

ABAC

ABAC Complaints Panel

Determination No: 65/08, 68/08, 72/08, 87/08 & 94/08

**In the COMPLAINT of The Alcohol Policy Coalition,
Ms Patricia Francis and Confidential complainants**

**Product: Jim Beam Bourbon Whisky
Advertiser: Jim Beam Brands Australia**

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

15 September 2008

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a television and website advertisement for Jim Beam Bourbon Whisky by Jim Beam Brands Australia Pty Ltd (“the Advertiser”) and arises from three complaints by confidential complainants received 15 August 2008 and 26 August 2008, and further complaints by Ms Patricia Anne Francis received 19 August 2008 and the Alcohol Policy Coalition received 29 August, 2008.

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 Advertising Code of Ethics which includes provisions about the content of Billboard advertising.
3. The ASB and the 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.
5. The complaints raise concerns under the ABAC and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

6. The complaint is in the form of four emails and a letter received by the ABAC Panel between 15 and 29 August 2008.
7. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue.
8. In this case, the advertisement was the subject of multiple complaints and it was decided to combine all complaints into a single determination. This has delayed resolution of the earliest complaints but collectively the complaints have been determined within the 30 day timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The television ad was submitted for pre-vetting examination and approval was given to a version of the ad (UL98/08). The website was not subject to pre-vetting.
10. The actual ad broadcast was however a different version to that which was given pre-vetting approval. This difference and its importance is discussed at a later point of this determination.

The Advertisement

11. All of the complaints concern a television advertisement. The advertisement features an attractive young woman sitting alone at a bar. She wears a low cut black dress and has a drink on the bar next to her. A barman is cleaning up in the background and there is also music playing. The woman says to the camera "Yeah, I'm single. I just broke up. Well,

two years ago. You see the thing about restraining orders, it's just a piece of paper." She takes a sip of her drink through her straw and continues "Oh, I still see him though but he doesn't see meeee!". The woman laughs and leans forward lowering her voice "I wear a disguise when I follow him". The scene is then replaced with an image of the Jim Beam logo and the words and simultaneous voiceover "The Stalker". The shot is then replaced with a picture of a bottle of Jim Beam Bourbon with the voiceover "Jim Beam", followed by the words and simultaneous voiceover "The Bourbon". There is also text at the bottom of the screen "Stalk your mates at thestalker.com.au".

12. The complaint of the Alcohol Policy Coalition also refers to a website that was available at <http://thestalker.com.au> until removed from public viewing by the Advertiser on 8 August 2008. The relevant website page has been made available for review by the Panel and can be described as follows:

- (a) The opening page of the website features a photograph of the woman featured in the tvc sitting at a bar with the text "The Stalker" and the Jim Beam logo directly below the woman. To proceed further the user must first confirm that they are over 18 years of age. Once they have done so they are taken to a page headed "Stalk your mate with a SMS from the Stalker" which features the following text:

"Freak out your friend with a message from our very own bunny-boiler. You'll have your mate looking over their shoulder and filling out an AVO in no time. But like the Stalker says, it's just a piece of paper. They'll need more than that to stop her. Happy Stalking!"

- (b) The user is then able to press a button "continue" to proceed to the next page entitled "Choose message" where they are able to select from the following messages to SM to their person of choice:

- Don't turn round baby, but you look SO hot. Speaking of babies ours'd be SO cute, like you. I wonder what we'd call them?
- I dreamt about you last night. Again! Every day without you is a NIGHTMARE! I kept your shirt. I wear it under my uniform.
- Why won't you answer? It's me. Are you ignoring me? I'd do anything for you. I hate you SOOO much? We'll be together 4ever.
- Hi big boy, remember me? What a crazy night. I think about you 24 7. I know it was 2 years ago but I'll never let u go.
- Who is she? It's not your sister because she's tied up in my basement. I forgive you. It's me or it's no one! I hate u but I love u.

