Position paper on clause 44 of the
Liquor Control Reform Amendment Bill 2021

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Executive Summary

1. The *Liquor Control Reform Act 1998* (**the Act**) regulates the supply of liquor in Victoria. It generally requires suppliers of liquor to be licenced, and to abide by the conditions of their licence. Those conditions can extend beyond the immediate supply of liquor, sometimes displaying a tenuous connection with the Act's main purpose.

2. The Victorian Commission for Gambling and Liquor Regulation (**the Commission**) administers the Act. Presently, section 115A of the Act confers a discretion on the Commission to ban a licensee's advertising if it is 'not in the public interest'. The Commission is left at large to decide whether that is so.

3. In an apparent attempt to inject certainty into that function, and to protect children from inappropriate sexual advertising, clause 44 of the *Liquor Control Reform Amendment Bill 2021* (**the Bill**) deems certain categories of advertising or promotion to not be in the public interest.

4. Amongst the categories is advertising that is 'directly or indirectly sexual'. With purity of purpose, in a single broadside, the Bill clumsily eliminates community participation from advertising supervision, undermines our Charter rights, and arbitrarily fragments advertising regulation, to name a few problems that arise.

5. The purpose of this paper is to identify the difficulties that will be created by clause 44.

Important Disclosure

6. This written submission evolved out of a brief to assist in drafting an objection to clause 44 of the Bill. I am being paid, by a liquor licensee who has an interest in seeing that clause 44 of the Bill is not enacted, for my time in drafting these submissions. Nevertheless, the views in this paper are my own and arise from my own reflections on clause 44 of the Bill.

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The *Liquor Control Reform Act 1998* and the *Liquor Control Reform Amendment Bill 2021*

The Act's scope and purpose

7. The Act's purpose is set out in section 1:

> The purpose of this Act is to reform the law relating to the supply and consumption of liquor.

8. The Act regulates the supply and consumption of liquor in Victoria by requiring, subject to exceptions (such as hospitals and florists), that suppliers of liquor hold a licence.

The current ban

9. Presently, section 115A of the Act provides:

> (1) The Commission may give a notice to a licensee banning the licensee from advertising or promoting—
>
> (a) the supply of liquor by the licensee; or
>
> (b) the conduct of licensed premises by the licensee—
>
> if, in the opinion of the Commission, the advertising or promotion, or the proposed advertising or promotion, is likely to encourage irresponsible consumption of alcohol or is otherwise not in the public interest.
>
> (2) A licensee to whom a notice applies must comply with the notice.
>
> Penalty: 120 penalty units.

10. There is no appeal procedure.

11. For convenience, this paper frequently refers to advertising alone rather than advertising *and* promotional activities.

Clause 44 of the Bill

12. Clause 44 of the Bill provides:

> After section 115A(1) of the Principal Act insert—
>
> "(1A) For the purposes of subsection (1), advertising or promotion that is not in the public interest includes the following—
>
> (a) advertising or promotion that is likely to appeal to minors;
>
> (b) advertising or promotion that is likely to encourage or condone violence or anti-social behaviour;

(c) advertising or promotion that is directly or indirectly sexual, degrading or sexist;

(d) any other prescribed advertising or promotion."

The explanatory memorandum

13. The Bill's explanatory memorandum says the following in respect of clause 44:

> Clause 44 inserts new section 115A(1A) into the Principal Act to specify types of advertising or promotions that would not be in the public interest for the purposes of the power in section 115A(1) of the Principal Act for the Commission to ban such advertisements or promotions. This term was previously undefined in the Principal Act and the amendments are aimed at providing greater certainty.

The second reading speech

14. In her second reading speech, the Honourable Melissa Horne, Minister for Consumer Affairs, Gaming and Liquor Regulation (**the Minister**), said:

> The Bill will introduce significant amendments to ensure that the Act is effective in minimising harm and supports a responsible industry.
>
> The primary object of the Act is to minimise harm from the misuse and abuse of alcohol. However, harm is not currently defined in the Act. The Bill amends the Act to introduce a definition of harm. This definition will provide greater clarity and certainty for the regulator, the Victorian Commission for Gambling and Liquor Regulation (VCGLR), which must consider the objects of the Act in its decisions. The definition will include family violence and other community level harms, including injury and property damage. Including family violence in the definition of harm is an important measure in acting upon the recommendation of the Royal Commission into Family Violence that the review consider family violence and alcohol-related harms, and confirms its relevance in relation to liquor regulation for the VCGLR and the community.
>
> ...
>
> The Bill will further strengthen the harm minimisation provisions of the Act by clarifying what advertising and promotions are not in the public interest, and therefore able to be banned. This will include advertising that promotes violence or advertising that directly or indirectly appeals to minors or is of a sexual, degrading or sexist nature. A power to prescribe advertising or promotions that would be subject to the ban, allowing flexibility to respond to any emerging advertising of concern, will also be inserted.

