ABAC

ABAC Complaints Panel Final Determination No: 112/11B

Complaint of McCusker Centre for Action on Alcohol and Youth
Product: Bacchus Shot Bucket
Supplier: Bacchus Distillery Pty Ltd

Professor The Hon Michael Lavarch – Chief Adjudicator Jeanne Strachan – Member Professor Richard Mattick – Member

13 February 2012

Introduction

1. This determination by the Alcohol Beverages Advertising Code ("ABAC") Adjudication Panel ("The Panel") concerns the name and packaging of the 'Bacchus Shot Bucket'. The product is produced by Bacchus Distillery Pty Ltd ("the Supplier"). This determination results from a complaint by the McCusker Centre for Action on Alcohol and Youth received 9 December 2011 that relates to this and other products and advertising which have been considered in separate determinations.

The Quasi-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. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising as quasi-regulation. The most important provisions applying to alcohol advertising are found in:
 - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB);
 - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and complaints mechanism established under the ABAC Scheme;
 - (c) certain broadcast codes, notably the Commercial Television Industry Code of Practice (CTICP) which restricts when direct advertisements for alcoholic drinks may be broadcast; and
 - (d) The Outdoor Media Association Code of Ethics which includes provisions about Billboard advertising.
- 3. The complaints systems operated under the ABAC scheme and the ASB are separate but inter-related in some respects. Firstly, for ease of public access, the ASB provides

- a common entry point for alcohol advertising and product material complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.
- 4. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
- 5. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

- 6. The complaint was received by ABAC on 9 December 2011.
- 7. The Panel endeavour to determine complaints under Part 1 of the ABAC dealing with advertisements within 30 business days of receipt of the complaint. As is explained later on, the process for complaints under Part 2 of the ABAC dealing with naming and packaging potentially involves a second stage of Panel consideration and the provision of additional time to the supplier of the product to make submissions. As a result, the 30-day timeframe is not applicable to these complaints

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. Pre-vetting of names and packaging is optional. The Advertiser is not a Code signatory and did not obtain pre-vetting approval for the name or packaging of the relevant product.

Name and Packaging

- 9. The Chief Adjudicator has a sample of the product material and the other Panelists have viewed photographs of the product.
- 10. The complaint goes to the product material in relation to the combination of the name "Bacchus Shot Bucket", the names of the separate individual beverages included in the bucket, the type of packaging used, the colour of the product and the label which describes the flavours of the product.
- 11. The Packaging is a transparent bucket with a lid that contains 28 individual 30ml prepackaged shots. Two layers of transparent flat based shot glasses containing alcohol beverages in different colours can be seen through the bucket.

- 12. A brown and cream coloured round label on the front of the bucket repeats the name "Bacchus shot bucket" in small print around the edge of the label. It includes images of three shot glasses with contents in various shades of brown, cream and pink on the right side of the label. The middle of the label features the text, "Bacchus Shot Bucket Party Bucket 28 x 30ml shots" with the term "Shot Bucket" in large prominent text. The bucket is sealed with a thin strip label with the name "Bacchus Shot Bucket" repeated along it.
- 13. A brown and cream coloured square label on the reverse side of the packaging has the name of the product, producer and distributor details. Below the Distributor details is an image showing the product contains approximately 10 standard drinks, followed by the statement "Please drink responsibly" and "contains Milk Products". Below the name of the product is a list of the alcohol beverages contained within the bucket, namely:
 - (a) 4 x QF Shots 15ml Melon Schnapps (15% alc/vol) 15ml QF Cream (15% alc/vol);
 - (b) 4 x Pancake Shots 15ml Maple Liqueur (15% alc/vol) 15ml Pancake Cream (15% alc/vol);
 - (c) 4 x Cowgirl Shots 15ml Bacchus Strawberry Liqueur (20% alc/vol) 15ml Original Bacchus Cream (15% alc/vol);
 - (d) 4 x Choc Éclair Shots 15ml Éclair Cream (15% alc/vol) 15ml Bacchus Choc-Whip Cream (15% alc/vol);
 - (e) 4 x Cowboy Espresso Shots 15ml Bacchus Café Latte Cream (15% alc/vol) 15ml Bacchus Butterscotch Gold Schnapps (20% alc/vol);
 - (f) 4 x Choc Banana Split Shots 15ml Bacchus Bananarama Cream (15% alc/vol) 15ml Bacchus Choc-Whip Cream (15% alc/vol);
 - (g) 4 x Cowboy Shots 15ml Original Bacchus Cream (15% alc/vol) 15ml Bacchus Butterscotch Gold Schnapps.