- (c) The website then allows a user to enter a person's name and mobile phone number to enable the sending of a message. Before pressing the send button the user is required to agree to the following statement "I confirm that I am choosing to "stalk" with care and am certain that the person I am sending the SMS to will not be offended or upset at receiving this message".
- (d) The user may also view the tv, download ringtones or select a send to a friend. There is also a link to the Jim Beam online shop and to the separate sites for the other Jim Beam tv's referred to as 'The Tragedy' and 'The Girlfriend'.

The Complaints

13. The first complainant argues that the advertisement:
 - (a) suggests to children staying up to watch the Olympics that stalking is good and it is all made possible by drinking Jim Beam.
14. The second complainant argues that the advertisement:
 - (a) is appalling in that it trivializes a restraining order and makes a joke of stalking a former partner particularly as they are advertising alcohol.
15. The third complainant argues that the advertisement:
 - (a) attempts to elicit humour from the aberrant behaviour of stalking, which attempts to undermine the laws relating to this serious crime and uses a character who is amused at flouting the law;
 - (b) associates the product, Jim Beam, with criminal behaviour;
 - (c) queries whether it is suggested that whisky turns people into stalkers;
 - (d) queries if because the victim is a male and the perpetrator is a ditzy woman, the notion of stalking is less threatening.
16. The fourth complainant argues that the advertisement:
 - (a) is a pathetic excuse to advertise some sick creative director's sexual fantasies; and
 - (b) with so many issues surrounding alcohol and its abuse of, you'd think we could raise the bar in terms of responsible drinking messages, instead of each of these women are seen as unintelligent, stupid highly sexualised objects, really scraping the bottom of the barrel as far as Australian standards are concerned.
17. The fifth complainant provided very lengthy and detailed arguments, but in summary, argues that the tv and website advertisement:

- (a) promotes offensive behaviour and fails to present a mature and responsible approach to the consumption of alcohol through associating the Jim Beam product with offensive behaviour, namely depicting a woman promoting and trivialising the offensive, criminal behaviour of stalking. The complete complaint from the Alcohol Policy Coalition is provided as Attachment 'A'.

The Code

18. The ABAC provides that advertisements for alcohol beverages 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.....

Arguments in Favour of the Complaint

19. In favour of the complaints it can be argued that the advertisement:

- (a) breaches section (a) of the ABAC Code by presenting an immature and irresponsible approach to the consumption of alcohol by linking the use of the product with the criminal offence of stalking;
- (b) breaches section (a)(ii) and (b) by encouraging under-age drinking by its broadcast during the Olympic Games when children are likely to be a high proportion of the viewing audience;
- (c) breaches section (a)(iii) in promoting offensive behaviour by indicating that it is acceptable to engage in “stalking” through downgrading and trivialising the effect of a restraining order and the use of the message “Stalk your mates” displayed at the conclusion of the advertisement;
- (d) breaches section (a) and (a)(iii) by the suggestion that the consumption of alcohol contributes to a person considering “staling” to be “good”;
- (e) breaches section (a) by encouraging an irresponsible approach to alcohol consumption by utilising a “male sexual fantasy” to encourage alcohol use.

The Advertiser's Comments

20. The Advertiser responded to the complaint and questions posed by the Panel by way of letter dated 5 September 2008. The principal points made by the advertiser are as follows:

- (a) 'The Stalker' parodies the boyfriend / girlfriend scenario in which one or other is reluctant to accept a relationship is over. In this case it is the girlfriend, who talks to camera in the established mock interview style of the campaign. In development research carried out prior to filming (**women age 20 to 35 and men age 18 to 25**) our audience quickly related to the boyfriend / girlfriend situation because it is an established cliché and specifically because the script begins with the words "Yes, I'm single" spoken by a young lady alone in a bar. The tvc is a parody from beginning to end. To help viewers identify the parody early on, the next phrase is "I just broke up...well, two years ago", which is a nonsensical contradiction. As the girl continues she giggles uncomfortably in the style of a 'mad-hatter', reinforcing the silliness of the words. Finally, she whispers to explain how she wears a disguise when she follows him. We chose these words because they present a slapstick comedy delivery of the punch-line. The audience with whom we tested this film found the tvc entertaining because it is silly, and the girl character is farcical ie. not existing in the real world, only in the world of a comedy sketch, a film and in this case, advertising.
- (b) There is no observable link in the commercial storyline to alcohol use and stalking so the question becomes; are we linking the consumption of Jim Beam with stalking, simply by offering a comedy sketch endorsed by Jim Beam. Specifically, does a reasonable person watch this commercial and then believe that drinking Jim Beam leads to an increased likelihood of they or others becoming stalkers? Our opinion is that the link between the two is so tenuous that any reasonable person would not be influenced in this way.
- (c) The Olympic Games audience comprised fewer young viewers than comparable FTA programming at similar times. The table below shows under 18's being the smallest contributor to this audience.