15. Not one of the recommendations of the Royal Commission into Family Violence related to advertising or promotion, much less sexual advertising.

Clause 44's apparent purpose

16. Both the explanatory memorandum and the second reading speech make clear that 'certainty' is a key aim of the new clause. It is understandable and admirable that the

Minister and Parliament should try to make legislation clearer and more certain. Particularly in this domain where, in circumstances where the Commission is not representative, there is sense in ensuring that the Commission be guided by clear principles as to how it proceeds to determine the public interest.

Current progress in Parliament

17. The Legislative Assembly passed the third reading on 9 September 2021. Clause 44 remained unamended.

1. Clause 44 is too broad

18. 'Sexuality' is, on any view, an exceptionally broad concept. It is much broader than 'sex' or 'nudity'. In a particular context or focus, sexuality can be implied by the biting of a bottom lip, the unfastening of a single shirt button, or the blurring of a part of one's body (irrespective of what the original photo portrayed). Indeed, a shape or object - an eggplant emoticon in a text message - can be sexual. So can a number (69).

19. 'Sexuality' is not inherently offensive or immoral. Nor is sex or nudity. *Of course*, that does not remove the need for careful judgment and debate about the appropriateness of sexual media in public places. However, the present Bill does not permit that debate to occur, not even *within* the Commission, let alone in discourse between the Commission and licensees, since the deeming provision renders the debate otiose.

20. Clause 44 fails to acknowledge that context, audience, message, and medium, all play a role in assessing whether sexual advertising is not in the public interest.

21. Members of the High Court of Australia recognised the importance of context in assessing indecency, in *Crowe v Graham* (1968) 121 CLR 375, a decision handed down more than half a century ago. In that case, Chief Justice Barwick doubted the wisdom of endeavouring to explore the meaning of the words 'indecent' and 'indecency' and in respect of the magazines that were the subject of that appeal, his Honour observed:

> 'Here, for example, sexual matters were referred to in the issues of the magazines in a way which might pass muster in a tap room or smoke concert but which, displayed in print to the reader of the magazine, could in my opinion, be held to offend the modesty of the ordinary man'.

22. Justice Windeyer also saw the importance of context:

> I think too that the members of the Supreme Court went astray in the way they looked at the publication. They examined it page by page, picture by picture, to pass judgment on each. But the charge was that the publication was, as a whole, "indecent printed matter". The photographs are only a part of the publication. They are of the kind which might be found pinned up to decorate the wall of a barrack room or hut. They are no doubt voluptuous and would thus have some sensual attraction for some people. They are not worlds of art. But whether any one of them by itself, or all of them together, could properly be called indecent in some other context seems to me highly questionable. That however is not the point. The publication is to be considered as a whole, its several parts in the context of the whole. When the question is whether there has been a

> publication of indecent matter, the goodness of part does not necessarily redeem the whole. It is the whole that is on trial in the whole circumstances of its publication.

23. Justice Owen referred to directions proposed by Justice Fullagar as appropriate to give to a jury in an indecency trial:

> It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere. They must be dealt with in scientific works, and they may be legitimately dealt with - even very frankly and directly - in literary works. But they can be dealt with cleanly, and they can be dealt with dirtily. There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards.

24. Justice Fullagar proposed those directions in *R v Close* [1948] VLR 445 (at 465), *73 years ago*.

25. Clause 44 is too broad in another way. It applies irrespective of the mode of communication. It permits the Commission to ban sexual advertising or promotion online, on the licensee's own website, on television and radio late at night, in age-restricted magazines, in emails sent to licensee's customers who have consented to receiving promotional material, and even in a licensee's own venue, even if those venues have age-restrictions that are enforced at the door by security guards.