The Complaint

- 14. The complainant argues that the Bacchus Shot Bucket packaging:
 - (a) Provides a price and contains shots with bright colours (green, pink and yellow) and names (pancake, choc éclair, espresso, banana split, cowgirl and cowboy) that closely resemble confectionary which combined establish a clear appeal to children and adolescents; and
 - (b) is not targeted at mature responsible drinkers as shots are designed to be consumed quickly and when they taste of sweet confections like banana splits and chocolate éclairs are likely to be conducive to the rapid and excessive consumption of alcohol.

The Code

- 15. Part 2.1 of the ABAC provides that the naming and packaging of alcohol beverages (which is also referred to within these standards as "product material") must:
 - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly
 - i) must not encourage excessive consumption or abuse of alcohol
 - ii) must not encourage under-age drinking
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - b) not have a strong or evident appeal to children or adolescents;
 - f) not encourage consumption that is in excess of, or inconsistent with the Australian Alcohol Guidelines issued by the NHMRC.
- 16. Part 2.2 of the ABAC provides that these standards (Part 2 (1) (a)-(g)), apply to the naming and packaging of all alcohol beverages supplied in Australia, with the exception of the name of any product or a trademark which the supplier can demonstrate, to the satisfaction of the Adjudication Panel, had been supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009.

The Supplier's Comments

- 17. The Supplier responded to the complaints and questions posed by the Panel by letter dated 12 January 2012. The principal points made by the Supplier in relation to the packaging were:
 - (a) We do not believe that the name and packaging for the Bacchus Shot Bucket (the product) is in breach of the Alcohol Beverages Advertising & Packaging Code (ABAC). We respectfully request that that ABAC Adjudication Panel dismiss the complaint against the product.
 - (b) The name and packaging does present a sufficiently mature and responsible approach to the consumption of alcohol beverages and in no way promotes or encourages excessive and irresponsible consumption of alcohol, or consumption in excess of the NHMRC guidelines. The product and label clearly state the number of standard drinks in the product and the exact alcoholic content of the product and also contain the words "Please drink responsibly". Prior to marketing the company took advice concerning product regulatory compliance.
 - (c) The bucket presentation of the product ensures the quality and safety of the product. This is achieved in the following ways:
 - The bucket contains any spillage;

- The bucket delivers the product to the consumer without being damaged;
- The bucket allows for easy delivery of a number of small drinks to be transported in a spill free environment;
- The bucket protects the product from direct light;
- The bucket protects and preserves the product during transport; and
- The bucket provides a convenient method of carrying the product for the consumer since it has a handle.
- (d) The colour of each of the shots contained in the product conveys the flavour ingredient, or is a colour selected to reflect the flavour of the product. For example, a strawberry concentrate is used in the cowgirl shot which produces a pink-red colour in the final drink. The colour is also a useful guide to the consumer of the flavour of the product, for example, banana split is presented as yellow.
- (e) The names of the individual shots are merely a description of the flavour of the product. For example, an espresso shot would have a coffee flavour. As for cowgirl, and cowboy flavours, these are well-known names of cocktail beverages, so that therefore consumers would expect them to have a creamy-strawberry and a creamy-butterscotch type of flavour respectively.
- (f) Bacchus Distillery is a company which is certainly aware of its social responsibility and is committed to promoting the responsible use of alcohol. It is company policy for employees to volunteer with the Alcohol and Drug Abuse Helpline, and this extends to the participation of senior management. Company management are therefore actively involved in ensuring responsible drinking, and have a conscious awareness of this responsibility. The company would not seek to undermine the responsible use of alcohol by creating and advertising products which do not comply with ABAC standards.
- (g) The name and packaging of the product does not encourage underage drinking and it does not have a strong or evident appeal to children or adolescents. The name and packaging of the product merely depicts an image of the shots contained in the bucket. There is no depiction on the package of any images, persons or scenes with any appeal to lure in a young buyer. The package label does not depict activities, imagery. music. characters, celebrities or any other elements that have strong or evident appeal to, or are targeted at, people under 18 years of age.
- (h) The types of consumers purchasing the product range from 25 to 30 years or age, and older, they are typically responsible, married women and mothers who purchase the product for consumption at parties and 'get-togethers'. The product is only sold through licensed liquor outlets.