BEIJING AUDIENCE			
Combined Agg. Mkts			
Target	AUD	TARP	Commercial Shr
Ppl<18	47,299	3.4%	55.1%
Ppl 18-29	36,543	4.1%	50.7%
Ppl 30-39	55,805	7.2%	56.4%
Ppl 40-54	96,228	7.5%	59.1%
Ppl 50-64	104,112	9.0%	60.1%
Ppl 55+	173,757	10.4%	61.3%

Source; Seven Affiliates Networks

- (d) The girl character is the one who speaks, and engages the audience which means that the girl represents stalking, not Jim Beam. By portraying the girl in this way we position her 'outside society', she is exceptional and irrational, one to be singled-out, not a person we propose anyone would wish to associate themselves with. On one

hand this is how the comedy works – it is easier to mock the outsider, but it is also why a reasonable person does not believe this commercial implies it is acceptable to engage in stalking. We maintain it indicates the contrary, that stalking should only be associated with those who sit outside society, those we single-out as unusual. The version of the commercial with “Stalk your mates” displayed in the final frame was replaced by a version without this notice, as soon as the accompanying website was closed (August 8th). An oversight at the broadcasting networks resulted in this notice continuing to display. This has not been the case since 29th August.

- (e) The commercial does not seek to portray stalking as desirable, nor does it seek to promote stalking, rather it parodies stalking as the preserve of the unusual. Since there is no consumption of alcohol implied or suggested we are unsure how alcohol consumption and the ‘acceptability’ of stalking can be linked unless this question is with reference to the girl character drinking alcohol and possibly believing her behaviour is justified as a result. The only comment we would make is that her drink is modest and the way she drinks is similarly under done.
- (f) The advertising aims to persuade consumers to choose Jim Beam instead of a competitor brand. Advertising does not have the magical power to persuade grown ups to drink more or less than they would otherwise drink. The National Drug Strategy Household Surveys shows alcohol consumption has continued to decline since the turn of the millennium, despite a continual increase in advertising expenditure. A TV commercial represents a significant financial investment which aims to be recouped by airing a tvc over and over again. The more effective commercials are those which continue to entertain when watched repeatedly. Whether one used the term “male sexual fantasy” or not, it is clear we have engineered ‘watchability’ into this commercial by using an attractive woman and a performance which is entertaining. However, ‘the reasonable person’ might be surprised to hear that the depiction of an attractive female in a TV commercial would result in irresponsible consumption of alcohol on their part. They might also question whether depiction of “male sexual fantasy” is irresponsible, or simply a mainstream television cliché which somehow becomes questionable when endorsed by an alcohol brand.

The Panel’s View

- 21. The advertisement is one of a series of tvc’s from the advertiser which are respectively entitled ‘The Party’, ‘The Tragedy’ and ‘The Stalker’. Collectively the series has attracted a large number of public complaints with ‘The Stalker’ attracting most complaints. The Panel will be making separate determinations on each of the advertisements.
- 22. The complaints bring into focus a number of aspects of the regime applying to alcohol advertising in Australia and each aspect and issue will be dealt with in turn. Accordingly, this determination will deal with the following matters:

- the relationship between the AANA Code of Ethics and the ABAC;
- ABAC pre-vetting approval;
- Section (a)(ii) and (b);
- Section (a) and (a)(iii) and the tv; and
- Section (a) and (a)(iii) and the website.

