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ABAC COMPLAINTS PANEL – DETERMINATION NO: 40/05

IN THE COMPLAINT OF THE COMMUNITY ALCOHOL ACTION NETWORK (CAAN)

**Product: Cougar Bourbon
Advertiser: Fosters Group**

Professor The Hon Michael Lavarch - Chief Adjudicator
Prof Fran Baum - Member
Ms Liz Dangar - Member
Ms Jeanne Strachan - Member

17 November 2005

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“the Panel”) concerns a television advertisement for the alcohol beverage Cougar Bourbon, a product of the Fosters Group (the “Advertiser”). The advertisement has attracted two complaints. The first complaint was made by way of an email to the Advertising Standards Bureau (ASB) dated 25 September 2005. This complainant has requested that their personal details be kept confidential. The second complaint was made by the Community Alcohol Action Network (CAAN) by way of letter to the ASB dated 4 October 2005.

The External Regulatory System

2. Alcohol advertising in Australia is subject to an amalgam of laws and codes of practice which regulates and guides the content and, to some extent, the placement of advertisements. Currently, alcohol advertising is subject to both:
 - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB); and
 - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and the complaints mechanism established under the ABAC Scheme.
3. The ASB and the ABAC Panel both assess complaints separately under their own rules. However, for the ease of public access to the complaints system, the ASB receives all complaints about alcohol beverage advertisements and forwards a copy of all complaints to the Chief Adjudicator of the ABAC.
4. The Chief Adjudicator of the ABAC then determines if the complaint raises issues which are solely within the province of the AANA Code of Ethics. If not, then the complaint will be forwarded to the ABAC Adjudication Panel for consideration. If only AANA Code issues are raised, then the matter is determined by the ASB.

The Complaint Timeline

5. The first complaint was received by the Panel on 26 September 2005. The second complaint came to the Panel by way of a covering letter from CAAN dated 27 October 2005.
6. The Panel endeavours to determine complaints within 30 days of receipt of the complaint, but this timeline is dependent on a number of variable factors. In this case, as discussed below, a preliminary matter required resolution before the Panel concluded that its jurisdiction was triggered to determine the complaint which required advice from the ASB and the Advertiser. Further, the second complaint from CAAN only came to the Panel's attention sometime after it was originally made to the ASB. The Panel has combined the complaints into a single determination. It should be noted that the advertisement was voluntarily withdrawn by the Advertiser in late September 2005, and has not been broadcast while the determination process has occurred.

Pre-Vetting Clearance

7. The external-regulatory system also features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The Advertiser advised that pre-vetting approval was granted to the advertisement.

The Advertisement

8. The complaints are about a television commercial for the Fosters Group beverage Cougar Bourbon. The advertisement consists of a simple graphic of a bottle of the product against a black background and a voice-over message.
9. The voiceover message is as follows: "This is an ad for Cougar. As you may be aware, the last ad for Cougar featured an attractive young barmaid serving five Cougars. However, this ad has been withdrawn due to a complaint from Mr Trevor Hardgold in Victoria, who said he should be free to watch television without having to watch attractive barmaids. If you would like to take this issue up with him, please write to Mr Trevor Hardgold, Thornbraith Road, Doncaster, Victoria or possibly gather a group of friends together and visit him in person. Thank you for your support."
10. When the voice-over reaches "or possibly gather a group of friends together and visit him in person" a graphic message "you've been warned" appears under the bottle of the product.

The Complaints

11. The first complainant states that the advertisement appears to be inviting people to harass someone who has made a complaint. It is argued that the advertisement transgresses the privacy of a previous complainant and invites the harassment of that complainant by encouraging a visit to the complainant's home. The complaint goes on to conclude that the advertisement seeks to cause completely unacceptable intimidation and to create a climate of fear so that people will not feel free to complain about the product's advertising.
12. The second complaint from CAAN makes a similar point about the advertisement being threatening and promoting possible violence against complainants. Specifically, it is argued that the advertisement breaches section (a) (iii) of the ABAC by promoting "offensive behaviour".
13. The CAAN complaint points to the dictionary definition of the term "offensive" and concludes the advertisement is "morally repugnant" and "insulting" and hence offensive.

