

SUBMISSION TO THE
HEALTH SELECT COMMITTEE

CONSIDERING

THE
PUBLIC HEALTH BILL

March 2008

SUBMISSION ON THE PUBLIC HEALTH BILL

Summary

The Distilled Spirits Association supports the broad intentions of the Public Health Bill.

However, the Association is concerned that the proposals relating to the code of practice may duplicate existing industry-developed initiatives.

The Association also has concerns regarding the regulation-making powers conferred upon the Director General of Health. These powers appear to be onerous and wide ranging and have the potential to usurp Parliamentary prerogative, especially in matters relating to liquor.

Recommendations

The Association recommends that at Part 3, Subpart 3 of the Bill, where those matters relate directly to liquor access, advertising, sponsorship, marketing, packaging and/or labelling, they be excluded and thus continue to be dealt with by existing and separate statutes or codes of practice. We recommend that where codes must be made, the Director General of Health be required to consult with industry, in order to avoid the overlap or overrule of existing codes of practice.

The Association recommends that clauses 374 (r) and 374 (x) be deleted.

In the event that the above-mentioned clauses were to remain, the Association recommends that the creation of any new regulations:

- should proceed only after full consultation with affected industry has been conducted,
- should not offend against any constitutional principle,
- does not deal with any matter already determined by Parliament and
- any new regulations should not unreasonably interfere with or restrict business.

Introduction

1. The Distilled Spirits Association of New Zealand is the national trade organisation representing New Zealand's leading producers and marketers of premium spirits (e.g. Brandy, Whisky, Rum, Gin, Vodka) and liqueurs.
2. Members include: Anchor Ethanol Limited, Bacardi Martini Asia Pacific Ltd, Brown Forman Beverages Worldwide, Diageo (New Zealand) Ltd, Federal*Geo, Lion Nathan Wines and Spirits Ltd, Maxxium NZ Ltd, Moët Hennessy NZ Ltd, Pernod Ricard New Zealand Limited, The Rum Company (New Zealand) Ltd and Vintage Wines and Spirits Ltd.
3. An important part of the Association's remit is to seek and maintain a fair, equitable and appropriate regime for the marketing, advertising and promotion of distilled spirits.

Discussion

4. The Association supports the broad intentions of the Public Health Bill and particularly those provisions relating to communicable diseases. However, the Association has serious concerns about parts of the Bill that relate to non-communicable diseases and those parts that extend new, wide ranging and discretionary powers to the Director General of Health, particularly in the:
 - promulgation of codes of practice or guidelines (Part 3, Subpart 3, Clauses 79 - 87) and the
 - making of regulations (Part 8, Miscellaneous, Clauses 374 (r) and (x)) to set control on a specified activity.

It is the Association's firm belief that unintended consequences will arise if the Bill is passed in its present form. Our following comments are confined to the above areas.

Making of Codes or Guidelines

5. The Bill provides for the Director General to issue non-binding codes of practice or guidelines about non-communicable diseases (NCD) and the associated risk factors to a particular sector on a particular activity. Codes or guidelines could, for example, be issued on "*the advertising, sponsorship and marketing of products and services...*"
6. In general, the Association is very supportive of voluntary codes of practice. However, the Association would like to highlight that there are existing codes of practice and guidelines that have long been in use in the industry. The potential duplication of these codes by the Director General would be very confusing for both the industry and consumers and is thus not warranted.
7. To give an example, the Advertising Standards Authority (ASA) has had in place, since 1992, an industry code of practice for the advertising of liquor¹. Discussions with the liquor industry have prompted the ASA to commit to releasing a new code for the naming, packaging and merchandising of alcohol sometime in the very near future.
8. The current code for advertising liquor has been industry-funded, developed by experts, and has been operating effectively for 16 years. The Association believes there is no need for any additional or similar code of practice and the considerable use of resources it would entail.
9. Industry-developed codes of practice follow best practice including having built in best practice mechanisms to enable an efficient and timely pre-vetting, complaints, appeals, compliance and review and monitoring process. It is notable that codes have industry ownership, are resourced by users (not taxpayers) and do not require any departmental vote. These features would unfortunately not be replicated in the arrangements provided for in the Bill. We also note that the ASA liquor codes administration system is entirely

¹ Code for Advertising Liquor, Advertising Codes of Practice – April 2007, Advertising Standards Authority

funded by industry, in contrast with the Broadcasting Standards Authority that has a taxpayer funded budget of \$1.5million per annum². This is indicative of some of the costs involved in the promulgating and administration of codes of practice.