The ABAC and Code of Ethics

23. The advertisement has been subject to a large number of public complaints. In most cases the complaints have raised issues which in essence are about the ad trivialising domestic violence and diminishing the effectiveness of Domestic Violence Orders. This issue falls squarely under section 2 of the AANA Code of Ethics and will result in a decision on the ad by the ASB.
24. The AANA Code of Ethics is a generic code which applies to advertising irrespective of the type of product being promoted. In contrast, the ABAC is a set of standards which go to alcohol and its responsible use. A complaint might raise issues under the ABAC or the Code of Ethics or both codes. In this case, the complaints dealt with in this determination have raised issues about alcohol as a product as well as more general concerns. This means there will be separate determinations by this Panel and the ASB.
25. While both the ASB and this Panel operate against the backdrop of 'community standards' in assessing complaints and ads, both bodies are applying quite distinct codes which go to different matters and accordingly different conclusions might be reached on a particular ad.

Pre-Vetting Approval

26. The ABAC scheme features the independent review of ads prior to broadcast or publication. This review is conducted by persons who are separate and independent from members of the Panel.
27. A version of the tv; was submitted for pre-vetting and approval was granted. In the event it seems the actual version broadcast varied from the approved version to add the printed message at the conclusion of the ad of 'stalk your mates at thestalker.com.au'. The approved version had reference to the website URL but did not have the 'stalk your mates' message.
28. The advertiser's explanation for the alteration was 'because the content of the website contained a number of text messages which viewers were invited to send to their friends'. The website itself was not required under the ABAC scheme to be pre-vetted and it was not independently reviewed.
29. The advertiser advised that the website was closed on 8 August and that at this point the tv; version of the ad with the 'stalk your mates' message was to have been replaced with the pre-vetted approved version. This in fact however did not occur until 29 August 2008.
30. The importance of the difference in the versions is discussed below.

Section (a)(ii) and (b)

31. The first complaint raises concerns that the ad was broadcast during the Olympic Games and will therefore be seen by many young viewers. The advertiser provided information that the viewing cohorts during the Games is not predominantly younger persons and that the ad had no particular appeal to children or adolescents.
32. The ABAC is a code which is based on the content of ads rather than the placement of ads. This can be contrasted with the CTICP which specifically limits the times at which alcohol ads can be broadcast. The ABAC standard goes to ads not encouraging underage drinking or having a strong or evident appeal to children.
33. The Panel does not believe that the content of the ad can reasonably be said to have a particular appeal to younger viewers and accordingly this ground of the complaint against the ad is dismissed.

Section (a) and (a)(iii)

34. The balance of the complaints raises the appropriateness of linking alcohol use with the theme of the ad, namely stalking. The argument is comprehensively set out in the complaint from the Alcohol Policy Coalition, but the same point is the essence of each of the other complaints.
35. As previously explained, the starting point is the fact that the ABAC does not go to the general issues of good taste, decency and violence and community safety. These are standards which alcohol advertising, like all advertising, should satisfy, however these standards are laid down in the AANA Code of Ethics and compliance with the standards is assessed by the ASB. The ABAC standards go to more specific issues related to the use of alcohol.
36. The relevant ABAC standards are found in section (a). This requires that advertising of alcohol beverages must present a mature, balanced and responsible approach to the consumption of alcohol and must not promote offensive behaviour, or excessive consumption, misuse or abuse of alcohol beverages.
37. Section (a) is a combination of both 'positive' and 'negative' standards. Ads must be positive in terms of being balanced, mature and responsible and must not be negative in terms of promoting offensive behaviour. In assessing if an ad meets this standard, the ABAC preamble provides that an ad is to be assessed with regard to its probable impact upon a reasonable viewer taking its content as a whole.
38. The Panel has on previous occasions examined the operation of section (a) and (a)(iii) including:
 - Determination 18/05;
 - Determination 40/05;
 - Determination 56/05 and 04/06;