26. Clause 44 also deems 'advertising or promotion that is likely to appeal to minors' to not be in the public interest. It is not limited to liquor advertising but also to advertising of 'the conduct of licensed premises by the licensee' (see the Act, section 115A(1)(b)). Thus, a cinema that is a licensee could not display advertisements for its screening of the next Disney film as it would likely appeal to minors and therefore, according to clause 44, would be 'otherwise not in the public interest'. Compounding the absurdity is the fact that a cinema that is not licensed to supply liquor, and which has the exact same advertising, would fall outside the purview of the Act and the Commission.

27. In contrast to clause 44, New South Wales' liquor control legislation, the *Liquor Act 2007* (NSW), regulates the sale or supply of 'undesirable liquor products' and activities by a licensee that inappropriately promote the sale of supply of liquor (see sections 100 to 102). Section 102(2) provides:

> (2) The Secretary may restrict or prohibit any such activity only if the Secretary is of the opinion that—
> (a) the promotion is likely to have a special appeal to minors because of the use of designs, names, motifs or characters in the promotion that are, or are likely to be, attractive to minors or for any other reason, or
> (b) the promotion is indecent or offensive, or
> (c) the promotion involves the provision of liquor in non-standard measures or the use of emotive descriptions or advertising that encourages irresponsible drinking and is likely to result in intoxication, or
> (d) the promotion involves the provision of free drinks, or extreme discounts or discounts of a limited duration, that creates an incentive for patrons to consume liquor more rapidly than they otherwise might, or

(e) the promotion otherwise encourages irresponsible, rapid or excessive consumption of liquor, or
(f) the restriction or prohibition is otherwise in the public interest.

28. New South Wales' provisions show greater awareness and focus, and do not carry the risk of capturing unintended advertising.

2. Clause 44 lacks clarity

29. Notwithstanding its breadth, or perhaps because of it, 'sexuality' is an unclear concept about which reasonable people would differ. This is so particularly at the margins of the concept, where sexual innuendo or allusion may be perceived by some and not by others. Clause 44 aggravates the uncertainty by confirming that even 'indirect' sexuality is liable to prohibition.

30. Instead of permitting the Commission to grapple with important questions as to the real impact of advertising on the community, on a case by case basis, the Act will divert the Commission into *semantic* debates about what is 'directly or indirectly sexual' or what is 'likely to appeal to minors'.

3. The Commission is given too little and too much power

31. Paradoxically, the Bill gives the Commission too little and too much power.

32. Section 115A of the Act, in its present form, provides that the Commission may ban certain advertising. That would remain unchanged if the Bill were enacted. Thus, even if the Commission is faced with advertising that falls squarely within one of the categories of advertising that is deemed not to be in the public interest, the Commission is not obliged to ban it. It continues to have discretion.

33. Faced with such a scenario, how then, does the Commission decide whether to impose the ban? Ordinarily, the Commission would consider whether the ad is contrary to the public interest. In some cases it might still do so but for any advertising that falls within the deeming provisions, it must take for granted that it is against the public interest, even if it can see clearly that it is not.

34. Accordingly, the Commission is left with too little power because, where advertising is sexual, it cannot decide for itself whether it is not in the public interest. It must simply proceed on the basis that it is, even when it obviously is not.

35. That, however, begs the question, pursuant to what principles or criteria must the Commission exercise its discretion? It clearly still has a discretion. The existence of a discretion in a vacuum creates unchecked power; the Commission is required to decide, but not told how. In practice, that void will be filled with personal taste. That gives the Commission and its members too much power or discretion in deciding what advertising to ban.

4. Clause 44 contains an unrestricted power to ban further advertising or promotion

36. In addition to the defined categories of deemed anti-public interest advertising and promotion, clause 44 also deems 'any other prescribed advertising or promotion' to not be in the public interest. Accordingly, the Governor in Council, effectively the government of the day, is empowered to make regulations which may prescribe, without limitation, further categories of advertising which are deemed to be against the public interest. The effect of this is to give the government of the day near complete power in regulating advertising by licensees.

37. How is a government's ability to impose a blanket ban on undesirable material compatible with freedom of expression? Clearly it is not. Yet this side-door escapes attention in the statement of compatibility.

38. If the Bill is enacted, if the government of the day decides to prescribe a new category of banned advertising, the scrutiny usually afforded by the Charter, and Parliament generally, such as it is, will be absent.