10. Further, the ASA codes will soon be made legally binding as part of the principle of “enforced self-regulation” under the Sale of Liquor Act. This means the Government will have additional powers via the Ministry of Health in cases of serious or persistent noncompliance. Additionally, there are certain powers available under the Broadcasting Act³. This existing framework goes much further than any codes that could be developed under the auspices of the Bill. This is especially relevant where clause 87 states codes and guidelines promulgated under the Bill are not legally enforceable.
11. Part 3, Subpart 3 of the Bill – “Codes of practice and guidelines” is flawed in the view of the Association. The Association recommends that a new clause should be included in the Bill to acknowledge other relevant legislation and direct the Director General to prefer any codes of practice or guidelines that are already in operation (see paragraph 17 for further detail).
12. In the event that this recommendation is not accepted, the Association submits that the following parts of the Bill be altered in the manner set out:

Part 3 of the Bill:

Clause 80, Principles

13. This clause sets out a list of considerations for the Director General.

Importantly for business, the provisions fail to reference any consideration of the economic implications of a code of practice or guideline for affected businesses or the wider economy. The Association submits that such consideration should be both included, and treated as paramount. Accordingly, we recommend the additional new sub-clauses be inserted:

80 (i) fully evaluated and relevant scientific and analytical conclusions

80 (j) the well-being of the affected industry, product or service and wider economy

Subpart 3 – Codes of practice and guidelines

Clause 81, Director General may issue codes of practice or guidelines

14. This clause sets the conditions when a code of practice or guideline is applied.
15. To limit or avoid duplication or overlap with other enactments and jurisdictions, and to ensure maximum cost effectiveness and efficacy, the Association recommends that sub-clause (1) be amended to read:

² Broadcasting Standards Authority 2007 Annual Report

³ Broadcasting Act s21 (e) (v) “Function of Broadcasting Standards Authority

(1) The Director General may, **after consultation with the relevant industry sector**, issue **or utilise pre-existing** codes of practice or guidelines to a sector on a particular activity that the sector undertakes if the Director General has reason to believe that the sector can reduce, or assist in reducing, a risk factor associated with, or related to, the activity, **or when an existing code of practice or guideline has been tried and failed.**

16. The Association also recommends that the following additional sub-clause be added to ensure any new code of practice does not contradict any codes of practice or guidelines in existence:

3(d) Ensure the code does not contradict an existing code of practice or guideline.

17. For additional clarification the Association recommends another new clause:

81(5) **“Action under certain other enactments to be preferred”**

This section applies if any activity relates specifically to liquor access, advertising, sponsorship, marketing, packaging or labelling with reference to, or with action to be taken in the first instance under, the:

- Sale of Liquor Act 1989 or
- Broadcasting Act 1989 or
- Code of Advertising Liquor or
- Australia New Zealand Food Standards Code.

Clause 83, What code of practice or guidelines may provide

18. Clause 83 (2) (d) provides the Director-General with the power to duplicate provisions existing elsewhere and in other jurisdictions that restrict the accessibility of alcohol (for example, to minors) at retail. The Association finds this concerning and unusual, as it is traditionally Parliament’s function to make liquor legislation.

19. For instance, the Sale of Liquor Act (s155 – Sale of liquor to minors) already expressly prohibits the sale or supply of alcohol to minors by mandating a minimum age of purchase.

20. Clause 83 (2) (e) potentially duplicates or supersedes the alcohol advertising codes of practice administered by the Advertising Standards Authority.