- Determination 55/06;
 - Determination 43/07;
 - Determination 12/08;
 - Determination 15/08 and 24/08.
39. From a review of these decisions, the following general observations can be made on how the Panel has interpreted section (a) and (a)(iii):
- the section is concerned with a 'responsible approach' to alcohol consumption which is a wider concept than consumption;
 - the expression 'offensive behaviour' used in section (a)(iii) must be understood within the context of the section and ABAC as a whole and is not a freestanding standard akin to section 2 of the AANA Code of Ethics;
 - within the context of ABAC, 'offensive behaviour' means unacceptable behaviour related to or influenced by the misuse of alcohol eg. Drunken loutish behaviour;
40. The Panel has recognised in a number of its decisions that alcohol-related violence is a serious social and public health issue. It has been noted that a public policy aim is to minimise the occurrence of such alcohol-related behaviour.
41. That said an ad must be assessed on its own merits against the relevant standards of the ABAC. The complainants' argument is that the ad breaches section (a) and (a)(iii) on the basis that the ad is failing to present a responsible approach to the consumption of alcohol through the association of alcohol use with stalking. Further, section (a)(iii) is breached by the promotion of offensive behaviour namely the criminal activity of stalking.
42. In support of this argument the Alcohol Policy Coalition contends that the overall context of the ad, which is set in a bar and includes the consumption of a drink (presumably alcohol) by a female character as she explains her stalking of her former boyfriend clearly links the use of the product with the anti-social and criminal behaviour of stalking.
43. The detailed arguments of the Coalition (Attachment 'A') go on to refer to previous Panel decisions and reliance is placed on guidance note 3 to the ABAC. The guidance notes are published by the ABAC Scheme's Management Committee to assist understanding of the ABAC provisions, but the notes are indicative only and have no binding effect on either pre-vetters of advertisements or this Panel.
44. For its part, the advertiser strongly rejects that the advertisement is in breach of section (a) and (a)(iii) of the ABAC. The advertiser contends the ad parodies a boyfriend / girlfriend scenario in which one of the

parties is reluctant to accept a relationship is over. This is argued to be done in a light-hearted and entertaining way.

45. The advertiser asserts that its market testing of the ad indicated that the intended audience understood that the ad is a cliché, is silly and is not to be taken seriously. It is argued that the ad does not link alcohol consumption with stalking and a reasonable viewer would not believe consumption of the product leads to an increased likelihood of stalking.
46. Further, it is argued by the advertiser that the female character is portrayed as irrational and 'outside society' and a person who a reasonable viewer would not identify with. This is an element of the comedic device used in the ad but also indicates that 'stalking should only be associated with those who sit outside society, those we single out as unusual'. Finally, it is argued that the alcohol consumption depicted in the ad is modest and there is no implication that alcohol consumption was involved when the stalking the woman described was carried out.
47. The Panel believes the television ad is in breach of section (a) of the ABAC. The ad fails to present a responsible approach to alcohol consumption. Domestic violence is a serious social and criminal justice issue in Australia. The ad presents a woman who is:
 - positioned in a bar consuming alcohol;
 - communicating in a manner which is slightly irrational and whose behaviour could arguably be influenced by alcohol consumption;
 - relating her history of stalking.
48. The ad is a parody, but the humour does not mean it is not promoting offensive behaviour and failing to present a responsible approach to alcohol use. This is reinforced by the final message of 'stalk your mates' which advised of the link to the product website. This message was not part of the version of the ad granted pre-vetting approval.

Section (a) and (a)(iii) and the website

49. The advertiser closed the relevant area of its website on 8 August 2008 following notification of complaints about the site. The Panel's practice is that it will make a determination on a complaint notwithstanding the withdrawal of an ad. The Panel sought from and was provided by the advertiser with a copy of the webpages and accordingly is able to make a decision. The Panel thanks the advertiser for its willingness to allow the relevant webpages to be reviewed.
50. The Alcohol Policy Coalition argues the website like the television ad breaches the ABAC. The advertiser was not required to submit the web material for pre-vetting and acted to remove the relevant pages when aware of public complaints.
51. The Panel believes the web pages are in breach of section (a) and (a)(iii) of the ABAC on the same grounds as the television ad. In addition, the web page provides viewers with the option to send various 'stalking themed' messages via SMS. These messages, when viewed in the

context of the ad, are not consistent with the standard of a responsible approach to alcohol use.

