Victoria Rubensohn AM, appointed in August 2011.
- Introduction of consistently dismissed category
 - A "consistently dismissed" category was introduced in 2010, responding to concerns that Bureau resources were too stretched and to ensure that resources are devoted to the work that is most likely to be upheld. This initiative has resulted in streamlining of this type of complaint.

The Bureau will continue to work with the advertising industry, associated national and international

bodies and the community to maintain a healthy system of advertising self-regulation.

6.7 Keeping up to date with international advertising standards

The Bureau is a member of the European Advertising Standards Alliance (EASA) which is the key organisation regarding advertising self-regulation issues in Europe and beyond. Bureau Chief Executive Officer, Ms Fiona Jolly, represented the Bureau at the EASA General Council Meeting in Brussels in April.

EASA promotes responsible advertising and high ethical standards in commercial communication and assists members and others via initiatives such as the EASA Advertising Self-Regulatory Charter and Best Practice recommendations. Membership of EASA allows the Bureau to measure its performance and operations against international standards and ensures that we have access to an appropriate best practice model for advertising complaint resolution.

In line with the EASA work and in our role as Deputy Chair of International Council on Advertising Self-Regulation, Bureau has worked to promote advertising self-regulation in the Asia/Pacific region. In November 2012, the Bureau played the lead role in organising and conducting a Dialogue on Advertising Standards-Principles and Practice held in Hanoi for APEC economies.

7. Upheld rates

Compared to the total number of advertisements considered by the Board in 2012, the number of advertisements found to breach the codes equated to an upheld rate of 13.7 per cent. This compares to 5 per cent in 2006. This is due to the continuous improvement initiatives referred to above, and in particular the introduction of new and more diverse Standards Board members and a greater awareness within the Standards Board of community standards, particularly around issues relating to sex, sexuality and nudity.

There is no right or wrong number for an upheld rate. There will always be circumstances in which people make valid complaints about an advertisement, but whose complaint is not in line with the broader community. There is a wide range of community views on particular issues and Bureau research shows that the Standards Board is generally in line with community views.

8. Compliance with Standards Board determinations

The Bureau has a record of nearly 100 per cent compliance by industry with decisions of the Standards Board. The Bureau's ability to achieve compliance across Federal, State and Territory jurisdictions, regardless of the size of the advertiser, is something that legislation and government administration is very unlikely to rival.