21. Clause 83 (2) (f) potentially duplicates or supersedes the alcohol-labelling regime⁴ administered by the trans-Tasman agency Food Standards Australia New Zealand.

⁴ Australia New Zealand Food Standards Code Standard 2.7.1

22. The abovementioned clauses, as drafted, are far-reaching. They potentially override and make obsolete the codes or guidelines already in existence, and intrude on the ambit of Parliament, other relevant bodies and official agencies without a demonstrated need.
23. The Association recommends that a new clause be inserted:

83 (4) “The Director General must ensure a code or guideline does not duplicate any existing enactment”.

Clause 84, Codes of practice or guidelines to avoid overlap with enactments

24. The Association supports this clause and suggests that it be extended to prohibit the creation of new codes or self-regulatory arrangements relevant to the issues already dealt with by existing codes. For example, those already developed and successfully operated by industry⁵:

“In issuing or amending codes of practice or guidelines, the Director General must endeavour to avoid any provisions that overlap with matters contained in an **existing enactment or code of practice**”.

Clause 88, Report to Minister

25. This clause sets out the reporting process for any codes and guidelines issued within three years of enactment. If an issue of non-compliance to meet voluntary “objectives” arose, the Government may then automatically make the code or guideline mandatory. The potential for this to occur may be remote, but must be addressed. The Association believes this process would be an unprincipled and undesirable way to achieve full regulation. Moreover, if the codes are voluntary (as per Clause 87, Codes of practice and guidelines not legally enforceable) there appears to be no reason for them to be referenced in the Bill. Accordingly, the Association recommends that clauses 88 (1) (d) and 88 (1) (e) both be deleted from the Bill.

Clause 374, Regulations about public health and safety

26. This clause enables regulations to be made that would reduce, or assist in reducing, risk factors associated with non-communicable diseases (NCDs).
27. The Association is not opposed to legislation empowering the Director-General to make regulations, especially where they relate to minor administrative and or technical adjustments. However the Association does have major concerns with the wide-ranging nature of the provisions – specifically sub clauses (r) and (x). Illogically, there do not appear to be any guiding criteria or conformity parameters for ensuring comprehensive public debate and consultation or reference to Parliament. This means an unspecific and inadequate process could lead to poor quality regulations being easily applied to “alcohol”.

⁵ ASA administered Code for Advertising Liquor and Liquor Advertising Pre-vetting System

28. Under the present proposal in the Bill, the making of regulations could effectively lay the foundations for departmental officials to make “legislation by stealth” and bypass the accepted democratic process or Parliamentary prerogative. The Association believes this raises serious constitutional issues.
29. Furthermore, the Association submits that these regulatory powers could be exploited or abused by aggrieved groups or lobbies in an attempt to achieve a legal outcome when one may have been previously considered by Parliament.
30. For example, Parliament⁶ recently rejected calls for the minimum age of purchase of alcohol beverages to be lifted (from 18 years of age to 20 years). In spite of this, some parties may seek to utilise the power to make regulations conferred by the Bill as a surreptitious way of revisiting or relitigating a failed issue. The Association believes this is totally unacceptable and an abuse of the regulation making process.
31. The making of regulations could also override, overlap or duplicate the responsibilities of other official agencies. For example, the Ministry of Justice is the head agency responsible for administering the Sale of Liquor Act. It would be a deliberate incursion into the jurisdiction of the Ministry of Justice if the Ministry of Health and/or representatives were authorised to duplicate or override liquor sales and access legislation. Such an intervention has the potential to carry significant consequences into areas related to budget, enforcement and compliance for which the Ministry would have no remit.
32. Furthermore, any new regulation could impose additional and new economic costs on individuals. According to the Minister’s first reading speech⁷: “the Bill balances the rights of the individual against those of the public interest...” In stark contrast, no such safeguards are provided for business interests, which is clearly unfair and thus the Association believes it to be a very important omission.
33. In view of the above matters, it is paramount in the development of any new regulation for the Director-General to consult widely and to seek expert evidence. Regulations should always be developed on a responsible and evidence based basis.
34. As a second example, the Associate Minister of Health and the Minister of Justice⁸ have recently proposed amendments to the Sale of Liquor Act. The amendments would institute a concept of “enforced self regulation” for liquor advertising and promotions. Consequently, the Association would see no need or grounds for the Director-General to intervene in this area, despite suggestions from health lobby groups and the recent Public Health Legislation discussion paper⁹.