39. The proposed section 115A(1A)(d), or regulations made under it, may be unconstitutional. The Commonwealth Constitution contains an implied freedom of political communication. The implied freedom invalidates laws that unreasonably burden freedom of communication about government or political matters. The new provision provides the government with a near unhindered ability to ban advertising.

5. The Commission's residual discretion is unguided

40. The unduly restrictive and expansive power renders the discretion legally unfeasible. In Australia, decisions made by the government are, for the most part, subject to judicial review. Judicial review is a process by which courts decide whether an administrative decision was made legally or not. Judicial review does not permit courts to examine the merits of a decision, or allow the courts to supplant the impugned judgment with their own. It simply permits the courts to invalidate illegal decisions. A decision is generally illegal not because of what it is but because of how it is made. For instance, failing to take into account a relevant consideration, or not failing to take into account an irrelevant consideration, might permit a court to quash a decision. What is clearly necessary in the exercise of each discretion is that there is at least one relevant consideration by which a member of the government (I use 'government' in the broad sense) must exercise his or her discretion.

41. Here, there are simply no apparent considerations at all. The Commission's discretion is preconditioned on it deciding that the advertising is not in the public interest, and if the Bill is passed, any sexual advertising is not. Yet, despite that one way road, the Commission must still decide whether to ban the advertising and issue a notice. How does it make that decision? According to what principles? When a licensee seeks judicial review of a Commission's decision to ban certain advertising, how is a court to decide whether the decision was legal or not? What will the Commission say it took into account? Perhaps more to the point, how could the Commission ever justify *not* banning scores of advertisements for every licensee in the State?

6. Current advertising oversight is superior

42. Commercial advertising in Australia is largely self-regulated by the Advertising Standards Board (**ASB**). The ASB has existed, in some form, since 1974.

43. Law regulating advertising is not non-existent (e.g. see the Australia Consumer Law), but it tends to focus on misleading advertisements, as opposed to advertising that offends other moral or social values.

44. The ASB provides a system of review by which *anyone* can complain about advertising. The complaints process is simple and accessible. The complaint is made in an online form.

45. The decision whether to ban the impugned advertising is:

    a. made by an independent jury made up of community participants (called the 'Community Panel');

    b. made in accordance with a clear, appropriate, and publicly available Code of Ethics;

    c. made after the advertiser is given an opportunity to respond;

    d. published together with reasons for the decision; and

    e. subject to review.

46. A review can be initiated by either the advertiser or complainant. If one is initiated, an independent reviewer makes a recommendation to the Community Panel as to whether its original decision should be confirmed or reversed.

47. The Code of Ethics, which is applied by the Community Panel, includes a concept of "Prevailing Community Standards" which is defined to mean:

> the community standards determined by the Ad Standards Community Panel as those prevailing at the relevant time in relation to Advertising or Marketing Communication.

48. It also includes sections 2.1, 2.2, and 2.4, which provide:

> 2.1 Advertising shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief.
>
> 2.2 Advertising shall not employ sexual appeal: (a) where images of Minors, or people who appear to be Minors, are used; or (b) in a manner which is exploitative or degrading of any individual or group of people.
>
> 2.4 Advertising shall treat sex, sexuality and nudity with sensitivity to the relevant audience.

49. As explained by section 3 of the Code of Ethics:

> The Code of Ethics is the overarching code setting out standards that apply to Advertising or Marketing Communication across any medium.
>
> Depending on the nature of the product or service being advertised, these other AANA codes may also apply:
>
> Food & Beverages Advertising Code
> Environmental Claims Code
> Wagering Advertising Code
>
> If the Advertising or Marketing Communication is directed primarily to children, the Children's Advertising Code may also apply.

50. The Code of Ethics is accompanied by a Code of Ethics Practice Note (both were updated in February 2021).

51. The Practice Note explains in detail what is meant by each of the following and when they are permitted or not permitted:

    a. 'discrimination / vilification';

    b. 'exploitative or degrading';

    c. 'sex, sexuality or nudity';

    d. 'health & safety' (which includes detailed consideration of body image).