The Panel's Jurisdiction and the coverage of the ABAC

14. As explained above, for present purposes the regulatory system applying to alcohol beverage advertising rests within the ambit of both the ASB under the AANA Code of Ethics and the Panel under the ABAC. The Panel's jurisdiction to determine complaints arises if:
 - The advertisement complained about falls within the scope of the ABAC *i.e.* in simple terms it is an alcohol advertisement (within the meaning of "advertisement" for ABAC purposes); and
 - The advertiser is bound by the ABAC *i.e.* a member of one of the four peak alcohol industry bodies who subscribe to the ABAC Scheme.
15. This means that the great majority of, but not all, advertisements which feature the promotion or at least the presence of alcohol beverages are capable of being assessed against the ABAC. It should be noted that the ASB applies a somewhat narrower definition of "advertisement" for the purposes of the AANA Code of Ethics than that which operates for the ABAC *e.g.* internet advertising is captured by the ABAC but not the Code of Ethics.
16. As mentioned earlier, each complaint about an alcohol advertisement is initially considered by both the ASB and the Chief Adjudicator of the Panel. The ABAC Scheme operates with the assistance of Rules and Procedures to assist in assessing if the complaint should be determined by the ASB or the Panel, or both. These Rules and Procedures have been approved as part of the overall ABAC Complaints Management System by Australian Governments and the relevant provision provides as follows:
 - (i) The Chief Adjudicator will look at all complaints received from the ASB to determine if the complaint raises issues which are solely within the province of the AANA Code of Ethics;
 - (ii) If it is so determined the complaint will not normally be further considered by ABAC (and will be handled by the ASB in accordance with their own procedures) excepting
 - (iii) Where the Chief Adjudicator exercises his or her discretion to refer to the complaint to the Adjudication Panel notwithstanding his or her determination that it raises issues which are solely within the province of the AANA Code of Ethics.
17. The current complaints raise a point about the advertisement discouraging the actual making of complaints by "creating a climate of fear" and suggesting a previous complainant about a Cougar Bourbon advertisement should be intimidated. Neither the AANA Code of Ethics nor the ABAC on their face have provisions which deal with complaints of this nature.
18. The ASB advised that it did not consider that the complaints necessarily fell under a particular provision of the Code of Ethics but that the ASB had scope to consider complaints under a catch-all category of "other" which enables the ASB to widen the scope of their review of advertisements subject to complaint. In the event the Advertiser withdrew the advertisement from broadcast prior to a meeting of the ASB, and under the practice followed by the ASB no determinations are made on advertisements which have been withdrawn prior to a hearing of a complaint.
19. The ABAC Rules and Procedures provide that the Chief Adjudicator will assess all complaints and determine if the complaint raises issues "which are solely within the

province of the AANA Code of Ethics". If a complaint is "not solely" within the Code of Ethics, then it is to be dealt with by the Panel under the ABAC.

20. Neither the ABAC itself, nor the ABAC Rules and Procedures, expressly contemplate a case where a complaint falls within neither the ABAC nor the AANA Code of Ethics. However, the drafting of the procedural rule regarding the coverage of the ASB of complaints establishes that the ABAC should act as a "safety net" to catch a complaint which does "not solely" raise a Code of Ethics matter, even if it also does not raise an ABAC issue.
21. Accordingly, the Panel concludes it should deal with this complaint and future complaints which do not fall solely under the AANA Code of Ethics, even when the complaint also does not apparently fall under the ABAC.

The Code

22. As stated, there is no express provision of the ABAC which goes to advertisements which suggest that complaints about alcohol beverage advertisement should not be made. Rather, the ABAC sets out a series of standards concerning the promotion of alcohol products.
23. Section (a) of the ABAC provides that advertisements for alcohol beverage must present a mature, balanced and responsible approach to the consumption of alcohol beverages and accordingly:
 - (iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages.

Arguments in Favour of the Complaints

24. It might be argued that the advertisement is contrary to a responsible approach to alcohol advertising by suggesting that complaints about advertising can be subject to an intimidatory response. Equally, it could be maintained that the encouragement of persons to "visit" a complainant is implicit of a call to violence and hence "offensive behaviour" in breach of section (a) (iii) of the ABAC.