52. Accordingly, the complaints in relation to the television ad and the single complaint in relation to the website are upheld.

22 August 2008

The Advertising Standards Bureau
Level 2
97 Northbourne Avenue
TURNER ACT 2612

Dear Sir / Madam,

**COMPLAINT REGARDING "THE STALKER" JIM BEAM
ADVERTISEMENT AND WEBSITE**

Alcohol Policy Coalition

The Alcohol Policy Coalition (the Coalition) is a coalition of health agencies - VicHealth, the Cancer Council of Victoria, the Australian Drug Foundation and Turning Point Alcohol and Drug Centre - who share a concern about the level of alcohol misuse and the health and social consequences in the community. The Coalition's long-term goal is to promote a safer drinking culture in the community.

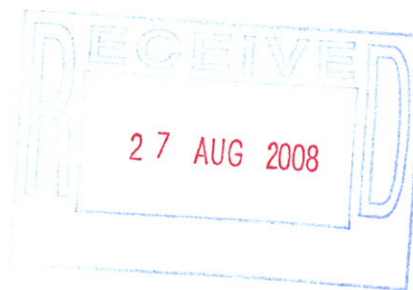
On behalf of the Coalition, we wish to lodge a complaint about the content of an advertisement and associated internet website called "The Stalker". The Stalker is part of an ongoing Jim Beam advertising campaign entitled "The Bourbon".

The Coalition considers that The Stalker advertisement and website contravene both the Alcohol Beverages Advertising Code (ABAC) and the Australian Association of National Advertisers Code of Ethics (the Code).

Executive Summary

Breach of the Alcohol Beverages Advertising Code

- The Coalition believes The Stalker advertisement and website contravene ABAC on the ground of "offensive behaviour" under (A)(iii) of ABAC.
- The Stalker advertisement and website breaches section (A) by failing to present a mature and responsible approach to the consumption of alcohol through the association of the Jim Beam product with offensive behaviour. The Stalker advertising campaign breaches section (A)(iii) by depicting a woman promoting and trivialising the offensive, criminal behaviour of stalking.
- "Offensive behaviour" under ABAC relates to alcohol misuse. The Coalition considers that the combined statements and actions of the woman depicted in the advertisement plus its setting and title create a direct link and association between alcohol and stalking. The "offensive behaviour" provision of ABAC is also breached - in the Coalition's view - due to the advertisement's promotion of the illegal, criminal activity of stalking.



VicHealth



- The Coalition further considers that the probable impact of The Stalker advertisement on a reasonable person would be that it depicts behaviour that does not meet acceptable, community standards. It is neither fair nor tolerant and explicitly breaks the law. Another probable impact on a reasonable person is that the advertisement has failed to present a mature and responsible approach to the consumption of alcohol through the association of the Jim Beam product with the offensive behaviour of stalking.

Breach of the Australian Association of National Advertisers Code of Ethics

- The Coalition considers that The Stalker advertisement is in breach of the AANA Code on the grounds of presenting or portraying violence (2.2.1) and depicting material contrary to prevailing community standards on health or safety (2.6).
- The Coalition considers that The Stalker advertisement presents or portrays violence. Stalking is a form of aggressive and violent behaviour that has been sanctioned as illegal by the criminal law. The woman depicted in the advertisement is engaged in this behaviour. By her own description, she follows her ex-boyfriend for extended periods and is actively breaching an intervention order.
- The Coalition considers The Stalker advertising campaign to be in breach of prevailing health and safety community standards. These standards advocate against the nature and effect of stalking behaviour as illustrated by the creation of stalking as a criminal offence under Australian law. The Stalker is also contrary to the commonly understood idea of a person's right to peaceful enjoyment and security in their daily lives in Australia.

Description of The Stalker advertisement

"The Stalker" is an advertisement about a woman who has not accepted that her relationship with her ex-boyfriend is over. It debuted on Fox Sports on Friday, 1 August 2008 and is booked to run on Channel Seven during the Olympics.

This advertisement features an attractive young women sitting alone at a bar. She wears a low cut black dress and has a drink on the bar next to her. A barman is cleaning up in the background. There is also music playing.¹

She tells us: "Yeah, I'm single. I just broke up. Well, two years ago. You see the thing about restraining orders, it's just a piece of paper. [Takes a sip of her drink through a straw]."²

Oh, I still see him though but he doesn't see meeee! [Laughter. Leans forward and lowers voice to a whisper] "I wear a disguise when I follow him."³

At the end of the advertisement, a male voiceover states: "The Stalker. Jim Beam. The Bourbon." Writing at the bottom of the screen invites you to "Stalk your mates at the thestalker.com.au".⁴

The Stalker advertisement can be viewed at the following website address:

<http://www.youtube.com/watch?v=c8c8FJsh2qg&feature=related>.

¹ For a visual depiction of this scene, see Attachment 1 in the Appendix.

² For a visual depiction of this scene, see Attachment 2 in the Appendix.

³ For a visual depiction of this scene, see Attachments 3 and 4 in the Appendix.

⁴ For a visual depiction of this scene, see Attachment 5 in the Appendix.

Description of The Stalker website

Until recently, The Stalker website was available at <http://thestalker.com.au>. However, Jim Beam removed the website from public viewing on Friday, 8 August 2008. The front page of the website now has the Jim Beam logo and the words "Website Closed."

The Coalition viewed and accessed the website prior to its removal. The following description of the website is based on that viewing.

At arriving at the front page of The Stalker website, you must confirm that are over 18 years of age. Once you have done so, you are taken to a webpage headed: "Stalk your mate with a SMS from the Stalker".

This webpage has the following text:

"Freak out your friend with a message from our very own bunny-boiler. You'll have your mate looking over their shoulder and filling out an AVO in no time. But like The Stalker says, it's just a piece of paper. They'll need more than that to stop her. Happy stalking!"

After pressing "continue" to take you to a new webpage, you are able to select from the following messages to SMS to your person of choice:

- Don't turn round baby, but you look so hot. Speaking of babies ours'd be so cute, like you. I wonder what we'd call them?
- I dreamt about you last night. Again! Every day without you is a nightmare! I kept your shirt. I wear it under my uniform.
- Why won't you answer? It's me. Are you ignoring me? I'd do anything for you. I hate you sooo much! We'll be together 4 ever.
- Hi big boy, remember me? What a crazy night. I think about you 24 7. I know it was 2 years ago but I'll never let u go.
- Who is she? It's not your sister 'cause she's tied up in my basement. I forgive you. It's me or it's no one! I hate u but I love u.

The website also offers a place for you to enter your friend's name and mobile phone number to enable you to send the message that you choose.

Alcohol Beverages Advertising Code

The Coalition believes The Stalker advertisement and website contravenes ABAC on the ground of "offensive behaviour" and we seek the adjudication of the ABAC Complaints Panel (the Panel).

(A)(iii) of the ABAC outlines offensive behaviour:

Advertisements for alcohol beverages must –

- (a) *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 alcoholic beverages.

In the Coalition's view, section (A) is breached by The Stalker advertisement and website failing to present a mature and responsible approach to the consumption of alcohol through the association of the Jim Beam product with offensive behaviour. Section (A)(iii) is breached through The Stalker advertisement depicting a woman promoting and trivialising the offensive, criminal behaviour of stalking.

Definition of “offensive behaviour”

In ABAC Complaints Panel Determination No: 55/06, the Panel considered the definition of offensive behaviour. The Panel noted that “offensive behaviour” is clearly a “wide expression but the context of its use in section (a) seems to be mostly likely directed at loutish or drunken behaviour.”⁵ In effect, “offensive behaviour” targets behaviour related to alcohol misuse.