- By law, the buyers of such products must be over 18 years of age. It is not an adolescent buying the product.
- (i) The name and packaging of the product does not fall within the exception in Part 2.2 of the Code.
- (j) We respectfully request that, having considered our comments above explaining why the Bacchus Shot Bucket does not breach the Code, the ABAC Adjudication Panel will dismiss the complaint against our product.
- 18. The Advertiser that featured the product in their catalogue provided the following comments in relation to the product by email dated 21 December 2011:
 - (a) The shot product in question has had 8 people order it with 10 units sold in total in the past 2 months. Two persons ordered the 2 carton unit. The orders for the questioned shot product also generally contained orders for standard beer products, some with glassware as a gift and some with some wine. These can all be consumed over a period of time of weeks or months. This would indicate that the purchase of the questioned items is along with normally acceptable and standard alcoholic products and accessories. A mixture of men, women, single women and seemingly married women ordered the product (as determined by Miss, Mrs, Mr) on the orders.

The Panel's View

- 19. This complaint raises a number of issues both procedural and substantive that will be considered by the Panel, namely:
 - Is this complaint within ABAC's jurisdiction?
 - Do the ABAC standards apply to the Product material?
 - The operation of the rules and procedures applying to Part 2 of the ABAC.
 - Is the Bacchus Shot Bucket name, label and packaging consistent with Part 2.1 (a) (ii) and (b) of the ABAC?
 - Is the Bacchus Shot Bucket name, label and packaging consistent with Part 2.1 (a) (i) (iii) and (f) of the ABAC?
 - Provisional Panel Determination.
 - Final Panel Determination.

Is this complaint within ABAC's jurisdiction?

20. The first issue is that Bacchus Distillery Pty Ltd is not a member of an alcohol industry body sponsor of the ABAC, nor is it a signatory to the ABAC scheme. Accordingly, the supplier has no contractual obligation to abide by a Panel decision. Bacchus Distillery,

however, has stated its commitment to promoting the responsible use of alcohol and has fully cooperated in the adjudication process. Given the advertiser's willingness to co-operate with the ABAC scheme in this instance, the Panel has proceeded to make this determination.

Do the ABAC standards apply to the Product material?

- 21. The standards apply to 'the naming and packaging of all alcohol beverages supplied in Australia'. The exception to this wide coverage is provided in section (2) Part 2 of the ABAC, which states that the standards do not apply if 'the supplier can demonstrate to the satisfaction of the adjudication panel' that the name of any product or 'a trademark' had been supplied for Australian bona fide retail sale in the ordinary course of business prior to 31 October 2009.
- 22. The effect of section (2) Part 2 is to 'grandfather' product names, labels and packaging which are on the market prior to the extension of the ABAC scheme to product names and packaging. This creates a 'line in the sand', after which alcohol product suppliers of new product brands are to comply with the standards.
- 23. The advice of the supplier of the product is that the "Bacchus Shot Bucket" product was not available for sale in Australia prior to 31 October 2009. Accordingly, the Panel is not satisfied that the exemption is available to the supplier and the product name and label will be assessed against the substantive ABAC standards.

The operation of the rules and procedures applying to Part 2 of the ABAC

- 24. Part 2 of the ABAC mirrors the original Part 1 which applies to advertisements for alcohol beverages. The operation of Part 1 and Part 2 of the ABAC scheme is supplemented by rules and procedures settled by the Scheme's Management Committee. While similar, the rules have important differences.
- 25. The key points to note are:
 - A complaint does not trigger an assessment of either an ad (Part 1) or a name or packaging (Part 2) against each of the ABAC standards. Rather, the assessment is against those standards which the nature of the complaint raises concerns.
 - The Panel reaches a decision on an advertising complaint in a single stage process. In contrast, the process for a naming and packaging complaint can be a two-stage process involving a "provisional" determination reached after the first stage and then a second stage resulting in a final determination.
 - The second stage in a naming and packaging complaint occurs if the Panel finds from its Stage One consideration of the complaint that a relevant ABAC standard appears to have been breached. If, after the Stage One process, the Panel is of the view that an ABAC standard has not been breached, then the determination becomes final and no second stage process occurs.
 - The materials which the Panel considers in both an advertisement complaint and Stage One of a naming and packaging complaint comprise:

- The complaint
- A copy of the ad or the product material in a naming and packaging matter (either an actual example of the product material or an accurate description of the material *e.g.* photographs).
- A response to the complaint from the advertiser/product supplier, including any questions asked by the Chief Adjudicator (questions go to aligning the complaint to specific ABAC provisions).
- Any other materials the Chief Adjudicator deems fit. Such other materials have included:
 - Previous decisions of the Panel
 - Provisions and decisions on other alcohol or otherwise relevant marketing codes made in Australia and overseas
 - > Background research of relevance carried out by the Panel.
- If a provisional determination is made in a naming and packaging complaint, then the second stage is triggered. This involves:
 - Providing the supplier of the alcohol product with a copy of the provisional determination
 - The supplier may seek a "rehearing" of the Panel's decision by providing a written response with further submissions within 10 business days of the receipt of the provisional determination
 - The Panel is to consider "any material provided by the supplier" and then issue a final determination.
- If the final determination holds that the name or packaging of the product material is inconsistent with a Part 2 ABAC standard, then a further process can be triggered by the supplier by which a modified name or package can be given "once and for all" certification of consistency with Part 2 ABAC Standards.
- 26. The policy rationale for the different approaches to an advertisement complaint adjudication process and a naming and packaging adjudication process would appear to relate to the seriousness and potential economic and business impact of an adverse finding by the Panel in both cases. While a decision that an ad is inconsistent with an ABAC standard may cause disruption and expense to an advertiser, the consequence is confined to a particular ad or potentially a wider marketing campaign.
- 27. In contrast, a decision that a product name, its labeling or packaging is inconsistent with an ABAC standard can potentially lead to an inability to use a product brand. This could in effect remove not only the branding, but also the physical product itself, from the Australian market. This severe consequence would be argued to justify both the second stage in the adjudication process and the "once and for all" clearance process

available for modified naming and packaging developed by a supplier in response to a final determination.

Is the "Bacchus Shot Bucket" name, label and packaging consistent with Part 2.1 sections (a) (ii) and (b) of the ABAC?

- 28. It is apparent from the complaint that the complainant has concerns with the:
 - Price of the product, which is described at "\$34.99 making \$1.25 for 30ml of 15% alcohol very affordable"
 - Nature of the alcohol beverage itself, which is argued to have colours and tastes that will appeal to children and adolescents, as well as being conducive to rapid and excessive consumption; and
 - Packaging of the product which is argued features colours and names e.g. banana splits and chocolate éclair, which resemble confectionary and have a clear appeal to children and adolescents.
- 29. It needs to be understood that the Panel has jurisdiction only to assess and determine the packaging of the product against the relevant ABAC standards. The Panel has no power to assess the appropriateness of the pricing of the product, nor to decide if a product of this type should be permitted on the market at all, irrespective of how it is packaged. The question of the pricing regime for alcohol has been the subject of Federal Government policy in terms of the tax treatment of different alcohol product types. Equally, it is a matter for Government if a product, be it alcohol or otherwise, should be permitted for sale.
- 30. Accordingly, this determination goes to the matter which the ABAC scheme empowers the Panel to consider, and that is the name and packaging (product material). The complainant argues that the colours displayed in the clear bucket and the names of the individual "shots" bring to mind confectionary and have a clear appeal to children and adolescents. Part 2, sections (a) (ii) and (b) collectively provide that product material must not encourage under-age drinking, nor have strong or evident appeal to children or adolescents.
- 31. The Supplier argues that the product material does not offend the ABAC standards by reason that:
 - the types of consumers purchasing the product range from 25 to 30 years of age and older
 - The package label does not depict activities, imagery, music, characters, celebrities or any other elements that have strong or evident appeal to, or are targeted at, people under 18 years of age
 - The product is only sold through licensed liquor outlets and therefore only available to consumers over 18 years of age