The Advertiser's Comments

25. The Advertiser responded to the first complaint and a question posed by the Panel by way of letter dated 19 October 2005. Key points made by the Advertiser were:
 - The advertisement did not refer to an actual complaint about previous advertising and the name and address used in the advertisement of the supposed complainant was entirely fictional.
 - The advertisement in this regard was not intended to be taken literally

- The advertisement was intended to link to the previous Cougar TV commercial which featured an attractive barmaid and which did receive some complaints. The link was to reflect 'larrikin qualities of the brand'.
 - The rejection of the concern that the advertisement would encourage irresponsible behaviour or harassment of any kind based on how a reasonable person would view the advertisement.
 - The advertisement was withdrawn voluntarily shortly after being first screened due to a review of the campaign. This review concluded, that out of context of a viewer not having seen the earlier TV commercial, it may be taken that the advertisement was being disrespectful of the formal advertising complaints process.
26. The Advertiser concluded by stating its commitment to applying 'the spirit and intent' of the ABAC and that in hindsight the advertisement may be misconstrued as inappropriate. This was not however an admission that the advertisement breached the ABAC or other advertising standard codes. The Advertiser maintains that the ad was consistent with all codes.

The Panel's View

27. The ABAC and the AANA Code of Ethics set out a series of standards which advertising as a whole and alcohol beverage advertising in particular are required to satisfy. The background to the ABAC reveals a long history of development which has involved many stakeholders from industry, the public health sector and government. It does not seem this long history has required these stakeholders to previously consider the possibility that an advertisement might seek to promote a product by challenging the complaints system for advertising.
28. This is not surprising as it is impossible for any law or code to, in advance, contemplate everything an inventive mind might one day produce. In these circumstances, the body charged with administering and applying the code, must look to the policy rationale which underpins the code for assistance in assessing the novel situation.
29. In this case, the advertisement complained of, does not raise an issue which is dealt with by the ABAC in express terms. At best it might be argued that the advertisement is contrary to section (a) of the ABAC which goes to advertisements meeting a standard of responsibility, maturity and balance and (a) (iii) which goes to offensive behaviour. In fairness however, the balance of section (a) makes it clear that these standards are to be viewed in the context of depictions of the consumption of alcohol, rather than being an independent and more general benchmark.
30. The Panel applies a common sense approach to the interpretation of the ABAC which focuses on its intent and policy purpose rather than a 'black letter law' strict interpretation method. Applying this approach, it could be seen as implicit in the ABAC that an advertisement which actually sought to intimidate potential complaints would be contrary to the spirit of the ABAC and the entire purpose of an open, transparent and publicly accessible complaints system.
31. The Advertiser states that there was no intention to cause a sense of intimidation and that the advertisement when viewed in context of the entire Cougar Campaign would be seen by a reasonable person as being humorous and reflecting a 'larrikin' approach. However, the advertiser came quickly to the view, even before complaints were received, that the advertisement did not strike the right tone and could be misconstrued.

For this reason the advertisement was withdrawn and has not been broadcast since its original screening in September 2005.

32. The Panel notes this action by the advertiser and agrees with the decision which has been made. The advertisement was capable of being 'misconstrued' (if the advertiser's intentions are accepted) and as a result could undermine public confidence that complaints about advertising are able to be made freely and then assessed on their merits as part of a sensible regime of regulation.
33. The Panel finds that the advertisement is not in breach of the ABAC because it would force an artificial and unsustainable interpretation on section (a) of the ABAC to contend that it envisaged a standard of advertising which the advertisement breached. Having made the only decision which is open to it on the drafting of the ABAC, the Panel however wishes to record its view that the advertisement was inappropriate and the advertiser was misguided in adopting this approach. In other words, if the ABAC covered the situation, the Panel would have found the advertisement in breach. That said, the advertiser is entitled to have acknowledged its swift action in reconsidering the advertisement and withdrawing it from broadcast.
34. The Panel draws to the attention of its Management Committee the circumstances of this case. An amendment to ABAC to make it clear that advertisements must not directly or indirectly discourage the making of complaints should be considered in reviewing the ABAC and the operation of the complaints management system.
35. The complaints are dismissed.