9. Enforcement of Standards Board determinations

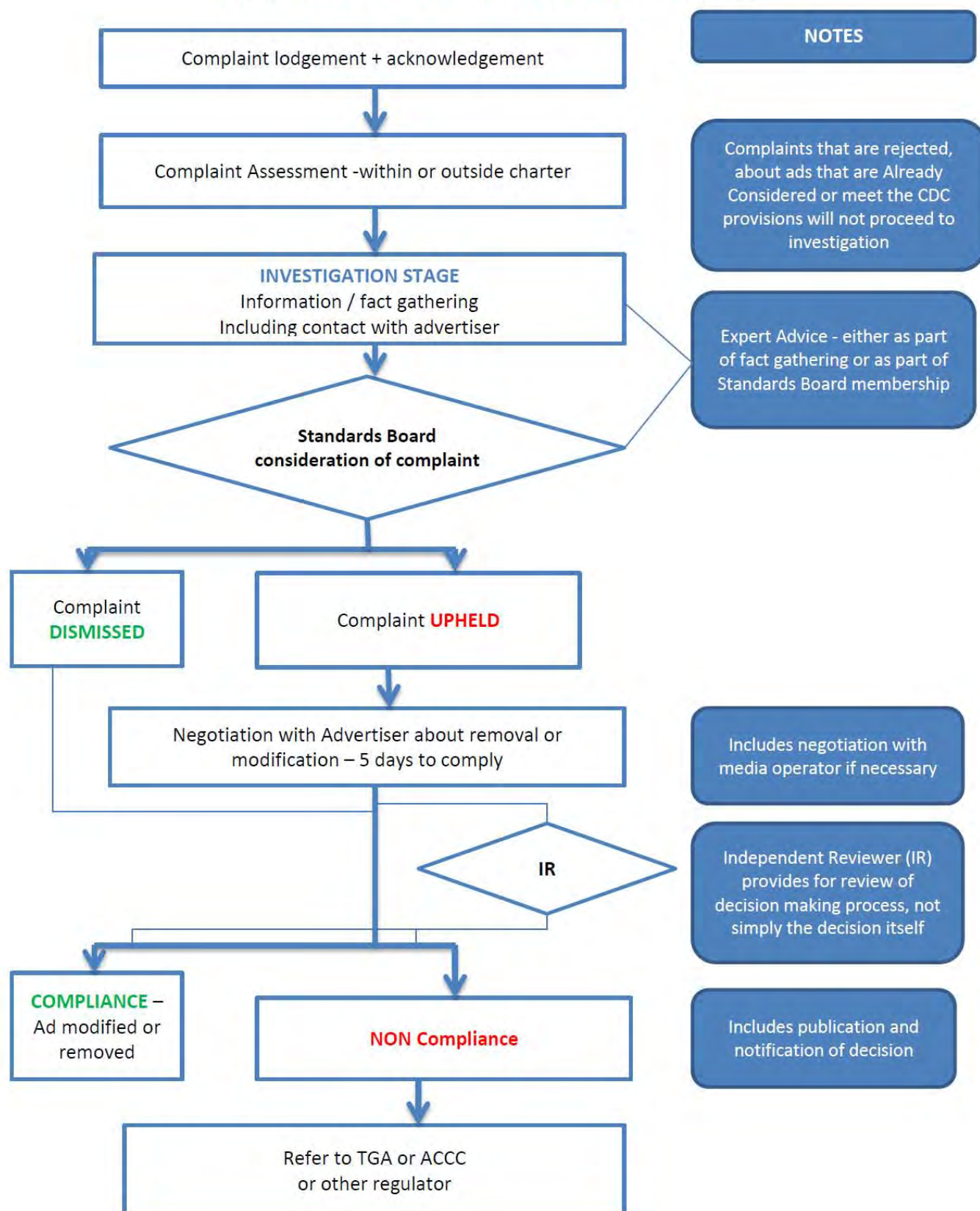
Regardless of an advertiser's reaction to a Standards Board determination, in the vast majority of cases where Code breaches are found, advertisers quickly ensure that their advertisement is removed or modified. Very few advertisers require more encouragement to comply. However, if necessary the Bureau has developed a range of enforcement actions to ensure compliance with Standards Board decisions.

Firstly, if a complaint indicates that an advertisement may breach government regulations or has broken the law, the Bureau can refer the case report to an appropriate government agency or industry body that has the authority to withdraw the advertisement. This can be done without a case going to the Standards Board for consideration.

Other actions can include:

- 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.
- Should an advertiser fail to respond to the Bureau's request to remove or modify advertising, the Bureau will liaise with industry and media bodies such as FreeTV and the Outdoor Media Association, which will either negotiate with the advertiser directly for the removal of the advertisement or in specific cases, take action to remove the advertisement.
- Under appropriate circumstances, the Bureau will refer an advertiser to a government agency such as: the Commonwealth Department of Communications, Broadband and the Digital Economy; the Australian Communications and Media Authority; the Attorney-General's Department; or to State Police Departments to request that these agencies assist in taking action against the advertiser. In some cases, local councils may also have relevant authority to assist with the removal of an advertisement, although this authority varies greatly between jurisdictions. Although Government agencies can be of assistance should the Bureau be unable to facilitate removal of an advertisement, it is apparent that they do not have relevant powers or funding to achieve enforcement outcomes or, in some cases, are unable to act quickly or on the basis of community concerns.

BUREAU COMPLAINT ADJUDICATION PROCESS



Appendix 3

ASB Timeliness Statistics

2012 Calendar Year

% of cases completed in:

