

ACMA Review

Department of Communications
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Canberra ACT 2601

By email – ACMAreview@communications.gov.au

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Review of the Australian Communications and Media Authority

We are grateful for the opportunity to provide comment to the review of the ACMA.

Quit Victoria is dedicated to ending the pain, suffering and costs caused by tobacco. We lead a credible, collaborative and comprehensive agenda to end the damage caused by tobacco to individuals and the community. We take a multi-faceted approach that involves social marketing campaigns aimed at discouraging smoking, encouraging quit attempts and supporting people to stay quit; the provision of cessation support to individuals; supporting social services and workplaces towards going smokefree; providing training and education to health workers on cessation support; and undertaking policy and advocacy to enhance the effectiveness of tobacco control policy and regulation.

Our submission relates to the term of reference regarding the current objectives of the ACMA, and in particular, the objective under the *Broadcasting Services Act 1992* (Cth) ('BS Act') "to encourage providers of broadcasting services to respect community standards in the provision of program material".

As part of our policy work Quit monitors advertising for direct or indirect promotion of smoking and other tobacco use. We frequently lodge complaints with the Department of Health ('DoH'), the ACMA and the Advertising Standards Bureau ('ASB') on advertising and promotion issues of concern as well as monitor the outcome of smoking related complaints lodged by others. We have observed inconsistent approaches between the ACMA and ASB on e-cigarette advertising:

- Certain complaints to the ASB regarding advertisements for e-cigarette products are upheld on the basis that the advertisements are considered to be in breach of section 2.6 of the Advertiser Code of Ethics – by depicting "material contrary to Prevailing Community Standards on health and safety". The ASB has found that advertisements that depict people smoking e-cigarettes suggest that the act of smoking is cool and glamorous – which is against prevailing community standards on health and safety.
- When considering complaints under the *Tobacco Advertising Prohibition Act 1992* (Cth) ('TAP Act') about the same advertisement considered by the ASB to glamorize smoking, the ACMA has rejected assertions that those advertisements promote and glamorize smoking or words and designs closely associated with tobacco products.

Below are extracts from decisions regarding the same e-cigarette advertisement for the Clever Smoke product:

(a) ACMA – Investigation Report 3110

...the ACMA is not persuaded by the complainant's submission that the advertisement 'gives positive 'publicity' to tobacco cigarettes by glamorising many of their inherent aspects', through promotion of a non-tobacco product that simulates the act of smoking tobacco cigarettes, and 'looks, feels and tastes' like a tobacco cigarette. The ACMA considers that:

- *the readily distinguishable and distinct nature of the Clever Smoke product, which is made clear during the advertisement; and*
 - *the repeated and forceful condemnation of tobacco products and smoking;*
- have the effect of nullifying any incidental promotion of smoking that the advertisement may otherwise have had.*

(b) ASB – Case number 0094/13

The Board noted that the video footage shows people using the product at work, in a bar and whilst with their children. The Board noted that the reactions of the people using the product are of enjoyment and considered that to depict people enjoying smoking, albeit fake cigarettes, is a depiction which is suggestive of smoking being pleasurable and this glamourises smoking. The Board noted that the Clever Smoke product does closely resemble a cigarette and considered that the advertisement is strongly suggestive of smoking a real cigarette whilst in a public place and whilst surrounded by children.

We also draw your attention to recent observations made by the Supreme Court of Western Australia when considering a matter involving charges against a retailer of selling a product designed to resemble a tobacco product. The Court observed:

“it is not difficult to see how the act of smoking (or otherwise consuming, by inhalation through the mouth) a substance other than tobacco smoke may nevertheless be associated with smoking tobacco products. For that reason, it is not difficult to envisage how the smoking (or the consumption by inhalation through the mouth) of substances other than tobacco smoke might be used to promote smoking tobacco products”¹

Determining whether certain material has the effect of promoting tobacco products or smoking can involve subjective judgements, so differing perspectives can be expected. However, with respect to the Clever Smoke advertisement, we consider that the law and evidence supports decisions contrary to those reached by the ACMA, including because findings on issues around the promotion of (a) smoking and (b) tobacco related words and designs are out of step with what a reasonable person would consider to be the case.

We believe this warrants organisational review of ACMA’s processes for determining ‘community standards’ and considering TAP Act complaints related to e-cigarettes. Such a need is reinforced by the fact that the ASB is reaching contrary decisions to ACMA regarding the exact same advertisements. The observations of the WA Supreme Court also reflect the approach of the ASB. Such a review would be consistent with the BS Act objective of *encouraging providers of broadcasting services to respect community standards in the provision of program material.*

Please contact Quit Victoria’s Legal Policy Adviser, Jacqui Bell, if you have any questions about our submission (jacqui.bell@cancervic.org.au; (03) 95146460).

Sincerely



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¹ *Hawkins v Van Heerden* [2014] WASC 127 [47].