



# **REVIEW OF INDEPENDENT REVIEW PROCESS 2010**

**ADVERTISING STANDARDS BUREAU**

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March 2011

<b>CONTENTS</b>	<b>PAGE</b>
<b>Executive summary</b>	<b>2</b>
<b>Analysis of responses and recommendations for future Independent Reviewer process</b>	<b>4</b>
Question 1	5
Question 2	7
Question 3	9
Question 4	11
Question 5	13
Question 6	16
Question 7	18
Question 8	20
Question 9	22
Question 10	23
Question 11	25
<b>Attachments</b>	
A – Issues paper and survey questionnaire	27
B – Independent Reviewer fact sheet	34
C – Myths and misconceptions	36
D – Independent review process diagram	40
E – Outcomes of independent reviews	41

## Executive summary

The Advertising Standards Bureau (ASB) established the Independent Reviewer process in April 2008 to provide an opportunity for original complainants and advertisers to request a review of an Advertising Standards Board (Board) determination in prescribed circumstances.

The process was developed as a means of reviewing the way in which a Board determination had been made. It was not designed to reconsider the issues or the “merits” of a complaint.

In August 2010 the ASB considered that the process had been in operation sufficiently long to undertake an internal review. The aim was to fine tune issues about which complainants or advertisers had expressed concern or that ASB had identified as matters for exploration.

ASB invited all individuals and organisations that requested an independent review of a Board determination or who had contacted ASB regarding the process to be part of the review. A range of other people and organisations that had specifically expressed interest in the Independent Reviewer process were also invited to participate. In addition, we encouraged wide participation via ASB media release, newsletter and bulletins and on the ASB website.

The review asked 11 questions of respondents. Ten questions were capable of providing both quantitative and qualitative responses, both of which are presented in the following report. All respondents provided qualitative comment. The last question requested comment only.

The report is based on each question asked of respondents. Qualitative and quantitative responses and ASB discussion and analysis of responses follow each question. Where appropriate, ASB recommendations appear against relevant questions. Some recommendations appear more than once since they are appropriate for more than one question.

ASB accepted the following recommendations for action and implementation:

1. ASB should review website material and correspondence to ensure maximum clarity about the entire complaints process, including the Independent Reviewer process.
2. ASB should more frequently draw public and advertiser attention to the Independent Reviewer process.
3. ASB should monitor and make publicly available information about timeliness of Independent Reviewer reviews to ensure that the process is as expeditious as possible.
4. ASB should ensure that parties to a case can appear before the Independent Reviewer if the Independent Reviewer considers this necessary.
5. ASB should amend case reports so that they indicate the existence of a request for review once such a request is accepted by the Independent Reviewer.
6. ASB should investigate strategies for recruiting younger people to the Board.
7. The fee structure should be changed as follows to reflect the concerns expressed by respondents and others:
  - Individuals pay \$100
  - Not for profit organisations pay \$500
  - Advertisers who pay the advertising levy pay \$1000
  - Advertisers who do not pay the advertising levy \$2000
  - All fees are inclusive of GST and will be reviewed in two years
  - The fee should be refunded if **the Board** changes its original determination.

Issues relating to cost and case reports will be implemented immediately while other matters requiring greater time and staff resource will be dealt with over the course of 2011.

Seventy per cent of responses came from those whom we directly invited to participate and thirty per cent via the ASB website or word of mouth.

The Survey Questionnaire is at Attachment A

The *Independent Reviewer Fact Sheet* (as revised) outlines the review process in operation since 2008 and is at Attachment B.

A variety of misconceptions and inaccuracies about the Independent Reviewer process and the general advertising self-regulation system appeared in some responses. These are addressed in Attachment C – Myths and Misconceptions.

A diagram incorporating a timeframe of the Independent Review process is at Attachment D.

A table showing outcomes of reviews and the time taken by the Independent Reviewers to provide a recommendation is at Attachment E.

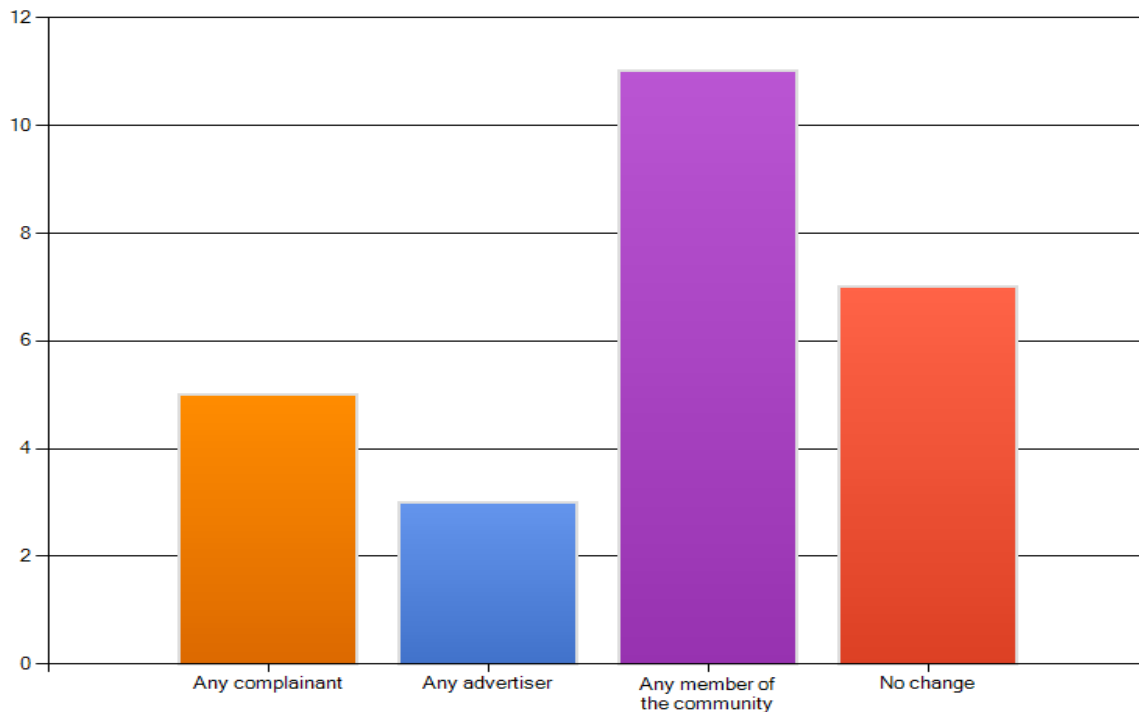
A number of responses contained comment about issues that are not within the scope of this review (eg - adequacy of codes, whether the Board can adequately reflect prevailing community standards, number and frequency of Board meetings, timeliness of publication of determinations, fines for advertisements in breach of codes, procedural matters relating to original determinations by the Board, discussion of specifically ABAC-related matters).



## **ANALYSIS OF RESPONSES AND RECOMMENDATIONS FOR FUTURE INDEPENDENT REVIEWER PROCESS**

NOTE: Questions 1, 6 and 10 allowed multiple responses, so percentages are not shown in those graphs.

**Question 1: Are there parties other than the original complainant or the advertiser who should be entitled to request a review?**



While 27 per cent of respondents consider there should be no change to the category of people who should be entitled to request a review, the majority of those who responded (61 per cent) consider that any member of the community or any complainant should be entitled to request a review. A much smaller percentage (12 per cent) felt that any advertiser should have this entitlement.

Respondents recorded a variety of reasons for requiring change:

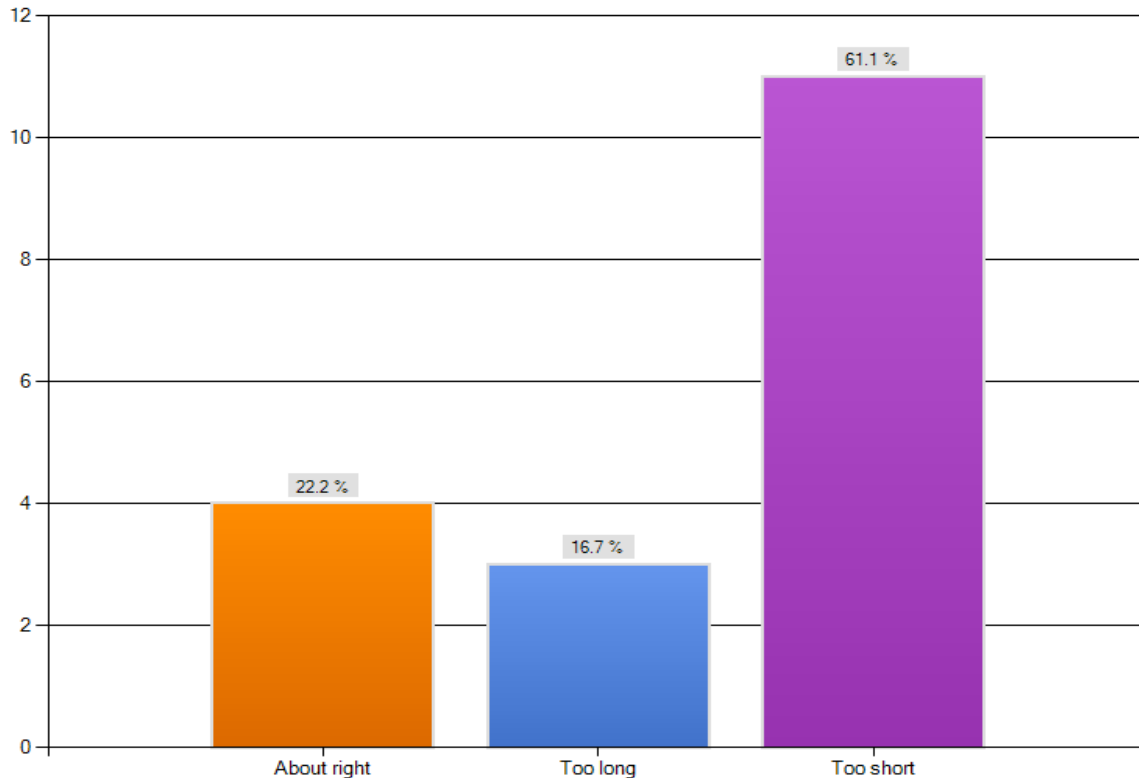
- a) So that the entire community can participate in ASB processes.
- b) To ensure that a member of an organisation that complained may respond if the original complainant (i.e. a person whose complaint is received in time for deliberation by the Board and whose complaint is sent to the Board) is unavailable.
- c) A third party who did not originally complain may wish to comment on a Board determination (which may include disputable facts or decisions).
- d) An original complainant may feel intimidated by the process.
- e) The original complainant may not have the technical knowledge required to provide the weight of evidence needed to secure a decision to uphold a complaint. Our organisation undertakes extensive internal consultation prior to lodging a complaint, so the letter arrives later than some others. The first letter of complaint is read and dismissed before our well researched letter is received. Our organisation recommends that if a second complaint is received, containing new or additional evidence which could have a significant bearing on the determination, then it should be considered.

ASB discussion/analysis

- a) The IR process was designed to provide an appeal process that is as independent, transparent and rapid as possible. ASB followed international precedent when designing the scheme, and we believe that the community requires a very quick turnaround on requests for review. If we opened the IR process to the entire community, rather than only original complainants, it would be very costly for ASB and take much longer to bring to a conclusion.
- b) ASB considers that an organisation has requested a review, not the individual actually signing the request on behalf of the organisation. ASB will discuss the request with any organisational member who has a right to bind the organisation (and we have done so already on at least two occasions).
- c) ASB maintains the view that only original complainants or the advertiser should be entitled to request a review. A broader entitlement would have an impact on ASB's ability to manage the process in terms of timeliness and staff resource.
- d) ASB does not believe that our processes are intimidating or difficult for consumers to follow. We readily provide all parties with appropriate assistance and advice if this is requested, and have comprehensive information available on our website to ensure that our information is clear and accessible to all.
- e) This is outside the scope of the Review. All parties have an interest in a fast resolution of complaints and it is the responsibility of parties to lodge complaints within the required time for presentation to the Board for consideration.

**ASB recommendation:**

**ASB should review website material and correspondence to ensure maximum clarity and more frequently draw public and advertiser attention to the Independent Reviewer process.**

**Question 2: Is the timeframe for requesting a review...**

A majority of those who responded (61 per cent) believe that the timeframe for requesting a review is too short while 22 per cent think the timeframe is about right and 17 per cent believe it is too long.

Respondents recorded the following reasons for concern:

- a) Ten days is too short – consultation is necessary in incorporated bodies and people may be on leave. The high cost of a review and considerable investment of resources means detailed consideration is required. At least one month should be provided.
- b) The time frame is too long, especially for short-cycle tactical campaigns. Lengthy delays can be costly and unreasonable..
- c) Other respondents suggest: fifteen business days would be more reasonable if issues are complex; timeframe should be 28 days at a minimum as this is the standard time period for reviews of decisions by most government departments and other agencies; since there is no set time for a Board decision to be published, it is unfair to place a strict timeline on requests for review.
- d) Possibility of an extension of time should be available since some complainants may: not be aware of their review rights; have difficulty in formulating a request for review or not enough time to do so; be temporarily absent from their address; suffer delays in mail delivery.
- e) Requests for review should not be limited to those determinations made by the Board in the previous month.
- f) The ten day time frame should commence from the time a determination is posted on the ASB website, not from the date of the final notification.

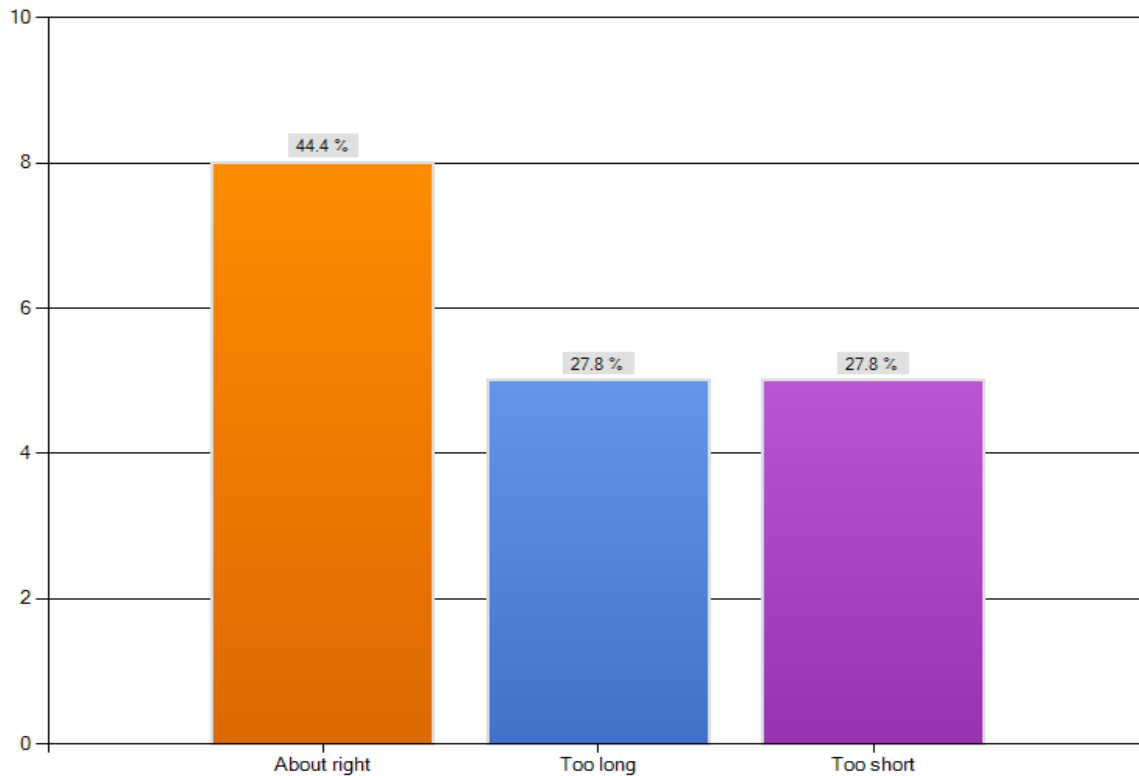


## ASB discussion/analysis

- a) ASB needs to balance the needs of individuals and organisations for more time, with the wider requirement that a determination about an advertisement is made quickly so that advertisers are not disadvantaged by having their advertisement improperly discontinued and the community is not disadvantaged if it turns out that an advertisement should have been banned. On balance, we think that rapid resolution of a request for review is of greater importance to most parties and that we cannot hold up the process on the basis of an organisation's internal processes.
- b) It would be difficult to reduce the time for requesting a review, especially given some strongly held views that the current ten day timeframe is already too short.
- c) The majority of respondents agree that it is imperative that the Independent Review process be concluded as quickly as possible. Any extension of the time to the Independent Review process would significantly increase the final determination time and would be unacceptable to complainants, advertisers and ASB.
- d) **Every** letter to complainants following a Board determination, whether the complaint has been dismissed or upheld, includes reference to the Independent Reviewer **and** an inclusion or link to information about the Independent Reviewer process. ASB believes that all complainants are more than adequately advised of their right to request a review; and that ten days should be adequate time to do so. ASB has in the past granted extensions for submission of requests for review under exceptional circumstances, but never for more than a couple of days. The vast majority (89 per cent) of complaints are received and responded to electronically, with no possibility of delay – it would be unreasonable to hold up the review process for the small percentage of mail that we receive through the post or for people who are temporarily absent from their address. However, we can consider a request for extension of time and consider the particular circumstances of the appellant.
- e) Requests for review are limited to recent Board determinations for sound organisational and administrative reasons – broadening the entitlement would impose unreasonable levels of uncertainty on advertisers and extend the resolution of cases.
- f) Final notification letters and posting of case reports on the web are contemporaneous.

**ASB recommendation:**

**ASB should clarify and improve information about the Independent Reviewer process on its website particularly regarding review rights and the process for making a request for review.**

**Question 3: Do you consider the time taken for the IR to complete the review...**

44 per cent of respondents believe that the time in which the Independent Reviewer completes the review is about right while 28 percent think the time taken is too short and the same number believe the time taken is too long.

Respondents record the following reasons for concern:

- a) Too short for complex cases; provides little time for a well considered decision.
- b) Ten days is excessive for a professional.
- c) Too long – TV advertisers have almost finished their campaign by the time the review is completed – advertisements should be taken off air until reviewed if there is sufficient cause.
- d) Far too long, especially for short-cycle tactical campaigns – advertiser suffers financially and in terms of staff resource if the advertisement is taken off air pending review.

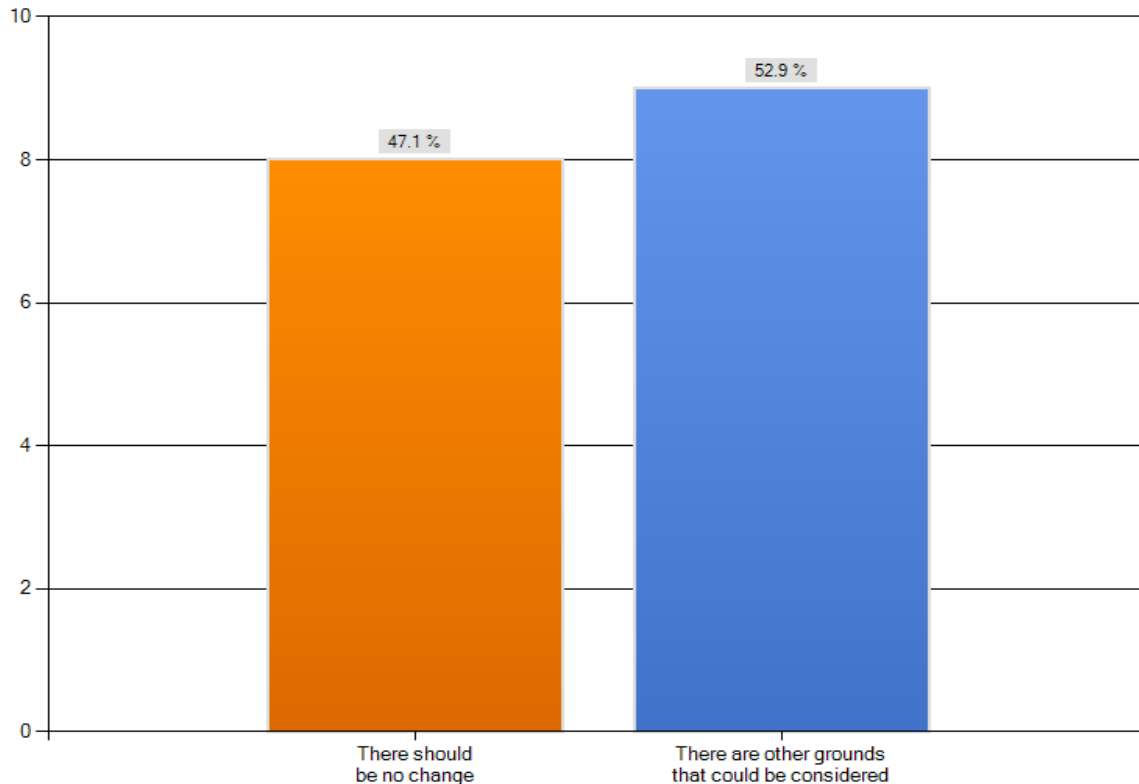
ASB discussion/analysis

- a) Independent Reviewers have not expressed any concerns to date (following eleven reviews) that the time allocated to them is too short to produce a considered recommendation. Flexibility exists for extension of time for particularly complex cases.
- b) ASB believes that it is reasonable to provide the Independent Reviewer with ten days to: view the advertisement; read all the paperwork from advertiser, person requesting review and supporting comment from other original complainants; conduct any further investigation; and then consider the case and make a recommendation.

- c) Some advertising campaigns do finish by the time the review is completed, although campaigns are often used in the future. Taking advertisements off air on the basis of a request for review which has not yet been adjudicated would be contrary to natural justice.
- d) Both ASB and the Independent Reviewers are very conscious of the interest that all parties have in concluding reviews as rapidly as possible and make every effort to expedite the process. The ten days includes three days that the advertiser/original complainants have to provide a response to the request. ASB does not believe that it would be reasonable to expect the Independent Reviewer to complete a review in less than ten days, although on occasions they have completed a review in less time.

**ASB recommendation:**

**ASB should monitor and make publicly available timeliness of Independent Reviewer reviews to ensure that the process is as expeditious as possible.**

**Question 4: Re the grounds for review...**

47 percent of respondents feel there should be no change to the grounds for review while 53 per cent believe that there are other grounds that could be considered.

Other grounds suggested by respondents:

- a) Clear guidance on minimum standards of evidence that will trigger a review should be provided, including what constitutes “substantial” or “procedural” flaws in the Board’s decisions. For groups that are unable to access professional and/or legal advice, the capacity to present evidence that satisfies the grounds for review will be low, notwithstanding that their concerns may be highly valid.
- b) Complainants (and others) should be able to request a review when they feel that the Board’s decision (and/or its application of the Code) did not address the concerns raised in complaints.
- c) Where the ASB has demonstrated that it has not properly discharged its obligation to conduct “research” into “prevailing community standards” as required by the Code, consideration should be given as to whether this should constitute a ground for review. The Board should be required to prove its case against an advertiser for an alleged breach of the Code – if the Board fails to do this, consideration should be given as to whether this constitutes a ground for review. If the complaints process outlined on the ASB website is unclear, the Independent Reviewer could be granted discretion to accept an advertiser’s request to reconsider the Board’s determination.
- d) Additional grounds could include: (i) an incorrect application of the advertising codes; (ii) a clear conflict of interest of the Board (in a general sense as a body of advertising representatives) or (iii) a misreading of the community interest.

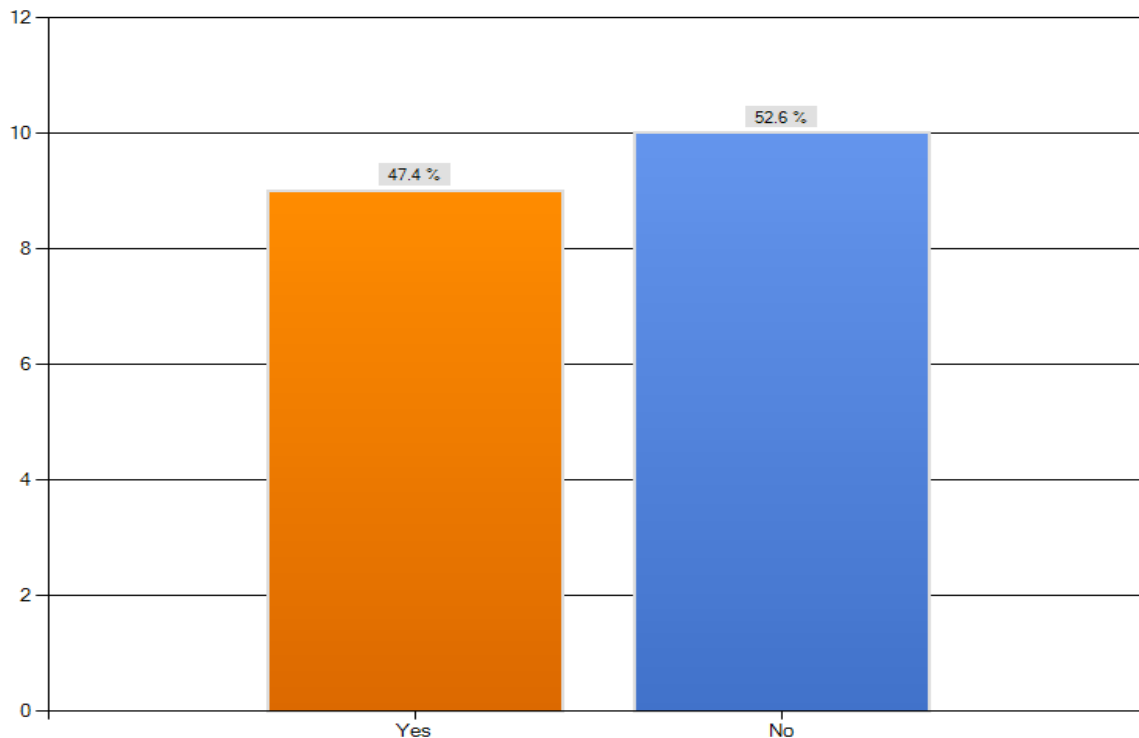
## ASB discussion/analysis

- a) ASB will certainly consider providing further information regarding the grounds for review to clarify some of these issues. The Independent Reviewer is generally prepared to accept a request if the complainant clearly articulates good reason for believing that the grounds are met. However, this concern appears to see an unnecessarily complex and legalistic approach to a process that we expect to be simple and easy to use. That is, ASB expects that a request would be made following receipt of a Board determination and according to the simple information provided in the Independent Reviewer information sheet. Swathes of supporting material should not be necessary except in exceptional circumstances, perhaps in relation to a case involving highly technical information.
- b) This is not within the scope of the Review – it is more an issue regarding the manner in which determinations are written. The Independent Reviewer will not accept requests about the merit of a Board determination, and like the Board, cannot consider issues that fall outside matters covered by the codes. All complaints that are received in time for deliberation by the Board are considered in Board meetings. A summary only of the final determination is published, not the entire discussion which led to the determination.
- c) ASB research projects are conducted according to the research program approved each year by the ASB Governance Board – it would be inappropriate for this to be dictated by an external body. ASB has undertaken community standards research since 2007. The Board is a community based entity which makes its determinations on the basis of what it identifies as community standards in the light of its own experiences as well as the research undertaken by the Bureau. The Board is not a legal body. ASB has very recently upgraded and improved its website, in particular relating to clear and comprehensive information required from advertisers.
- d) (i) is clearly covered by the second ground for review, so can be considered by the Independent Reviewer; (ii) there is no advertising representative on the Board and therefore no possibility of conflict of interest on this basis – if there is any possibility that a member of the Board could have a conflict of interest, no matter how peripheral, that member absents themselves for that complaint; (iii) the issue of “community standards” or “community interest” will always be subjective and cannot be part of the Independent Reviewer’s role which is designed to ensure oversight of the process followed by the Board.

**ASB recommendation:**

**ASB should clarify and improve information about the general complaints process and Independent Reviewer process on its website particularly regarding review rights and the process for making a request for review**

**Question 5: Do you support continuation of the current process?  
(IR makes recommendation to Board on the basis of the process followed by Board, does not conduct further “merit” review of the case)**



47 per cent of respondents support the continuation of the current process and 53 per cent do not.

Reasons why respondents do not support continuation of the current process:

- a) Independent Reviewer should provide a further “merit” review of a case.
- b) If the Independent Reviewer does not undertake a merit based review of additional material, the Board (which makes determinations on the merits of a complaint) should automatically consider a request for review where the request is accompanied by new or additional material.
- c) The Independent Reviewer cannot compel the Board to confirm or review the primary decision; a recommendation from the Independent Reviewer should be binding on the Board.
- d) Complaints process should be amended to provide that the recommendation of the Independent Reviewer must be taken (and be seen to be taken) into consideration; decisions made by the Independent Reviewer should be done in an open, transparent and clear manner – all decision makers must give reasons and rationale for their decisions.
- e) There is a perception that the Board lacks objectivity in reconsidering a case following Independent Reviewer recommendation, given that they made the original decision; the Board reconsidering the original decision should only include those who did not participate in the original decision; the Independent Reviewer should be organisationally distinct from the primary decision makers; in a self regulatory scheme it is impossible for the reviewer to be distinct from the primary decision maker which creates a community perception of lack of independence.
- f) Parties should have the right to appear and provide additional material before an Appeal Panel (whether this is of Board members or externally constituted).

- g) The review process is captured by the industry and will result in few variations of primary decisions. Since the Board consists largely of advertisers or industry representatives, there is no properly independent review of a decision. How can the Board consider properly “community expectations”?
- h) Independent Reviewer should regularly audit the decisions of the Board – review process should not rely solely on requests for review.
- i) An advertising complaints appeals body (community/stakeholder group) should be established to be independent of the ASB both organisationally and in terms of membership.

ASB discussion/analysis

- a) The Independent Reviewer was originally established, following discussions with comparable international organisations, to provide a recommendation to the Board after assessing the process followed by the Board and/or any new material provided by the parties to the case. The ASB Independent Reviewer system was not designed to provide a further “merit” review. ASB considers that 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.
- b) The Independent Reviewer provides an initial independent and objective consideration of new material as well as undertaking a consideration of the appropriateness of the process undertaken by the Board. This extra layer of consideration of new material provides the appellant with greater access to natural justice than was the case prior to the establishment of the Independent Reviewer.
- c) The current system of review requires that the Independent Reviewer provide a recommendation only to the Board. If a request meets the grounds for review, the Independent Reviewer considers all aspects of the case and makes a recommendation to (a) confirm the Board’s original determination in which case there is no further investigation, or (b) review its determination. In the case of (b) the Board MUST review (can either uphold or dismiss the original complaint/s which could mean that the original determination is overturned). The fact that the recommendation must be reconsidered is binding on the Board.
- d) The Board must reconsider its original decision if the Independent Reviewer’s recommendation is to do so. This process is fully documented (Independent Reviewer’s reasons and reasoning) in the updated case report that follows the Board meeting at which the IR recommendation is discussed. The updated case report is sent to all who participated in the review and is posted on the ASB website.
- e) The Independent Reviewers and Board members are entirely separate entities – they do not interact in any way and are completely independent of each other. ASB will clarify information material to emphasise the separate roles and separation of the two bodies.
- f) Independent Reviewers, who are highly qualified legal and administrative professionals, have the right to seek clarification of any matter that is presented to them if they feel this is necessary to ensure a reasoned recommendation. This will include the opportunity for a complainant or advertiser to appear personally if the Independent Reviewer considers it necessary.
- g) Independent Reviewers are independent not only of the Board members, but also of the advertising industry. Neither Independent Reviewer has any involvement at all with the industry. While this point is outside the scope of the review, it is important to note that, while all members of the Board have an interest in advertising, none has any ongoing specific involvement in the advertising industry, and none is an advertiser or industry representative. An examination of the Board members on the ASB website clearly shows that the Board comprises community members, and thus is able to reflect (as much as is possible) community standards.

- h) Independent Reviewers are engaged specifically to consider requests for review of Board decisions. It is not the role of the Independent Reviewer to audit Board decisions and such a role would place considerable financial strain on ASB resources.
- i) Independent Reviewers are recruited for their impartiality and lack of bias. They focus on the process by which Board determinations are made, not the merits of a case.

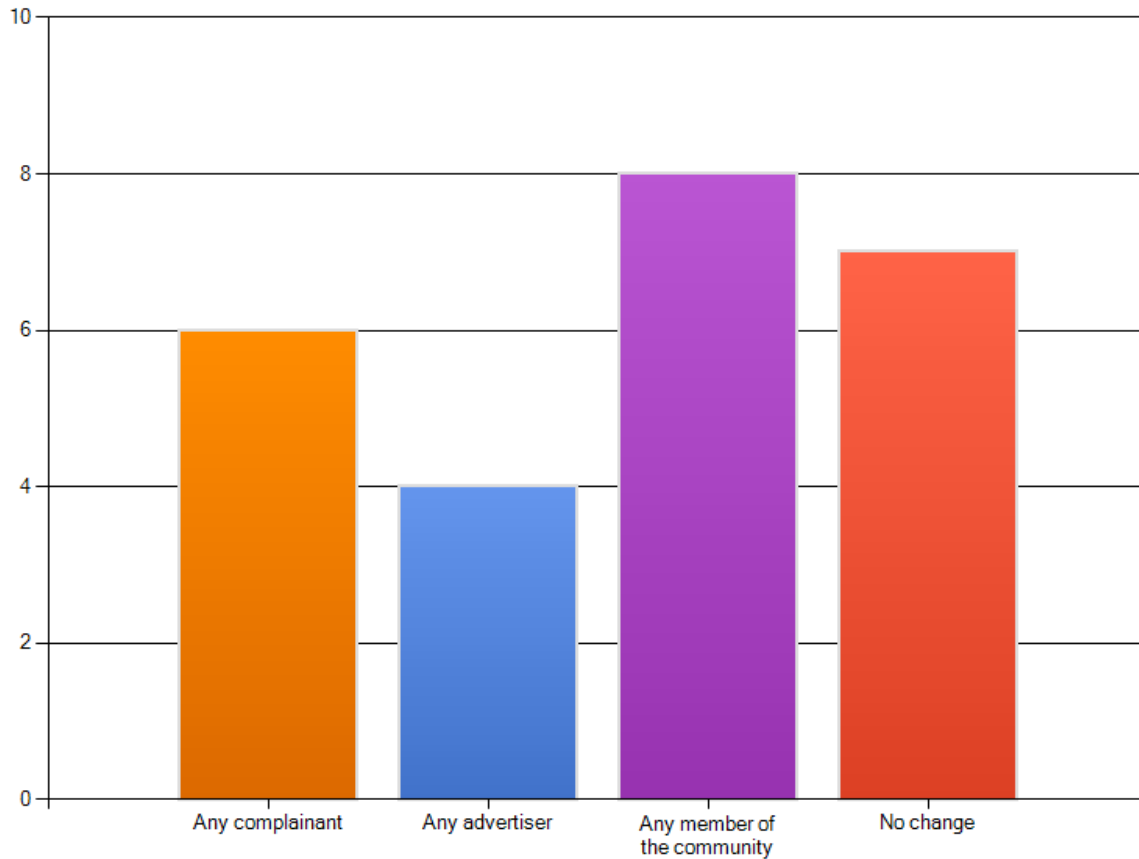
**ASB recommendation:**

**ASB should clarify and improve information about the Independent Reviewer process on its website particularly regarding the separate roles of the Board and the Independent Reviewer.**

**ASB should ensure that parties to a case can appear before the Independent Reviewer if the Independent Reviewer considers this necessary.**



**Question 6: Should parties other than those specifically associated with the case be entitled to comment on a request for review?**



28 per cent of respondents believe that only those parties specifically associated with a case should be entitled to comment on a request for review. However, 32 per cent believe that any member of the community should be entitled to do so, while 24 per cent believe this should be the prerogative of any complainant and 16 per cent believe any advertiser should be entitled to comment.

Respondents record the following reasons for concerns:

- a) Wider consultation would extend an already lengthy process.
- b) A Board determination may include facts or a decision that a third party may wish to comment on; wider consultation would contribute to a fairer, more transparent and more just outcome reflecting the needs and views of all parties.
- c) Wider consultation is necessary as the process is already heavily in favour of the advertiser.
- d) Currently a determination is based on the first complaint received and not influenced by the number of complaints or the range of issues raised by different complainants. Wider consultation would ameliorate this flaw.

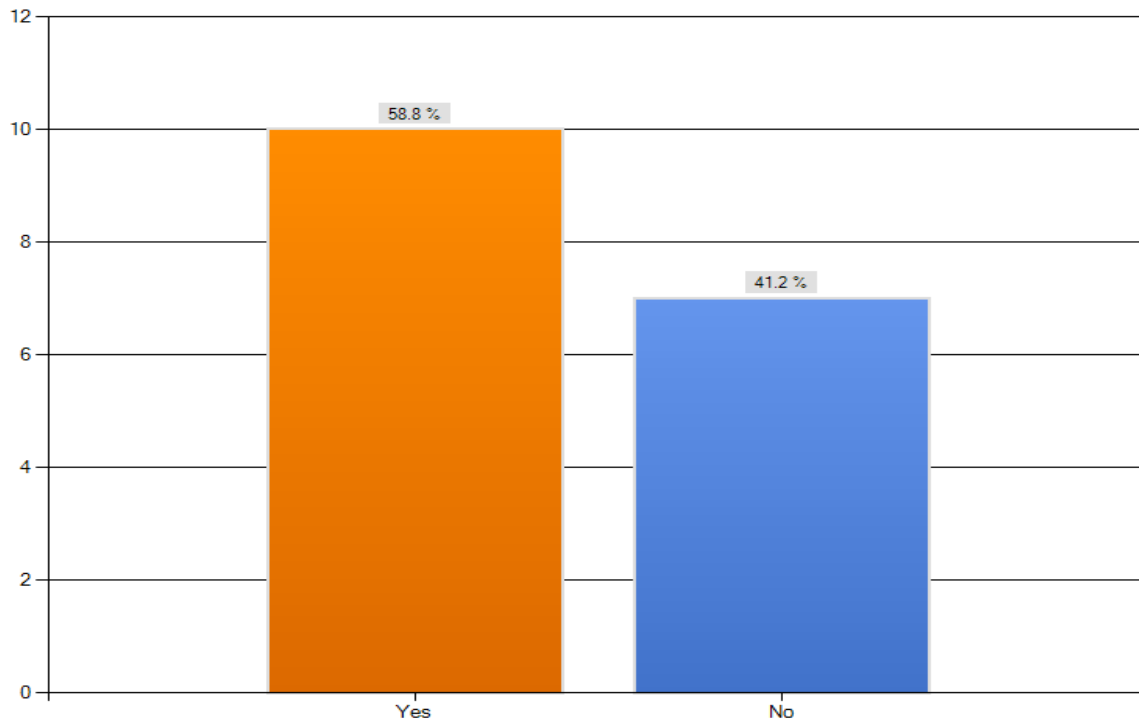
ASB discussion/analysis

- a) ASB attempts to provide this Independent Reviewer service as rapidly as possible while ensuring a transparent and fair review process – broadening the category of people entitled to comment would definitely lengthen the process.
- b) Original complainants have the opportunity to obtain information from experts to support their request for review. As a small organisation with requirement to expedite cases, it is necessary for ASB to balance extremely broad consultation with the need to finalise cases as rapidly as possible (which is in the interests of all parties). We believe that consumers who have concerns about advertising have a robust but simple and accessible process that they can follow to address their concerns.
- c) The Independent Reviewer process has no bias in favour of advertisers. Information about Board members and Independent Reviewers is available on the ASB website.
- d) A Board determination is based on ALL complaints that are received in time for deliberation by the Board at its meetings held twice each month (this can be as few as one or as many as two hundred complaints). The Board receives copies of all complaints received, and makes its determination having read all the documentation provided from both complainants and advertisers.

**ASB recommendation:**

**ASB should clarify and improve information on its website – particularly regarding the complaints adjudication process and the independence of the Board.**

**Question 7: Is the current review process appropriate?  
(Original determination is published and determination stands pending IR recommendation and subsequent Board determination if appropriate)**



59 per cent of respondents believe that it is appropriate to publish a case report before the outcome of a review and 41 per cent do not.

Reasons for respondents holding these views:

- a) Allowing (dismissed) advertisements to run pending outcome of a review is unfairly advantageous to advertisers. The entire complaints process has little or no deterrent effect because the advertisement has generally run its cycle by the time a determination is finalised. If the ASB recognises sufficient grounds for a review of the original determination, this should be sufficient to warrant suspension of the advertisement pending conclusion of the review process. Otherwise, potentially substantial harm could be caused.
- b) Once an advertiser notifies ASB that it intends seeking a review of the determination, the original determination should not be published and the advertisement should not be discontinued or modified until the final determination – otherwise substantial prejudice/cost is incurred by the advertiser and there is no demonstrable benefit to the industry. Only final determinations should be published and advertisers should be obliged to discontinue or modify their advertisements only on the basis of final determinations.
- c) Original determination should stand while review is underway – documentation regarding the decision should clearly note that it is pending the outcome of a review.
- d) Discontinuing or modifying an advertisement following Independent Review process has long since lost any punitive effect – the need for effective penalties and prompt regulatory intervention is essential. The prolonged nature of the review process provides a loophole for advertisers who know that their advertisement will in all likelihood run its course before a final determination is made.
- e) ASB has no legislative power to enforce determinations – it should note this fact in documentation regarding upheld complaints.

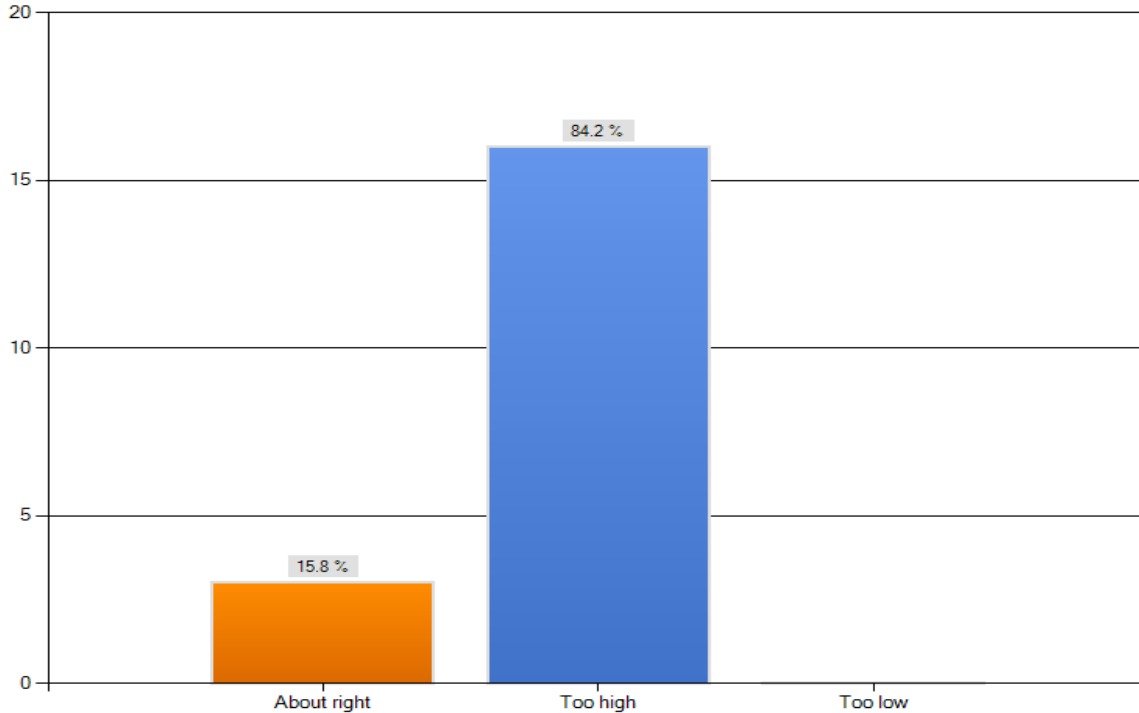
## ASB discussion/analysis

- a) Natural justice dictates that the original determination should stand until a contrary determination is made. It is true that some, but by no means all advertising campaigns have run their course by the time a final determination is made. Any determination affects the advertiser's ability to use the advertisement in the future. While this is not within the scope of this review, it is useful to note that adverse determinations are a significant deterrent for advertisers. This is shown by the fact that the ASB has virtually 100% compliance with its determinations. In addition, the generally damaging "naming and shaming" of advertisers against whose advertisements complaints have been upheld, is a valuable deterrent to inappropriate advertising. One of the aims of the ASB is to educate and encourage advertisers to develop advertising campaigns that are more sensitive to the views of the community.
- b) If a request for review is accepted and the Independent Reviewer recommends that the matter should go back to the Board for review, it would be unreasonable to expect the community and the industry to wait until the expiry of this process before a final case report became available.
- c) Case reports are published once an original determination has been finalised. At that stage it is impossible for ASB to know whether a review will be requested. ASB will amend case reports to note the existence of a request for review once such request has been received.
- d) While enforcement and regulatory issues are outside the scope of this review, it is useful to note that many advertising campaigns (especially those produced by large advertisers for products such as alcohol, cars or food), have very lengthy runs (sometimes years). The prospect of an expensive advertisement being withdrawn from circulation is a significant impost on advertisers.
- e) It is true that ASB has no legislative power to enforce determinations. However, there is little point in making the type of note suggested, given that virtually 100% of advertisers comply with Board determinations.

**ASB recommendation:**

**ASB should clarify and improve information on its website particularly regarding the Independent Reviewer process and the general complaint process and enforcement issues.**

**ASB should amend case reports so that they indicate the existence of a request for review once such a request is accepted by the Independent Reviewer.**

**Question 8: Is the level of fee currently charged for the IR service appropriate?**

84 per cent of respondents consider the level of fees charged for the Independent Reviewer to be too high while 16 per cent consider the fees to be about right.

Respondents record the following reasons for these views:

- The charge should be calculated as a fixed amount (same for all applicants) to cover the costs of the Independent Reviewer only.
- There should be no cost for complainants, community groups and not for profit organisations seeking a review. The current cost is prohibitive and represents a deterrent to most people or organisations. \$20 or \$30 would be fairer.
- There is lack of clarity regarding the meaning of the fee categories

#### ASB discussion/ analysis

- ASB recognises the need to reconsider the issue of charging for this service, but it is unlikely that the charge would be at a fixed rate for all levels of applicant - it would be unreasonable to expect an individual to pay the same as an advertiser. The current fee does not contribute significantly to the cost of the Independent Reviewer process. ASB subsidises the greater part of the cost of the Independent Reviewer system for all applicants.
- ASB must apply a charge to this service for two major reasons. While we recognise that the current fee makes requesting a review difficult for some people and organisations, we are not in a financial position to fund this additional service to the complaints process completely – we must recoup at least some of the cost of the service. Secondly, our personnel resource will not allow the receipt of vast numbers of requests which could be the inevitable result of scrapping the fee completely. There must be some level of fee to deter vexatious or frivolous requests for review, or requests from those for whom the grounds for review are not applicable.

- c) As part of this review, ASB will address the issue of fee categories.
- Rationale:
    - ASB and the advertising industry significantly subsidises costs of the Independent Reviewer (on average between \$3000 - \$4000 for each review taking into account the fee to Independent Reviewer and ASB costs).
    - Fees must be charged to cover some of the costs of the service.
    - Fees must be charged to deter frivolous or vexatious requests.
  - Costs of the Independent Reviewer system
    - Both Independent Reviewers are paid a yearly retainer and an amount for each review they undertake.
    - These costs are significantly greater than the amount obtained by ASB in fees for the service and the disparity will be much greater if the fees are reduced as suggested above – any significant reduction in fees may require the ASB to reconsider its priorities.
  - It would be unfair to expect all those who request a review to pay the same fee, so the following categories will apply.
    - Individuals (ie - all individual consumers who do not represent or are not a part of an organisation).
    - Not for profit organisations.
    - Advertisers who pay levy.
    - Advertisers who do not pay levy.
    - (Government departments and agencies that place advertisements are considered to be advertisers; Government departments and agencies that lodge requests for review as a complainant are considered not for profit organisations).

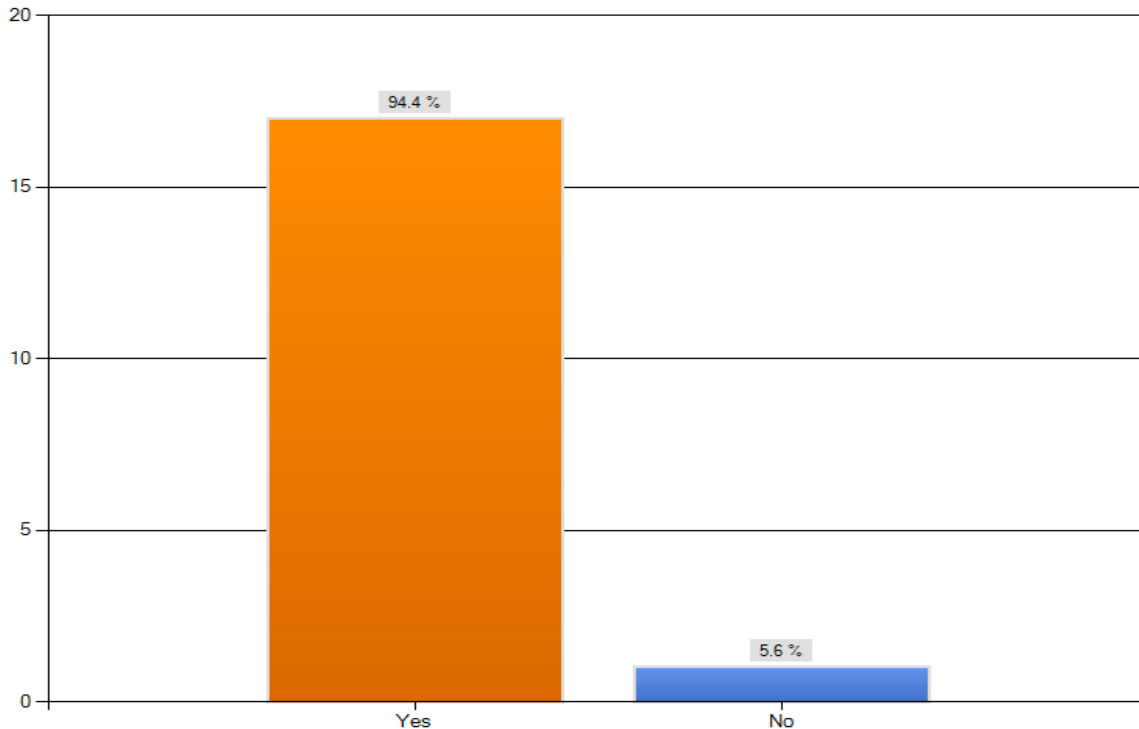
**ASB recommendation:**

**The fee structure should be changed to reflect the concerns expressed by respondents and others.**

**The fee structure should be clarified as follows:**

- Individuals pay \$100.
- Not for profit organisations pay \$500.
- Advertisers who pay the advertising levy pay \$1000.
- Advertisers who do not pay the advertising levy pay \$2000.
- All fees are inclusive of GST and will be reviewed in two years.

**Question 9: Should the fee associated with a request for review be reimbursed if the Board agrees with the IR recommendation and the original determination is changed?**



94 per cent of respondents believe that it is simply common sense that the fee associated with a request for review should be refunded if the Board, following an Independent Reviewer recommendation, changes the original determination. It would make the process more credible and would provide a tangible recognition of a successful appeal.