52. For example, the following is an excerpt of the Practice Note under the heading 'sex, sexuality or nudity':

> Overtly sexual depictions where the depiction is not relevant to the product or service being advertised are likely to offend Prevailing Community Standards and be unacceptable.
>
> Full frontal nudity and explicit pornographic language are not permitted. Images of genitalia are not acceptable. Images of nipples may be acceptable in advertisements for plastic surgery or art exhibits for example.
>
> Overtly sexual images are not appropriate in outdoor advertising or shop front windows.
>
> Although not exhaustive, the following may be considered to be overtly sexual:
>
> • Poses suggestive of sexual position: parting of legs, hand placed on or near genitals in a manner which draws attention to the region;
>
> • People depicted in sheer lingerie or clothing where a large amount of buttocks, female breasts, pubic mound or genital regions can be seen; The use of paraphernalia such as whips and handcuffs, particularly in combination with images of people in lingerie, undressed or in poses suggestive of sexual position;

> • Suggestive undressing, such as pulling down a bra strap or underpants; or
>
> • Interaction between two or more people which is highly suggestive of sexualised activity.
>
> Discreet portrayal of nudity and sexuality in an appropriate context (eg advertisements for toiletries and underwear) is generally permitted but note the application of the relevant audience. More care should be taken in outdoor media than magazines, for example.
>
> Images of models in bikinis or underwear are permitted, however, unacceptable images could include those where a model is in a suggestively sexual pose, where underwear is being pulled up or down (by the model or another person), or where there is clear sexual innuendo from the ad (e.g. depicting women as sexual objects).
>
> Models who appear to be minors should not be used in sexual poses.
>
> The use of the word "sex" does not, of itself, make an advertisement unacceptable. However, such advertisements must not contain images that are overtly sexual and inappropriate having regard to the relevant audience.
>
> Images of naked couples embracing when viewed in a public space, has been found to be inappropriate and to not treat the issue of sex, sexuality and nudity with sensitivity to the relevant broad audience.
>
> Sexualised images which include elements which would be attractive to children, such as cartoons or depictions of Santa, when in a medium which can be seen by children have been found to not treat the issue of sex, sexuality and nudity with sensitivity to the relevant broad audience.

53. Where is the like guidance for clause 44? It does not exist because the effect of clause 44 is to impose a blanket ban on anything remotely sexual, without regard for its context, audience, or message.

54. The 'sub-codes', such as the Food & Beverages Code, also contain detailed and nuanced rules, which further highlight the simplicity and bluntness of clause 44.

55. For example, clause 44 provides:

> 'advertising or promotion that is not in the public interest includes the following - (a) advertising or promotion that is likely to appeal to minors'.

56. By contrast, section 3 of the Food & Beverages Advertising Code provides:

> 3.1 Advertising or Marketing Communication to Children shall be particularly designed and delivered in a manner to be understood by those Children, and shall not be misleading or deceptive or seek to mislead or deceive in relation to any nutritional or health claims, nor employ ambiguity or a misleading or deceptive sense of urgency, nor feature practices such as price minimisation inappropriate to the age of the intended audience.

> 3.2 Advertising or Marketing Communication to Children shall not improperly exploit Children's imaginations in ways which might reasonably be regarded as being based upon an intent to encourage those Children to consume what would be considered, acting reasonably, as excessive quantities of the Children's Food or Beverage Product/s.
>
> 3.3 Advertising or Marketing Communication to Children shall not state nor imply that possession or use of a particular Children's Food or Beverage Product will afford physical, social or psychological advantage over other Children, or that non possession of the Children's Food or Beverage Product would have the opposite effect.
>
> 3.4 Advertising or Marketing Communication to Children shall not aim to undermine the role of parents or carers in guiding diet and lifestyle choices.
>
> 3.5 Advertising or Marketing Communication to Children shall not include any appeal to Children to urge parents and/or other adults responsible for a child's welfare to buy particular Children's Food or Beverage Products for them.
>
> 3.6 Advertising or Marketing Communication to Children shall not feature ingredients or Premiums unless they are an integral element of the Children's Food or Beverage

57. Section 3 demonstrates vastly greater insight.

> Apart from the codes, the ASB commissions independent research into community standards including a recent study entitled 'Community Perceptions of Sex, Sexuality and Nudity in Advertising' by Colmar Brunton Social Research, which was published in 2010.

58. The genesis of this report is explained on ASB's website:

> Community concern about the portrayal of sex, sexuality and nudity in advertising has been reflected in complaints to Ad Standards.
>
> In 2018 sex, sexuality and nudity accounted for 36.39 per cent of complaints to Ad Standards.
>
> Ad Standards commissioned research into this issue and published a comprehensive research report on the matter in 2010.

59. Similarly, the opening paragraph to ASB's *Overtly Sexual Imagery in Advertising* guide explains:

> In September 2020, the AANA announced changes to the Code of Ethics and Practices Notes around the use of sexual imagery in advertising. These changes reflected increasing community concern around increased sexualisation of advertising and children's exposure to sexualised images. The aim of these changes is to ensure that children are appropriately protected from inappropriate sexualised imagery and to stop the use of overtly sexual images being used in advertising when they are not relevant to the product or service being advertised.

60. The ASB also releases overviews summarising Community Panel determinations including, on topics of sex, sexuality and nudity and exploitative or degrading advertising.

61. In August 2017, Deloitte Access Economics released a report (admittedly commissioned by the ASB) of its comparison of the ASB with a hypothetical government regulator, finding that the ASB requires a lower budget, performs equally well in terms of achieving compliance, is more efficient, is equally effective, and is more responsive.

62. The argument that current oversight is superior is not limited to the ASB. In fact whilst it does not appear to rival the ASB, the *Liquor Control Reform Act 1998* does not prescribe what is not in the public interest and therefore permits the Commission to exercise its judgment in advertising. The Commission has an online list of promotions it has banned stretching back to 2011. More importantly it has a document entitled *Guidelines for responsible liquor advertising and promotions* which contains 16 principles. It is plain to see that those principles are presently focused on the Commission's role - liquor regulation. If clause 44 is enacted, the Commission will have to consider and presumably act on licencee advertising that has nothing to do with liquor.

7. There is no evidence of community support for amendment

63. In 2016, in the wake of the Royal Commission into Family Violence, the Victorian Government undertook a review of the *Liquor Control Reform Act 1998*.

64. Approximately 57 submissions were received, including from Victoria Police, the City of Melbourne (and numerous other local governments), the Royal College of Surgeons, the Australian College for Emergency Medicine, the Australian Medical Association (Victoria), the Law Institute of Victoria, the Deakin University Violence Prevention Group, and the Salvation Army. Not one submission raised the topic of sexual advertising.

65. Similarly, as already noted above, none of the recommendations of the Royal Commission into Family Violence related to advertising.

66. In her second reading speech, the Minister said (underline added):

> The Bill will further strengthen the harm minimisation provisions of the Act by clarifying what advertising and promotions are not in the public interest, and therefore able to be banned.

67. By suggesting that the Bill is 'clarifying' what is and is not in the public interest, the Bill is given an air of benignity and helpfulness. That may well be the intention. But just as intention and consequence may differ, clarification and declaration are different creatures. The Bill declares, rather than clarifies, what is in the public interest. It does so without any reference to community support or investigation.

8. Human and civil rights are disproportionately restricted

68. Article 19 of the United Nations' Universal Declaration of Human Rights provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

69. Article 19 is a useful point of reference but its essence is captured in:

    a. the United States' Bill of Rights (First Amendment);

    b. the United Kingdom's *Human Rights Act 1998* (Article 10);

    c. the European Convention on Human Rights 1950 (Article 10); and

    d. the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) (section 15).

70. Although many licensees are companies, who do not have human rights, an individual can be a licensee (the Act, section 27). Clause 44 does not distinguish between corporate and individual licensees.

71. Moreover, although expression by commercial entities for commercial purposes (sometimes described as 'commercial speech'), such as advertising, generally enjoys narrower protection, commercial speech is not devoid of social or moral purpose nor is it devoid of protection.

72. For example, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, the US Supreme Court held (citations omitted):

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.
>
> The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.
>
> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

73. The US Bill of rights is not entirely comparable to our Charter or a bill of human rights. Nevertheless, the reasoning is instructive. Even more instructive is the proposition that if the advertising is not misleading or related to an unlawful activity, the interest the State is seeking to protect in regulating the advertising must be *in proportion to that interest*. In

other words, the connection between the burden placed on advertisers and the public interest sought to be achieved, must be demonstrable.