- The bucket presentation ensures the quality and safety of the product by containing spillage, preventing damage by transport and from direct light and allows for easy and convenient delivery of a number of small drinks to be transported
- The colour of the shots conveys the flavour of the ingredient
- The names of the individual shots describe the flavour of the product.
- 32. The ABAC provides some guidance to the Panel as to how it is to assess the consistency of either an ad (Part 1) or a name or packaging (Part 2) to the prescribed standards of good marketing practice. The preamble to the ABAC provides that "the conformity of an advertisement with this code is to be assessed in terms of its probable impact upon a reasonable person within the class of persons to whom the advertisement is directed and other persons to whom the advertisement may be communicated, and taking its content as a whole".
- 33. The preamble in its current form was part of the ABAC before the extension of the scheme to names and packaging in 2009. Clearly the guidance provided has not been amended to refer to "product material" as opposed to advertising. The Panel, however, assumes it was not intended to exclude the preamble guidance from assessing complaints under Part 2, but that the essential messages in the preamble as to assessing consistency with the code are to apply to Part 2, as well as to Part 1.
- 34. This is important, as the key elements of the preamble are that consistency is to be assessed:
 - In terms of probable impact upon a reasonable person
 - Within the class of persons to whom the advertising (or the name or packaging) is directed and other persons to whom it may be communicated
 - Taking its content as a whole.
- 35. This means that the intention of an advertiser or a supplier is not a decisive issue, but rather the decisive issue is how "a reasonable person" is probably impacted upon by the ad or product material. The Supplier states that the types of consumers purchasing the product range from 25 to 30 years of age or older. No information is provided as to the basis for that assertion and in any event, the key question is how a reasonable member of the public who may well come across the product, either as part of a targeted audience or otherwise, would view the packaging and the names of the individual "shots".
- 36. The Panel has on numerous occasions adjudicated upon the equivalent provisions in Part 1 dealing with an alcohol advertisement's strong or evident appeal to children or adolescents. From these previous decisions, it can be noted:
 - The intention of the supplier as to its target audience is not material: rather, it is the "probable impact" of the product material which is important.

- Product material might have consequential or residual appeal to children or adolescents and not breach the code.
- What is not permitted is product material which has "strong or evident" appeal to children and adolescents.
- Assessment of consistency is a case-by-case exercise in which imagery, colour, use of characters and context is important in deciding the overall probable impact of the product material.
- 37. In the current case, the product material comprises a translucent bucket through which consumers can see two layers of clear shot glasses containing beverages of a variety of colours. Most of the beverages are shades of brown and cream but some are pink, lime green and yellow. The colour of an alcohol beverage is an aspect of the product itself and may not ordinarily be of critical importance. However, in this case the Panel considers that the clear packaging which displays two separate colours in each glass and the bucket packaging that enables a number of different colours and combinations to be seen is a relevant factor for the Panel in considering the packaging of the product.
- 38. The other factor of relevance to this consideration is the names of the individual shots as displayed on the label of the external packaging of the product and the foil lids that seal each of the individual shots. These names are evocative of sweets, *i.e.* Choc Éclair, and desserts, *i.e.* Choc Banana and Pancake.
- 39. The Panel has assessed the product material as a whole. A majority of the Panel believes that the product material is in breach of the standards in Part 2.1 Sections (a)(ii) and (b) of the ABAC by a combination of:
 - the translucent packaging of multiple individual products that enables a number of different colours to be displayed in combination;
 - the depiction on the label of the shots that look similar to multi-coloured icecream or yoghurt based desserts or drinks that would have strong or evident appeal to children or adolescents; and
 - the names of the individual shots on both the label and the foil lids of the shots that describe foods and concepts that have strong appeal to children or adolescents, namely Pancake, Choc Éclair, Choc Banana Split, Cowboy and Cowgirl.

Is the "Bacchus Shot Bucket" name, label and packaging consistent with Part 2.1 sections (a) (i), (iii) and (f) of the ABAC?

40. The complaint argues that the product material encourages or promotes excessive consumption in excess of the NHMRC Australian Alcohol Guidelines by its taste of sweet confections and its packaging as shots which are designed to be consumed quickly.