⁶ Sale of Liquor (Youth Alcohol Harm Reduction: Purchase Age) Amendment Bill (formerly Part of Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill (Gallagher) negatived 8/11/06

⁷ Hansard 11/12/07

⁸ "Liquor reforms balance regulation and responsibility", Hon Mark Burton & Hon Damien O'Connor 17/10/07

⁹ Public Health Legislation: Discussion Paper, November 2002, Ministry of Health

35. The Association would like to highlight that “alcohol” issues are generally substantive and controversial - to the extent that Parliament allows full participatory public consultation and traditionally determines these matters by a conscience vote. Therefore, the Association believes that the Director-General should not be responsible for making regulations in this area. Instead, alcohol related matters are more properly dealt with by the self-balancing process of Parliament itself than by delegated officials.
36. Whilst the Bill’s explanatory notes reference possible scrutiny of regulations by Parliament’s specialist Regulations Review Committee, this supposed safeguard concerns the Association. Our concern relates to the Regulations Review Committee’s inadequate and limited powers as set out under Standing Order 315. It is noted that complaints can be heard only after a regulation has been made. Additionally, it is noted that regulations (as per Clause 377, Special provisions as to regulations) are simply applied by way of a Gazette notice. This causes “alcohol matters” to once again bypass the usual consideration of Parliament and related scrutiny.

Clause 374, Regulations about public health generally

37. The sub-clauses:

- (r) the prohibition or regulation of the importation manufacture, packing, or sale of any thing likely to introduce or increase a risk to public health, and
- (x) reducing, or assisting in reducing, risk factors (within the meaning of **section 79**) associated with, or related to, non-communicable diseases:

delegate very wide powers to the Director-General and seriously encroach on Parliamentary processes, especially when related to “liquor” matters. Therefore, the Association recommends that both sub-clauses (r) and (x) should be deleted.

38. In the event that this recommendation is not accepted, the Association recommends that the Bill’s regulation making provision be amended to require the following clarifying or specific conditions:
- regulations should not be used as a clandestine mechanism to circumvent or override other Parliamentary decisions,
 - the Ministry of Health should not intervene in another Ministry’s jurisdiction where it has no principal responsibility,
 - all relevant and affected parties or special interest stakeholders should be properly engaged in meaningful consultation,
 - any proposed new regulation should be informed with substantive scientific assessment and evidence,
 - any proposed new regulation should be fully costed economically and proven to be effective, and
 - any alcohol-related matters should be the sole jurisdiction of Parliament.

Conclusion

39. The Public Health Bill, if enacted in its present form, will have a serious impact on our industry (and other industries).
40. It is the view of the Association that certain provisions could predispose and favour the wishes of some public health lobby groups over the interests and reasonable expectations of business.
41. Where codes of practice and guidelines already exist, especially in relation to alcohol, it would be logical for the Director-General to prefer to utilise them rather than generate new regulations that have the potential to duplicate or overlap existing regulations.
42. The regulation making provision in the Bill raises serious issues about the efficacy and efficiency of the regime. In the case of alcohol related matters it should remain fundamentally the legislature's function to make new legal requirements. New regulations should only be made after consideration of scientific and other empirical evidence along with full and proper consultation with the affected constituency.
43. Regulation making powers have the potential to be abused. They should not be an alternative pathway for additional laws or restrictions made by departmental officials, or for the advocacy of lobby groups who have been unable to achieve their objectives through the Parliamentary process.

Distilled Spirits Association of New Zealand Inc.