**ASB discussion/analysis**

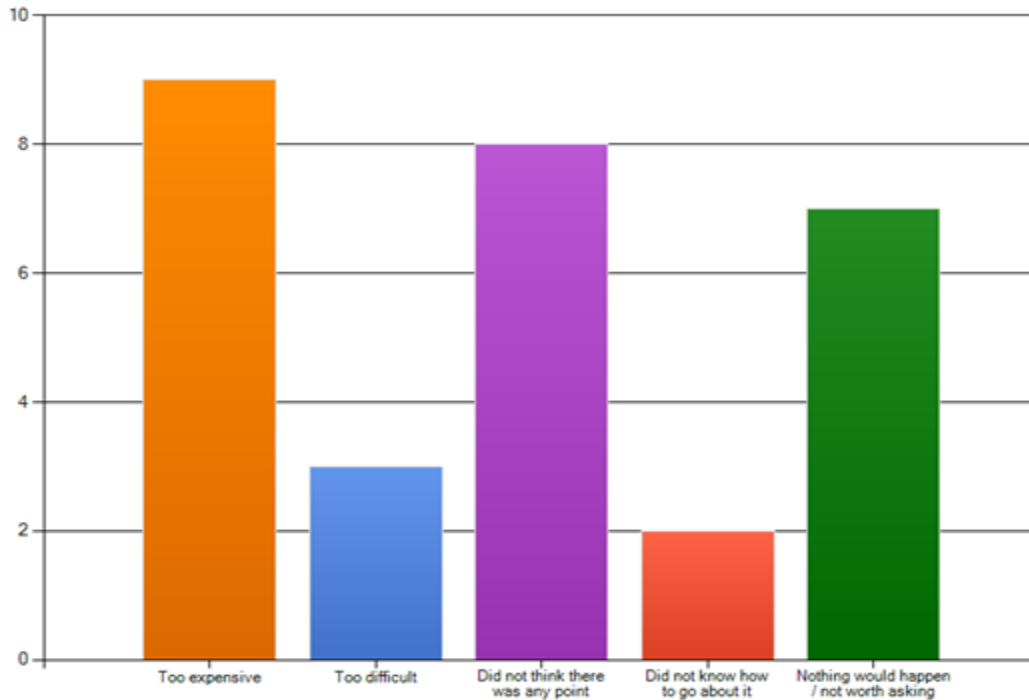
ASB initiated this question, having decided that this could be an appropriate course to take subject to the outcome of the review.

**ASB recommendation:**

**The fee structure should be changed to reflect the concerns expressed by respondents and others.**

Suggested change:

- The fee should be refunded if **the Board** changes its original determination

**Question 10: If you wanted to request a review but did not, why did you not make the request?**

A little more than half of respondents answered this question. Of these, 83 per cent record that they did not make a request because it was too expensive or they did not think there was any point or they thought it not worth asking. 10 per cent thought it too difficult to make a request and 7 per cent recorded that they did not know how to go about it. A number of respondents to this question would not have been entitled to request a review because they have never made a complaint, but their comment was accepted and recorded.

Comments made by respondents:

- a) The ASB should provide more detailed and more accessible information in relation to the Independent Reviewer process. The need to do this is highlighted by the small number of requests for review since the inception of the service. Steps should be taken to ensure that the public is aware of their right to request a review by the Independent Reviewer. There is no mention of the Independent Reviewer process in the case report regarding dismissed complaints. It might appear the ASB has made a conscious effort to maintain low awareness of the Independent Reviewer system among complainants.
- b) I have lost faith in the effectiveness of the self-regulatory system and the capacity of the Board to reflect community standards. For this reason I have not felt willing to pay the excessive fee required to request a review.
- c) I know there's no point because the Board does not include a member of my age or younger (Uni student)



## ASB discussion/analysis

- a) Since inception of the Independent Reviewer in 2008, ASB has received 14 requests for review. 11 of these were within time and met the grounds for review so went to the Independent Reviewer for consideration. The relatively small number of requests received is one of the reasons why we have undertaken this review. Information about the Independent Reviewer was widely disseminated at the time of inception via the ASB website, media release, ASB newsletter and bulletins. More importantly, EVERY letter to complainants or advertisers following a Board determination, whether the complaint has been dismissed or upheld, includes reference to the Independent Reviewer **and** an inclusion or link to information about the Independent Reviewer process. ASB believes that all entitled parties are more than adequately advised of their right to request a review. However, we will explore more comprehensive means of ensuring that people generally are aware of the process since it is clear that there is some confusion and misconception of how it operates. Our new website includes a more user friendly electronic process for making a request than was earlier available
- b) The effectiveness of the self-regulatory system and capacity for the Board to reflect community standards is not within the scope of this review, but we believe both are well covered.
- c) ASB has found it difficult to attract younger people to the Board. Currently, the Board includes a wide range of ages, background and experience – brief biographies of members may be found on the ASB website. A recruitment exercise is scheduled for 2011 and particular attention will be paid to attracting young people.

**ASB recommendation:**

**ASB should clarify and improve information about the Independent Reviewer process on its website particularly regarding the rights of complainants to request a review.**

**ASB should investigate strategies for recruiting younger people to the Board.**

**Question 11**

In response to the last question (providing the opportunity to make any other relevant comment) the following responses were received:

- a) The advertiser should have the right to apply directly to the Independent Reviewer to make submissions in support of the grounds for review and discuss any procedural issues. When a review is requested on the basis of new information, the Independent Reviewer should liaise with the advertiser/complainant to talk more about the nature of the evidence and why it is significant. The process by which information is considered is not transparent and previous experience was that the justification was poor and failed reasonable evidentiary standards.
- b) It is very difficult for a complaint to even get to the Independent Reviewer stage. The ASB automatically dismisses complaints regarding advertising campaigns that have ended. This significantly limits the effectiveness of the ASB for two primary reasons: most, if not all, advertisements and campaigns have limited run times; and in many cases the ASB decision-making process takes longer than the ad campaign. Some complaints are not even considered by the Board at all because the advertisement was of limited duration, which means they cannot be lodged for Independent Review.
- c) More consideration needs to be given to the individual's reason for requesting a review, especially given the high fee charged
- d) The Independent Reviewer is appointed by the Board which perpetuates a perception that the review process is captured by an industry culture. A public nomination process for selection may be more in line with the public interest. Both the Reviewer and any Boards or committees considering complaints should be truly independently appointed.
- e) There was a lack of publicity given to this current process – many colleagues who have an ongoing interest in the regulation of advertising were not aware that this process was under way.
- f) Recent complaints are not easy to find on the website.
- g) ASB must ensure that all appropriate information in Codes and their Explanatory Notes is clearly available on the website for the use of those wishing to appeal

## ASB discussion/analysis

- a) Advertisers may provide extensive information to the Independent Reviewer if they choose to do so in their submission. Independent Reviewers are chosen for their ability to distil, analyse and adjudicate on all material related to a case. They are also empowered to seek further information from any party if they feel the need. The Independent Reviewer system was established to provide all parties with a simple and independent means of appealing a Board decision. It was not designed to be highly legal in nature or practice, although it is overseen by two highly regarded members of the legal and administrative community whose decision making process is clearly recorded in the final, published case report.
- b) ASB does not accept that it is difficult for a complaint to be the subject of a request for independent review – all complainants are provided with the opportunity to request a review in the letter they receive with the final determination. ASB does not automatically dismiss complaints regarding advertising campaigns that have ended – if an advertiser advises that the advertisement will never be used again, the campaign is over, and the issue raised about the advertisement does not appear to be of significant public concern, ASB will generally not send the complaint to the Board since the advertisement will not be seen again. However, if it is possible or likely that the advertisement will be used in the future, the complaint will be sent to

the Board for determination and the determination will stand for five years. There are examples on the ASB website of Board determinations relating to advertisements of limited duration e.g. Meat and Livestock advertisements for Australia Day or advertisements specifically for the Royal Easter Show. ASB has the ability to call special meetings for such complaints.

- c) The Independent Reviewers are empowered to consider only issues that fall within the Grounds for Review and they carefully consider any reasons for requesting a review.
- d) This is outside the scope of the review. The Independent Reviewers are not appointed by the Advertising Standards Board but by the Governance Board of the Advertising Standards Bureau. Independent Reviewers are chosen specifically for their understanding of administrative law and natural justice and a key requirement is their independence from the advertising industry.
- e) This is outside the scope of the review. As is mentioned in the issues paper accompanying the Review Questionnaire, those specifically invited to respond to the Review were individuals or organisations who had been involved in the Independent Review process or who have specifically expressed to ASB an interest in the process. ASB was keen to have as broad a range of comment as possible, so distributed a press release early in September 2010. In addition, there has been a general invitation to respond to the review clearly available on the front page of our website for months. Reference to the review was also included in our recent newsletters and email bulletins to which those who are interested in our work subscribe via the website.
- f) The state of the ASB website is outside the scope of this review. However, we should point out that ASB has very recently redesigned and upgraded its website to make it easier to use and to provide quicker and easier access to information about our work. It is now very easy to find any case report for any period.
- g) ASB will check its website to ensure that all appropriate information is available on its website for those wishing to request a review.

**ASB recommendation:**

**ASB should ensure that parties to a case can appear before the Independent Reviewer if the Independent Reviewer considers this necessary**

**ASB should clarify and improve information about the Independent Reviewer process and the general complaints process on its website**

ATTACHMENT A

**ADVERTISING STANDARDS BUREAU**

Community perception of the Independent Reviewer process

**ISSUES PAPER**

September 2010

**INTRODUCTION**

The Advertising Standards Bureau (ASB) introduced a review process for Advertising Standards Board (Board) determinations in 2008. We designed the system to provide an opportunity for review of Board determinations that is facilitative, speedy and simple as well as ensuring a comprehensive complaint system that encourages consumer trust. We anticipated that such a system would allow parties to a review to provide their review documentation and receive a final outcome within as brief a period as possible.

This review system does not provide a further merit review of a case determined by the Board. The role of the Independent Reviewer is to consider the process followed by the Board and to recommend whether the Board's original decision should be confirmed or reviewed.

In 2008, ASB indicated an intention to review the process within a couple of years to allow fine tuning and correction if necessary.

The ASB invites you to participate in our internal review of the policy and implementation of this system.

**AIM**

**The aim of this review is to understand community and industry perceptions about the Independent Reviewer system as it currently operates, so that ASB may improve and enhance the system and ensure compliance with international best practice as foreshadowed in 2008.**

**INVITATION TO PARTICIPATE IN THE REVIEW**

The ASB invites you to take part in this review.

- Please read the attached *Independent Reviewer fact sheet* which describes the current Independent Reviewer process within Australia.

For your information, others invited to participate include:

- all individuals and organisations that requested a review of a Board decision or who contacted ASB regarding the process

**ATTACHMENT A**

- other organisations or people who have expressed interest in this system eg - other industry bodies, government agencies, incorporated bodies, media, educational institutions
- Independent Reviewers
- This issues paper will be publicly available on ASB's website, and we encourage anyone who has an interest to complete the questionnaire

All responses will be used to inform our consideration of the current system with a view to making improvements consistent with community views and ASB resource.

Responses to this issues paper and any other comments or suggestions may be made to ASB at:

- Email: [administration@adstandards.com.au](mailto:administration@adstandards.com.au)
- Mail: Advertising Standards Bureau  
Level 2  
97 Northbourne Avenue  
TURNER ACT 2612

In your response, please provide:

- The name of the person submitting comment
- The organisation or interest group represented by the comments (if appropriate)
- Contact details – including telephone number, postal address and email address (if available)

Upon receipt of your completed questionnaire, ASB may contact you to seek an individual interview by phone or face to face to clarify any questions that we may have regarding your responses, and to give you the opportunity to expand on any issue of concern to you.

Thank you for your time, and we hope that you are prepared to assist us by completing this questionnaire.

For further information, please contact ASB at:

Phone: 02 6262 9822

Email: [administration@adstandards.com.au](mailto:administration@adstandards.com.au)

Submissions in response to this Issues Paper are due on **Friday 22 October 2010**.