- 41. The Supplier argues that the product material does not encourage excessive consumption by reason that it clearly states the number of standard drinks in the product and the exact alcohol content of the product; and it contains the words "Please drink responsibly".
- 42. Again, it needs to be understood that the Panel has no power to assess if a product of this type should or should not be permitted for sale. The issue for the Panel is the consistency with ABAC standards of the packaging, and the names of the individual "shots", taken as a whole. The relevant ABAC standard is Part 2 section (a) (i) and (iii) which state the product material must not encourage excessive consumption or consumption that is in excess or inconsistent with guidelines issued by the NHMRC.
- 43. The Panel's previous decisions under Part 1 of the ABAC relating to advertising have recognised that there is a clear distinction between the purchase of alcohol packages of multiple containers *e.g.* carton of beer, case of wine and the consumption of alcohol. Essentially, the Panel recognises that purchasing alcohol is not the same as consuming alcohol. For instance, it does not follow that, because a consumer buys a carton of beer, it means that the consumer will then consume the alcohol in a binge-drinking session or otherwise in an excessive or irresponsible manner. Quite often the purchased beer might be consumed over several weeks, or by many people, and not a single individual.
- 44. The individual alcohol products within the bucket are packaged within shot glasses and are given various names such as Pancake and Cowboy Espresso Shots. In fact, each individual product is described as a "shot" and the bucket container is labeled as a "shot bucket". The term "shot" carries with it various connotations with respect to alcohol beverages, such as:
 - A description of a measure of alcohol often equal to a standard drink
 - A description of the type of glass in which a type of alcohol beverage is served.
- 45. The complainant takes the term to be associated with the rapid consumption of alcohol *i.e.* downing the contents in a single gulp. Certainly a reasonable person could take that inference from the term "shot" and the Panel believes that the individual packaged drinks may well be consumed quickly, as opposed to being sipped. It is noted, however, that the packaging of the individual shots have a flat bottom, as opposed to say a test tube or other style container, which would not easily allow consumption other than by a single swallow.
- 46. The complaint refers to the sweet confection flavours of the product as described on the label as likely to be conducive to rapid and excessive consumption of alcohol. The Panel doesn't believe that the description on the label of the sweet confection flavours encourages or promotes excessive or irresponsible consumption. The product flavours may increase the appeal of the product but the Panel considers that it doesn't necessarily follow that the product will be consumed in excess.
- 47. The Panel has assessed the product material as a whole and does not believe the packaging of the product breaches section (a) (i) (iii) and (f) of the ABAC.

Provisional Panel Determination

48. Consistent with section 4 (i) of the rules and procedures applying to the Panel processes, the Panel made a provisional determination on 25 January 2012 that the product material is in breach of Part 2, sections (a)(ii) and (b) of the ABAC.

Final Panel Determination

49. The Supplier was provided with a copy of the Panel's provisional determination on 25 January 2012 and has not requested a re-hearing of the provisional determination. As more than 10 business days have elapsed since the Supplier was provided with a copy of the Panel's provisional determination that determination is now made final.

Chief Adjudicator's Addendum to Determination 112/11B

Pursuant to clause 4.0(m) of The ABAC Scheme Rules and Procedures the onus is on the Supplier to demonstrate to the Chief Adjudicator that a product name or trademark was in use in the Australian market prior to 31 October 2009. The Rule provides that the Supplier may do so at any stage of the process prior to the end of the five (5) business day period the Supplier has to respond to a final determination.

In its response to this complaint dated 10 January 2012, the Supplier advised that "the name and packaging of the product does not fall within the exception in Part 2.2 of the Code". The Supplier did not respond to the Panel's provisional determination within 10 business days. On 13 February 2012 the Panel made its Final Determination. On 17 February 2012 the Supplier's solicitors responded to the Final Determination and advised "Whilst we acknowledge that the Bacchus Shot Bucket was not available for sale prior to 31 October 2009, the individual shots that are contained in the Bacchus Shot Bucket have been for sale in the Australian market since 2003. This includes the colours and flavour names in question." The ABAC Executive Officer requested that the Supplier specify the particular names and trademarks that the Supplier asserts fall within the grandfathering exemption and provide material in support of the assertions made. The Supplier has not done so and the Chief Adjudicator must now consider whether the Supplier has demonstrated that the relevant product name or trademark was in use in the Australian market prior to 31 October 2009.

The material before the Chief Adjudicator on this issue is the assertion of the Supplier that the individual shots and their colours and flavour names were in use in the Australian market since 2003 and the Supplier's earlier assertion that the name and packaging of the product does not fall within the exception in part 2.2 of the Code. The onus is on the Supplier to demonstrate that a particular name or trademark falls within the exception in Part 2.2 of the ABAC Code. Within its determination, the Panel assessed the product material referred to in the complaint as a whole, namely the "Bacchus Shot Bucket". It is clear from the Supplier's responses that this particular product was not in use in the Australian market prior to 31 October 2009. The Supplier's assertion that some elements of this product were in use in the Australian market since 2003 is insufficient to satisfy the Chief Adjudicator that the name or trademark of this particular product falls within the exception in Part 2.2 of the ABAC Code.

27 February 2012