74. By contrast, in *R (on the application of N. Cyprus Tourism Centre Ltd) v Transport for London* [2005] EWHC (Admin) 1698 (the *North Cyprus Tourism* case), Justice Newman simply proceeded on the basis that commercial advertising was equally deserving of free expression protections under Article 10 of the European Convention on Human Rights.

75. Section 15 of the Charter provides:

> Freedom of expression
>
> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
>
> (a) orally; or
> (b) in writing; or
> (c) in print; or
> (d) by way of art; or
> (e) in another medium chosen by him or her.
>
> (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
>
> (a) to respect the rights and reputation of other persons; or
> (b) for the protection of national security, public order, public health or public morality.

76. Section 28 of the Charter provides:

> Statements of compatibility
>
> (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
>
> (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

77. In her statement of compatibility, the Minister, said:

> Section 15—Freedom of expression
>
> Section 15 of the Charter provides that every person has a right to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds. This freedom is qualified by section 15(3) which allows for restrictions which are reasonably necessary 'for the protection of … public health or public morality'.

> Clause 44 of the Bill extends the existing limits on liquor advertising to protect children from exposure to liquor advertising and prohibit violent or sexist content. It thereby restricts the freedom that product owners have to express particular content in their advertising.
>
> The avoidance of content that is sexist or otherwise degrading to women is something that is in the public interest and that may also contribute to reducing family violence in the community. Shielding minors from liquor advertising is 'reasonably necessary' to protect public health and is consistent with existing restrictions on advertising tobacco products.
>
> As the Charter only applies to natural persons, and not corporations, this right need only be considered as it applies to advertisers who are natural persons.
>
> While the Bill limits the freedom that advertisers have to promote their products, given the public health and child protection imperatives, the limit sits clearly within the exemptions contemplated by section 15(3) of the Charter.
>
> Section 17—Protection of families and children
>
> Section 17 of the Charter provides that both families and children are entitled to protection. Several sections of the Bill promote this right by seeking to minimise the harm that liquor poses to minors.
>
> ...
>
> Clause 44 introduces a prohibition on liquor advertising that 'is likely to' appeal to minors. This amendment protects children by reducing their exposure to liquor promotion.

78. The Minister argues that clause 44 'extends the existing limits on liquor advertising to protect children from exposure to liquor advertising and prohibit violent or sexist content'.

79. Those arguments have the following problems.

80. First, clause 44 is not limited to 'liquor advertising' but extends to advertising or promoting 'the conduct of licensed premises by the licensee' (see the *Liquor Control Reform Act 1998*, section 115A). Thus, any advertisement of the licensee's core non-liquor related services is captured. If the amendment's true purpose is to protect children from 'liquor advertising and prohibit violent or sexist content', then clause 44 is vastly overextended.

81. Second, clause 44 is not limited to circumstances in which minors are likely to, or may, be exposed to advertising (for example, the law affects advertising or promotion conducted *within* an age-restricted licensed premises, or to emails sent directly to customers of a licensed venue.)

82. Third, clause 44 is not limited to advertising that is 'sexist' but even indirectly sexual advertising, including, for example, advertising whose sexual connotations would not be recognised by a child (Disney movies famously contain many sexual references that a child would not recognise).

83. The assertion that 'the limit sits clearly within the exemptions contemplated by section 15(3) of the Charter' is unsustainable.

9. The amendments create an unfair playing field

84. Clause 44 will create an unfair playing field between licensees vis-a-vis other businesses. The Act is of no concern to businesses that do not supply liquor.

85. For example, clothing retailers such as Victoria's Secret and Seafolly can advertise without any regard to clause 44. They may readily install large digitised posters portraying women (usually) in suggestive revealing clothing and poses at ground level in Melbourne Central during the day. By contrast, if the Bill is enacted, a licensed cinema will not be able to display posters of American Beauty, The English Patient, Moulin Rouge, or the Piano.

Conclusion

86. It is unlikely that in practice, the Commission would exercise its discretion to ban posters of the English Patient. It may be that the Commission will exercise its discretion in a more nuanced and common sense way, rather than actually enforce the law as it is written. But that is the problem. The proposed amendments are so broad, ambiguous, and inflexible, that the Commission will have to resort to guidelines that exist not in the law but in the shadows, picking and choosing for itself what is really in the public interest, and deciding for itself what the amendments really intended.

87. Clause 44's implications are more pernicious than the sexual advertising it proposes to ban; it should be roundly rejected.