Email submissions are preferred.

We expect to finalise the report by the end of 2010.

# QUESTIONNAIRE

*Note: text highlighted in red refers to the current review process as articulated in the Independent Reviewer Fact Sheet*

- please copy and paste this symbol as appropriate in the boxes provided

## WHO CAN ASK FOR A REVIEW?

*If people who originally complained about an advertisement or the advertiser are unhappy about a Board determination regarding a particular advertisement, they may ask for a review of the determination. These are the only people who may request a review.*

[Mark as many boxes as you believe to be true]

**Q.1 Are there parties other than the original complainant or the advertiser who should be entitled to request a review. For example:**

- Any complainant
- Any advertiser
- Any member of the community
- No change

**Why?**

## TIMEFRAME FOR REQUESTING A REVIEW

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

**Q.2 The time frame for requesting a review is determined by the need to resolve Independent Review cases as quickly as possible for all parties. Taking into account the needs of all parties, including the Independent Reviewer, is this timeframe:**

- About right
- Too long
- Too short

**Comment:**

## ATTACHMENT A

Upon receiving a request for review, the Independent Reviewer has ten business days in which to complete the review and make a recommendation. This time includes the three days which other parties are given to respond to the request for review.

**Q.3 Do you consider the time taken for the Independent Reviewer to complete the review:**

- About right
- Too long
- Too short

**Comment:**

### **GROUNDINGS FOR REVIEW**

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

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

**Q.4 In relation to the grounds for review:**

- There should be no change
- There are other grounds that could be considered

**Comment:**

### **THE REVIEW PROCESS**

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

If the Independent Reviewer, having considered all the original and new documentation, recommends that the original determination should be reviewed, the case is referred back to the Board. The Board will review its determination in line with any recommendation from the Independent Reviewer and will either uphold or dismiss the original complaint/s.

## ATTACHMENT A

International best practice suggests that an Independent Reviewer's role should be to assess the appropriateness of the process that the Board follows or to assess any new material provided by parties to the case.

The ASB Independent Reviewer system was NOT designed to provide a further "merit" review of a case – 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 prevailing community standards.

<p><b>Q.5 Do you support the continuation of the current process?</b></p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><b>Why or why not?</b></p>
--

*The investigation that the Independent Reviewer undertakes will include an invitation from the Independent Reviewer for other parties in the case (ie either the complainant(s) whose views were considered by the Board or the advertiser) to comment on the submission provided by the party requesting the review.*

<p>[Mark as many boxes as you believe to be true]</p> <p><b>Q.6 Should parties other than those specifically associated with the case be entitled to comment on a request for review, for example:</b></p> <p><input type="checkbox"/> Any complainant</p> <p><input type="checkbox"/> Any advertiser</p> <p><input type="checkbox"/> Any member of the community</p> <p><input type="checkbox"/> No change</p> <p><b>Why?</b></p>
--

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

While a review is underway:

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



## ATTACHMENT A

<b>Q.</b>	<b>Is this an appropriate approach?</b>
<input type="checkbox"/>	<b>Yes</b>
<input type="checkbox"/>	<b>No</b>
	<b>Why or why not?</b>

**COST OF MAKING A REQUEST**

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

ASB must make a charge for this service to cover some of the direct costs associated with the Independent Reviewer service. We wish to provide the community with an accessible way of handling advertising complaints while enabling the system to operate without resources being diverted to inappropriate areas.

<b>Q.8</b>	<b>Is the level of fees currently charged for the Independent Reviewer service appropriate?</b>
<input type="checkbox"/>	<b>About right</b>
<input type="checkbox"/>	<b>Too high</b>
<input type="checkbox"/>	<b>Too low</b>
	<b>Comment:</b>

[Some jurisdictions reimburse fees if a request for review results in the request being upheld by the Board and the original decision being changed.]

<b>Q.9</b>	<b>Should the fee associated with a request for review be reimbursed if the Board agrees with the Independent Reviewer recommendation <u>and the original decision is changed</u>?</b>
<input type="checkbox"/>	<b>Yes</b>
<input type="checkbox"/>	<b>No</b>
	<b>Comment:</b>

ATTACHMENT A

**GENERAL ISSUES**

**Q.10** If you wanted to request a review of a Board determination but did not, why did you not make the request?

Too expensive

Too difficult

Did not think there was any point

Did not know how to go about it

Nothing would happen/ not worth asking

**Other:**

**Q.11** Please make any other comments about any aspect of the Independent Reviewer system that you feel may be appropriate for this review

Please provide the following information to assist in our analysis of this survey and to allow us to contact you for possible further discussion:

Name:

Organisation:

Address:

Email:

Phone number:

**Responses should be emailed to [administration@adstandards.com.au](mailto:administration@adstandards.com.au)**

THANK YOU FOR TAKING THE TIME TO PROVIDE INPUT TO THIS REVIEW



## ATTACHMENT B

### The review process

If people who originally complained about an advertisement or the advertiser are unhappy about a Board determination regarding a particular advertisement, they may ask for a review of the determination.

### Who can ask for a review?

People who originally complained about an advertisement and the advertiser are the only people who may request a review. If the complaint was made by an organisation, an advertiser or an industry complainant, the request for review should be signed by a person who, in the opinion of the Independent Reviewer, has the right to bind that organisation.

Requests for review received from people who were not original complainants will not be submitted to the Independent Reviewer and payment will be returned.

### Time frame for requesting a review

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

### Grounds for review

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

- Where new or additional relevant evidence which could have a significant bearing on the 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 Code, or clearly made against the weight of evidence).
- Where there was a substantial flaw in the process by which the determination was made.

Since no review will proceed if the point at issue is the subject of legal action between anyone directly involved, requests for review should make plain that no such action is underway or contemplated.

### Cost of making a request

The cost of lodging a request for review is \$100 for complainants, \$500 for complainants from not for profit organisations, \$1000 for advertisers who pay the advertising levy and \$2000 for advertisers who do not pay the advertising levy. This payment must accompany a request for review and is not refundable if the Independent Reviewer decides that the request does not meet the grounds for review. The payment is refundable if the Independent Reviewer accepts the request and the Board changes its original determination.

### Making the request

Requests for a review must be lodged via the ASB's online complaints system and must:

- contain a full statement of the grounds
- be in writing
- be accompanied by relevant payment.

## ATTACHMENT B

## Role of Independent Reviewer

In line with international best practice, the Independent Reviewer's role is to assess the validity of the process followed by the Board, or to assess any new material provided by parties to the case.

The Independent Reviewer does not provide a further merit review of a case. Their role is to recommend whether the Board's original determination should be confirmed or be reviewed. It is inappropriate to set up one person as a decision maker in place of a 20 member Board that makes determinations on the basis of community standards.

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 Independent Reviewer decides to accept the request, the Independent Reviewer will undertake appropriate investigation. The investigation will include an invitation for other parties in the case (ie either the complainant(s) whose views were considered by the Board or the advertiser) to comment in writing on the submission provided by the party requesting the review. The Independent Reviewer can request that parties to a case appear in person or by teleconference if necessary.

If the Independent Reviewer decides not to accept the request because they consider that it does not meet any of the required grounds, the person making the request will be informed.

Following investigation the Independent Reviewer will make a recommendation to the Board, stating whether the 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 ASB will not delay publication of the relevant determination pending the outcome of the review.

## What happens after a review

The Independent Reviewer can recommend:

- the Board's determination should be **confirmed**. There is no further investigation and the Board's original determination remains in place.
- the Board should **review** its determination. In this situation the case will be referred back to the Board at its next meeting along with the Independent Reviewer's recommendation and any material submitted during the independent review process. The Board must then review its determination in line with any recommendations from the Independent Reviewer. The Board can then either uphold or dismiss the original complaint/s.

The case report for the original case will be revised to include details of the Independent Reviewer's recommendation and, where necessary, the outcome of the Board's review of its determination.

The Board's determination on reviewed cases is final. No further review is possible.

The ASB will inform all parties of the Board's final determination. Determinations that are revised or amended following a review will be published on the ASB website.

## MYTHS/MISCONCEPTIONS ABOUT THE ADVERTISING STANDARDS BOARD AND THE INDEPENDENT REVIEWER PROCESS

### Independent Reviewer

- *Information about the Independent Reviewer process is not easily accessible*  
Detailed information about the Independent Reviewer process is available on the ASB website and is highlighted in the “complaint process” steps on the website. The Independent Reviewer process is available to all “original complainants” and the relevant advertiser. (Original complainants are those who lodge a complaint in time for presentation at the relevant Board meeting). All correspondence with the original complainants and advertisers following a Board determination, whether the complaint has been dismissed or upheld, informs those parties about the Independent Reviewer process and includes explanatory material or a link to information about the Independent Reviewer process.
- *Reasons and rationale for Independent Reviewer recommendations are not provided/are not transparent*  
The Independent Reviewer’s reasons and reasoning for a recommendation is fully documented in the updated case report that follows the Board meeting at which the Independent Reviewer recommendation is discussed. The updated case report is sent to all who participated in the review and is posted on the ASB website.
- *The Independent Reviewers lack independence from the Board and ASB*  
Independent Reviewers and Board members are entirely separate entities. They do not interact in any way and are entirely independent of each other and from the advertising industry. None are advertisers or advertising industry representatives. An examination of Board members on the ASB website clearly demonstrates the community based nature of the Board. Independent Reviewers, like Board members, are recruited specifically for their administrative law expertise, impartiality, lack of bias, and independence from the advertising industry.
- *The ASB has sufficient funds to provide the Independent Reviewer service free of charge*  
The ASB is not Government funded. Responsible advertisers fund the ASB via a voluntary levy of 0.035 per cent of their advertising spend. This was sufficient for ASB needs until recent years during which we have expanded our remit to undertake services such as the Independent Reviewer process. Any increase in workload does not result in an increase in income, so we must recoup some of the cost of this new service. Our resources fund: management of over 4000 complaints per year; regular research into community standards; Board member attendance and travel to monthly meetings in Sydney; copyright licence fee to AANA; staffing and administrative costs (including information technology, communications and publications).

## ATTACHMENT C

- *The Independent Reviewer process is difficult to follow without legal knowledge or expert advice*

The Independent Reviewer process is not intended to be a complex legalistic process. There are only three grounds for review to be addressed in a request for review. Extensive supporting material from legal or expert advisors is not necessary, except perhaps in exceptional circumstances involving cases with highly technical information. The Independent Reviewer is generally prepared to accept a request if the complainant articulates good reasons for believing that there are grounds for review.

