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Distilled Spirits Industry Council of Australia Inc.

14 April 2010

Mr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra
ACT 2601

RE: Authorisation no.: A91201 & A91202 / Pubic Register no.: C2009/1955

Dear Mr Chadwick,

I write to make a submission on behalf of the Distilled Spirits Industry Council of Australia Inc. (DSICA) regarding the application for authorisation by the Casuarina Business Precinct Stakeholders Committee (A91291 and A91202).

DSICA is the industry association representing the importers and manufacturers of distilled spirits in Australia, and it is generally supportive of local initiatives and soundly based regulations that aim to reduce levels of alcohol abuse. However, the inclusion within the draft Determination to authorise restrictions on the availability of Ready To Drink (RTD) products is opposed by DSICA.

DSICA is a strong supporter of efforts to reduce alcohol-related harms and associated anti-social behaviour, and has taken credible steps to that end. Its membership initiated the creation of DrinkWise Australia, and they continue to fund that organisation.

DSICA members have voluntarily adopted harm minimisation labels, developed the standard drink logo and initiated its widespread use, and have recently launched a self-regulatory *Statement of Responsible Practices for Alcohol Advertising and Marketing*. A trial moratorium on television advertising by members before 9pm is underway, and DSICA is also a strong supporter and funder of the Alcohol Beverage Advertising Code Scheme.

DSICA notes that as the main association of spirit manufacturers it was not contacted by the ACCC about this authorisation process or invited to make a submission. DSICA only became aware of the ACCC process through an ACCC media release on 25 March 2010, and regrets the timing of this submission late in the ACCC decision-making process.

"Free The Spirit"

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DSICA's objections to the granting of conditional authorisation focus exclusively on the proposed Liquor Accord standards contained at 2.11(a) of the draft Determination, specifically the bullet point which deals with RTDs:

- *ready to drink products greater than 500 ml in volume – all ready to drink products in single sales units greater than 500 ml are to be withdrawn from sale.*

DSICA disagrees strongly with the ACCC assessment at 4.26 of the draft Determination that including a ban on the sale of RTDs in the Liquor Accord is justified. The inclusion of RTDs as a 'problem product' is contrary to any evidence or research that DSICA is aware of, or to the submissions on the application, or to the Northern Territory Licensing Commission. DSICA notes that the Australian Drug Foundation cites the Commonwealth Government increasing the excise rate on RTDs as support for the authorisation, but DSICA disputes that interpretation of the Commonwealth's reasons.

On the basis of cost per standard drink (12.5ml of alcohol), RTDs are the most expensive category of alcohol available in retail stores, except for bottled wines retailing above \$20 and premium spirits such as single malt whiskey. For this reason, it is very difficult to intuitively conclude that RTDs are the preferred choice of heavy or abusive public drinkers looking for the cheapest alcohol or the 'biggest bang for their buck'.

Ready to drink (RTD) products are sold in five approximate sizes: 275ml bottles and cans, 330/345ml bottles and 375ml cans (the great majority of market share), 440ml cans, and 640/660ml cans and bottles. The proposed standard specifies (somewhat ambiguously) a volume limit of 500ml for 'single sales units', which on one interpretation captures the largest sized containers at 640 or 660ml.

Based on conversations with ACCC staff, this submission proceeds mainly on the understanding that ACCC has made its draft Determination using the interpretation that the proposed standard refers to sales of single containers above 500ml in volume.

Information from the Liquor Merchants Association of Australia is that there are only four RTD product lines in containers above 500ml. All of these RTD product lines in containers above 500ml are bourbon/rum and colas, and these sizes have a very small share of the RTD market.

The bourbon/rum and cola RTD category competes directly with full-strength beers for consumers. The RTD tax increase in April 2008 saw a substantial shift in sales away from dark spirit RTDs (bourbon/whisky/rum) towards beer and full strength bottled spirits, hence full strength beers are a close substitute.

The Applicants argue, and the ACCC has accepted, that the proposed ban on these few products will have little impact on consumers' choices as there are several close substitutes.

However, DSICA would argue that as there are many close substitutes (both within the RTD category and with other types of alcohol products such as beer and bottled spirits) a narrowly constructed product ban will have little impact on alcohol abuse, and it is impossible for the ACCC to justify the authorisation using the net public benefit test of section 90(8).

The draft Determination itself states at 4.41 that:

"...something more than a negligible benefit is required before the power to grant authorisation can be exercised".

In addition, DSICA is concerned that at 4.27, the ACCC imposes a very low and merely procedural barrier for the Liquor Accord to extend the proposed ban on sales of RTD to other smaller sizes, or to other products it deems problem alcohol products. The accord members will only have to consult with, not even gain agreement from, two branches of the NT government in order to have full legal protection.