- *The Independent Reviewer can overturn a Board determination if s/he has a different interpretation of the facts or of prevailing community standards*

The Independent Reviewer's role is to ensure that the Board has followed the appropriate *process* in making its determination, or in considering any new evidence supplied by either party. The Independent Reviewer has no role in considering the merit of the arguments put by either the complainant or the advertiser or of applying their own view of what are prevailing community standards. If the Independent Reviewer considers that the determination appears illogical s/he is likely to recommend it be reconsidered.

- *The Independent Reviewer decision is not binding on the Board*

The current system of review requires that the Independent Reviewer provide a recommendation only to the Board. The Independent Reviewer can make a recommendation (a) confirming the Board's original determination, in which case there is no further investigation, or (b) that the Board review its determination (having regard to the findings of the Independent Reviewer about the process followed by the Board or about any new evidence supplied). The Board is bound to review its determination where recommended to do so by the Independent Reviewer. The Board's review will be a fresh look at the case taking into account new information or applying a more rigorous process where the Independent Reviewer has recommended that there was a flaw in the process or determination or an error in the determination.

## Board

- *Board determinations are based on the first complaint received and not influenced by the number of complaints or range of issues raised by different complainants*

The Board considers *all* complaints received in time for presentation at the relevant Board meeting. The Board receives copies of all complaints received and makes its determination having read all documentation provided by all complainants and the advertiser, and if appropriate advice from third party experts (e.g. where there are complex questions relating to highly technical matters). The Board considers all issues raised by complainants and also assesses the advertisement against relevant codes regardless of whether a complainant raised it as an issue.

## ATTACHMENT C

- The Board comprises advertisers and advertising representatives and thus cannot be independent from the advertising industry*

Board members are not drawn from the advertising industry or from community lobby groups. A list of current Board members and their backgrounds is available from the ASB website.
- The Board automatically dismisses complaints about advertising campaigns that have ended*

The Board does not automatically dismiss complaints regarding advertising campaigns that have ended. If an advertiser advises that the campaign is over and the advertisement will never be used again, the Advertising Standards Bureau will generally not send the complaint to the Board for deliberation unless the complaint raises issues of public interest in which case the advertisement will be looked at even if no longer running. However, if it is possible or likely that the advertisement will be used in the future, the complaint will be sent to the Board for determination. There are examples on the ASB website of complaints regarding very short campaigns such as those for Australia Day or for the Royal Easter Show. It is possible for the Board to be called for an extraordinary meeting regarding an advertising campaign of limited duration.
- The Board has little capacity to measure or reflect “community standards”*

The Board is a community based entity which makes its determinations on the basis of what it identifies as community standards in the light of the experiences of its members, the research undertaken by the ASB from time to time and any additional research undertaken in relation to a specific complaint. The ASB has undertaken community standards research yearly since 2007 to measure the Board’s effectiveness in reflecting prevailing community standards relating to specific sections of the Code of Ethics.
- The complaints process has little or no deterrent effect*

Adverse determinations are a significant deterrent for advertisers. This is shown by the fact that the ASB has virtually 100% compliance with its determinations. In addition, the generally damaging “naming and shaming” of advertisers against whose advertisements complaints have been upheld, is a valuable deterrent to inappropriate advertising. One of the aims of the ASB is to educate and encourage advertisers to develop advertising campaigns that are more sensitive to the views of the community.

**ASB**

- The ASB is responsible for the drafting of the Codes it administers*

All Codes administered by the ASB may be found on the ASB website. ASB usually has some input at the development and review stage, but the Codes are primarily developed by the relevant industry bodies.

**ATTACHMENT C**

The Australian Association of National Advertisers (AANA) is responsible for drafting the:

- AANA Code of Ethics
- AANA Food and Beverages Code
- AANA Code for Advertising and Marketing to Children
- AANA Environmental Claims in Marketing Code

The Federal Chamber of Automotive Industries (FCAI) is responsible for drafting the:

- FCAI Motor Vehicle Code

The Australian Food and Grocery Council (AFGC) is responsible for drafting the:

- AFGC Responsible Children's Marketing Initiative

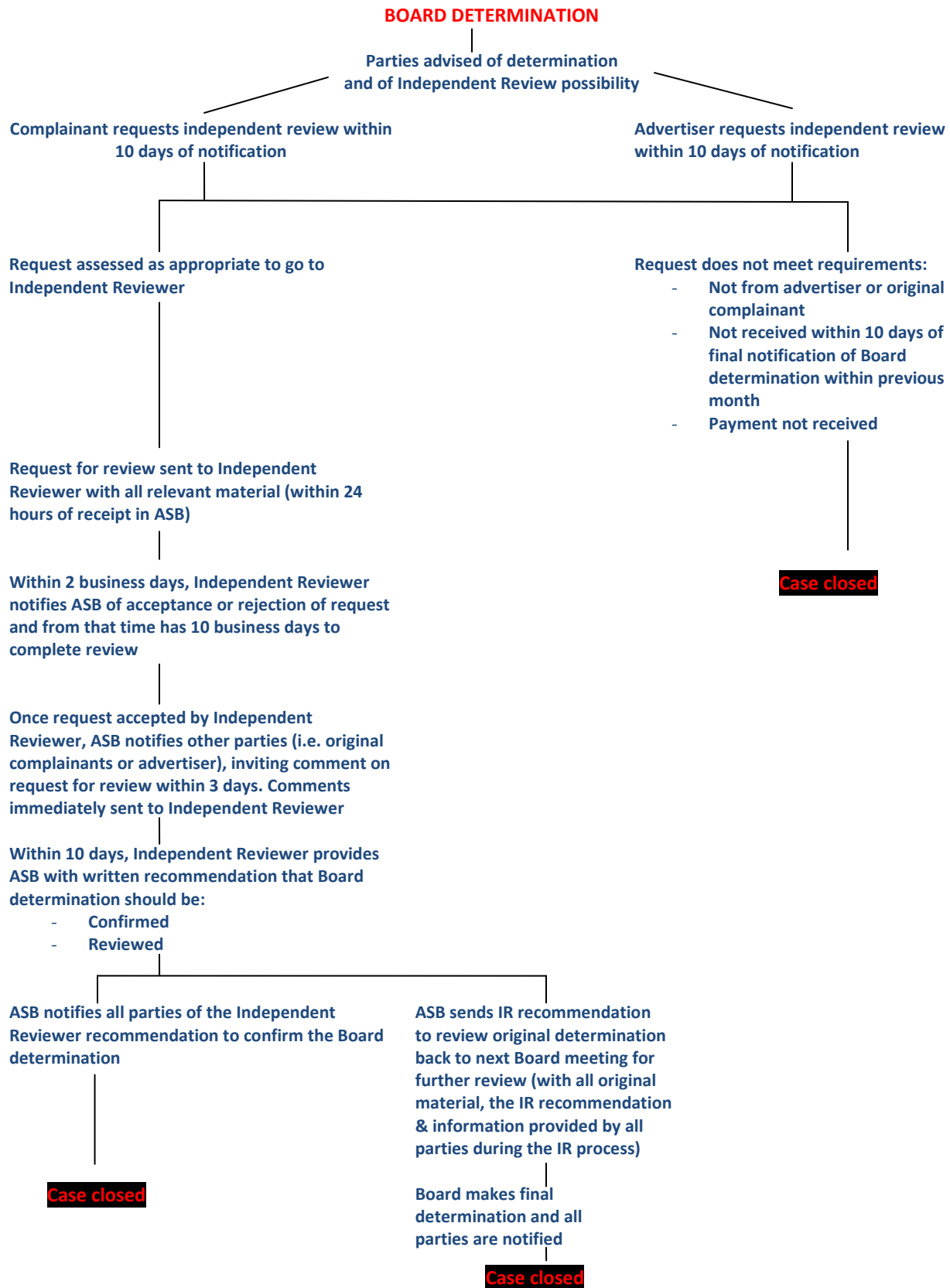
The Quick Service Restaurant Industry (QSR) is responsible for developing the:

- Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children.

The role of the Board is to make determinations with regard to the Codes. The Board is not empowered to consider issues that fall outside the Codes. Consumers wishing to comment on content of the Codes should approach the industry body responsible for development of the relevant Code.



ATTACHMENT D



## ATTACHMENT E

**COMPLETE LIST OF CASE REPORTS REGARDING CASES CONSIDERED BY INDEPENDENT REVIEWERS  
2008 – 2010 AND TIME TAKEN FOR REVIEWERS TO PROVIDE THEIR RECOMMENDATION**

No	Case	Board determination	IR Recommendation	Time taken by IR to provide recommendation	Board Determination on Review
1	Trading Post Australia Pty Ltd <b>133/08</b>	19/05/08 Upheld	Confirm 25/06/08	8 days	N/A
2	Insurance Line Pty Ltd <b>-157/08 &amp; 158/08</b>	19/05/08 Upheld	Confirm 25/05/08	8 days	N/A
3	Mitsubishi Motors Aust (Pajero – Daniel’s birthday) <b>289/08</b>	13/08/08 Dismissed	Review 1/10/08	10 days	Dismissed
4	Yum Restaurants (KFC Hot’n’Spicy fillets -the boyfriend)- <b>312/08</b>	8/9/08 <u>Upheld</u>	Review 19/09/08	9 days	<u>Dismissed</u>
5	Government of WA – Rethink Drink – <b>108/09</b>	8/04/09 Upheld	Confirm 26/05/09	17 days (IR in hospital – serious illness)	N/A
6	AMI (SMS “TRY” – Making Love? Do it longer) - <b>419/09</b>	23/09/09 Dismissed	Review 4/11/09	10 days	Dismissed
7	Telstra (Cyber bully) <b>474/09</b>	14/10/09 Upheld	Review 30/11/09	9 days	Upheld
8	Land Rover (Range Rover Sport)- <b>511/09</b>	20/01/10 - Dismiss	Review 27/04/10	9 days	Dismiss
9	Crazy Domains (Pamela Anderson) <b>22/10 &amp; 24/10</b>	10/02/10 - Uphold	Confirm 27/04/10	10 days	N/A
10	Hyundai (ix35) - <b>182/10</b>	12/05/10 - Dismiss	Review 14/07/10	10 days	Dismiss
11	Lexus LFA Supercar <b>215/10</b>	26/05/10 - Dismiss	Confirm 14/07/10	11 days (IR ill)	N/A
12	Diageo Australia (Bundaberg Rum) <b>0467/10</b>	24/11/10 - Dismiss	Confirm 22/12/2010	6 days	N/A

NOTE: The Independent Reviewer has 10 business days to provide a recommendation. This includes 3 days during which the original complainant(s) or advertiser are offered the opportunity to comment on the request for review. The material provided to the Independent Reviewer includes: original case report; all complaints; original advertiser response to complaint; request for review; subsequent comment from advertiser/original complainants on the request for review; the advertisement; any other relevant case reports or advertisements that may be relevant. In addition, we would expect that the Independent Reviewer would consider any ASB research reports or determination summaries that are relevant to the case.