While outside of the ACCC's consideration of the application, DSICA is deeply concerned that the authorising of a restriction on one size of RTDs (or possibly any sale greater than a single can or bottle, depending on interpretation) poses a substantial risk that the ban will be replicated and extended by other liquor accords and licensing regimes, each body taking such action without any evidence that RTDs contribute materially to alcohol abuse and anti-social behaviour but with the implied support of an ACCC authorisation.

DSICA's objections fall into four heads:

1. the proposed standard is somewhat confusing in its wording and should be clarified (if it is not removed);
2. this proposed standard is unjustified on any research, evidence or the application but the ACCC authorisation will be adopted by other liquor accords as reason to restrict RTD availability
3. the draft determination is inconsistent in that the RTD standard is unjustifiably much harsher than those standards for higher strength cask or fortified wine
4. this proposed standard unjustifiably discriminates against RTD products while ignoring other alcohol products that have equivalent or higher alcoholic strength and are available in larger containers; and

The proposed standard is confusing in its wording

The text of the proposed RTD standard for the Liquor Accord is:

ready to drink products greater than 500 ml in volume – all ready to drink products in single sales units greater than 500 ml are to be withdrawn from sale.

The confusion arises from the term "single sales unit", which is not terminology used in the alcohol industry. The question is this: do the words "single sales unit" refer to the common pre-packaged units of six-packs or 'slabs' (4x6 cans/bottles), or does it refer to a single container?

If it is the former, then sales of a six-pack of 375ml cans or bottles, or greater volumes, can be legally removed from sale. If the intention is the latter, the proposed standard would be clearer if it simply stated that containers greater than 500ml are withdrawn from sale.

If the ACCC's final Determination is that sales of more than one RTD can or bottle (given the usual volume is 330/375ml) can be restricted, then DSICA would question the level of support within the community and by those submitters in support of the application, particularly as the Applicants have not supported the RTD standard with any specific evidence that RTDs significantly contribute to the behavioural problems within the Casuarina Business Precinct.

The ACCC should also consider that confusing terminology has been used throughout the application process. The original application stated “sale of ready to drink products greater than 500ml in volume”. While this text differs, the essential ambiguity remains.

The ACCC should also be aware that retailers usually have a higher retail margin on single container sales. A restriction on sales of a six-pack will lead to some determined abusive drinkers simply making repeated purchases of single containers.

The proposed standard is unjustified on sound research evidence

The Applicants do not give any observational data about the contribution of the larger sized RTD containers to the anti-social behaviour that they wish to address, or in fact to RTDs at all. The proposed ban on the largest sized RTD containers appears in the original application without any specific mention of its availability, over-consumption, or its impact on abuse or anti-social behaviour.

The Applicants drew on the work of the Crime Prevention Thorough Environmental Design Review conducted for the precinct. Recommendation 11 of this review suggested restricting bulk alcohol sales, specifically and solely the sale of bulk wine, as a way of reducing alcohol abuse and anti-social behaviour within the precinct. In the draft Determination’s discussion of the proposed Liquor Accord and the review, no mention is made of RTDs as a cause of anti-social behaviour.

RTDs as a ‘problem product’ within the Northern Territory have quite simply failed to register with any researcher, local regulator or local authority. The announcement by Northern Territory Licensing Commission of its Review of Cheap and Problem Liquor Products makes no mention of RTDs as part of the alcohol problem, but does specifically and repeatedly discuss the role of cask wine.

Even the National Drug Research Institute paper (*Restrictions on the sale and supply of alcohol: Evidence and Outcomes*, 2007) that the Applicants have relied on to argue that the proposed product restrictions will not simply lead to significant substitution into other types of products, fails to mention RTDs – of any size container - as a problem product or as leading to worse behaviour.

That NDRI research paper discusses strategies for high risk alcoholic beverages both internationally and in Australia and never once mentions RTDs as a product that is correlated or linked to higher levels of abuse and harms. In the NDRI paper’s discussion of alcohol restriction trials in Australia, restrictions that have been placed on RTDs have always been identical to those restrictions on full-strength beer in recognition of their substitutability.

The tri-annual National Drug Strategy Household Survey is regarded as the ‘gold standard’ for how Australians drink, and what they drink. That research¹ clearly shows that RTDs are **not** the preferred choice of high risk drinkers of either sex, at any age range. Beer, wine and bottled spirits are the preferred drinks for those who drink at risky levels.

It is clear on the evidence – from the Applicants, from the broader body of research, and from the Northern Territory regulators such as the Northern Territory Licensing Commission – that RTDs are not a significant contributor to problematic drinking, and certainly not more so than other alcohol product categories such as beer and cask wine.

¹ *NDSHS 2004 Detailed Findings*, table 5.4 pg 28, Australian Institute of Health and Welfare, 2005. The 2007 survey found no change in the pattern of preferred drinks from 2004.

The removal from sale of RTDs is extremely unlikely to improve the levels of alcohol abuse and anti-social behaviour, and DSICA urges the ACCC to remove that part from its final Determination.

DSICA has noted an increasing trend for local liquor accords, police and liquor licensing authorities to single out RTD products for trading restrictions without evidence or debate, in the belief that because RTDs are modern products using distilled spirits they are inherently more dangerous. This approach is becoming widespread, irrespective of the fact that the great majority of RTDs are the same strength as the most popular beers available and with much lower alcohol by volume (ABV) than wine.

DSICA has a credible fear that an ACCC authorisation for the Casuarina Business Precinct Liquor Accord including the proposed RTD standard will give an official imprimatur to an increasing number of product bans by local accords, without any supporting evidence that RTDs are overly contributing to alcohol abuse and anti-social behaviour.

The proposed RTD standard is much harsher than for cask wine

The draft Determination includes standards for the sale of cask wine (2L and 4L) and fortified wine which restrict the time of sales, the number of containers for each trading day, and the display and customer access to these products.

However, it is only RTDs (presumably in containers above 500ml) that are to be withdrawn completely from sale. It is not stated in the draft Determination or in the application why it is only RTDs that are singled out for complete removal from that market. Nor is there any justification given why RTDs require removal, as opposed to the lesser restrictions for cask wine and fortified wine. This part of the draft Determination is completely contrary to all of the evidence and arguments.

DSICA notes that the largest sized RTDs contain at most 2.6 standard drinks and are 4.8% ABV, whereas a 4L cask of 11-12% ABV wine contains 30-32 standard drinks, a four litre cask of fortified wine (18% ABV) approximately 48-50 standard drinks, and a 750ml bottle of fortified wine contains 11-12 standard drinks.

A substantial legal question is why the ACCC would authorise the total removal from sale of a product with 2.6 standard drinks while other alcohol products with many times that amount of alcohol are merely restricted in time of sale and their placement within stores. This is especially illogical as those products are much cheaper in terms of cost per standard drink. This price disparity has been noted by the Northern Territory Licensing Commission when it launched its Review of Cheap and Problem Liquor Products in late 2009.

Given the aim of the authorisation is to assist the Applicants reduce the bulk supply of alcohol, it is illogical why the lowest strength product containing the least amount of alcohol is withdrawn fully from sale while higher strength products with much greater amounts of alcohol remain on sale, albeit with some restrictions on time of sale and store placement.

DSICA notes that in all of the research literature on alcohol abuse in the Northern Territory, it is cask wine that is singled out, and there is either no or only passing mention made of RTDs.

The proposed standard targets RTDs while ignoring other products of a similar strength, retailed in larger containers

The proposed RTD standard is (presumably) for the largest sized containers (640/660ml) with the purpose to reduce the bulk sake of alcohol. However, in its draft determination, the ACCC and the Applicants have ignored the full strength beer with the same alcohol content (4.8% ABV) that is retailed in even larger sized bottles (750ml).

DSICA questions why the Applicants only proposed standards for the sale of wine and RTDs, and not for full-strength beers that have identical alcoholic strength, and the logic of the ACCC accepting this in its draft Determination granting interim authorisation.

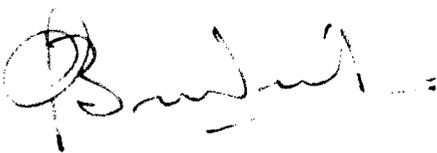
Conclusion

DSICA submits that:

1. Authorising the Casuarina Business Precinct Liquor Accord to remove RTDs (of any size) from sale is completely unjustified given the absence of any evidence that RTDs are in any way a 'problem product' either within the precinct or within the region or nationally.
2. Given the public interest justification of the application is to reduce the availability of cheap bulk alcohol, authorising RTDs to be completely removed from sale while much cheaper and stronger products with many times the amount of alcohol face lesser restrictions cannot be justified on any logical basis.
3. The applicants and the ACCC have ignored the availability of a close (and cheaper) substitute for those RTDs within the removal, specifically full-strength beers in larger containers.
4. The ACCC draft Determination fails the net public benefit test set by Section 90(8) in that the likely benefit of the RTD removal from sale will be negligible.

DSICA requests the opportunity to discuss this submission with the ACCC. Please contact Stephen Riden, Manager Information and Research, on 03-9696-4466 if this is agreed to.

Yours sincerely,



Gordon Broderick
Executive Director