Does the behaviour depicted in The Stalker meet this test? On one view, it does not. The woman shown in the advertisement is not portrayed as drinking alcohol in an excessive or irresponsible manner.

However, on another view, the overall context of The Stalker suggests that there is an association between alcohol and the offensive behaviour of stalking. For example, Jim Beam has chosen to endorse its product through an advertising campaign entitled “The Stalker”. The advertisement is set in a bar. The woman is shown in the advertisement as consuming an alcoholic beverage and having a half-drunk drink sitting next to her on the bar at various points in the advertisement.

In particular, the woman makes highly inappropriate and offensive statements directly after consuming some of her drink – “Oh, I still see him though, but he doesn’t see meeee! [Laughter. Leans forward and lowers voice to a whisper] “I wear a disguise when I follow him.” It is unclear whether the amount of alcohol the woman has drunk is influencing her behaviour. Nevertheless, the advertisement as shown highlights the woman laughing and making inappropriate remarks about stalking behaviour following the consumption of a drink. It also reinforces the impression that the advertisement treats the offensive behaviour of stalking as a joke. In the Coalition’s view, the combined statements and actions of the woman and the setting and title of the advertisement create a direct link and association between alcohol and stalking.

If, however, the view is taken that there is no direct association between alcohol and stalking, the Coalition considers that the “offensive behaviour” definition test is nevertheless met by the description of stalking behaviour itself.

The ABAC does not permit the promotion of illegal or criminal activity through alcohol advertisements. While noting that offensive behaviour must be connected to alcohol related behaviour, the Panel in ABAC Complaints Panel Determination No: 55/06 went on to say that:

“The occurrence of alcohol related crime, particularly violence, is well recognised as a social and economic problem....The Panel believes *an advertisement which promoted criminal activity would be in breach of the ABAC (italics added).*”⁶

In effect, what is important to determine whether an advertisement is in breach of ABAC in this context is the existence of criminal or illegal activity being portrayed in the advertisement. The establishment of a link between the alcohol consumption and the illegal or criminal behaviour is a secondary issue.

Guidance Note 3 to the ABAC reinforces this view. This states that:

“There can be no association with violent, aggressive, dangerous, anti-social or illegal acts or behaviour, nor can there be any suggestion of illegal, irresponsible or immoderate consumption of alcohol. *It is of no consequence whether the presence or consumption of alcohol in this context has caused the circumstance being portrayed; as such issues are not to be presented in any form. (italics added)*”.⁷

⁵ ABAC Complaints Panel Determination No: 55/06: *Final Determination – Tooheys Extra Dry*, 15 February 2006, paragraph 22. Accessed 12/08/08 at <http://www.abac.org.au/uploads/File/Final%20Determination%20-%20Tooheys%20Extra%20Dry%20-%2015%20Feb%202006.pdf>.

⁶ As above, paragraph 22.

⁷ Guidance Note 2, *Alcohol Beverages Advertising Code: Guidance Notes*. Accessed 12/08/08 at <http://www.abac.org.au/uploads/File/ABAC%20Guidance%20Notes.pdf>

Consequently, whether The Stalker advertisement is in breach of ABAC depends on whether it is perceived as promoting criminal or illegal behaviour. The ABAC Preamble indicates that an advertisement is to be assessed against ABAC in terms of its probable impact on 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.

To determine whether it is probable that a reasonable person would perceive The Stalker advertisement as promoting criminal behaviour, it is necessary to answer two questions:

- (1) whether The Stalker advertisement depicts offensive behaviour in the sense of criminal or illegal activities; and
- (2) whether a reasonable person would perceive it as such.

These issues are discussed below.

Stalking as “offensive behaviour”

The Coalition considers that The Stalker advertisement promotes “offensive behaviour” by promoting and trivialising the criminal offence of stalking.

Stalking is a criminal offence in each Australian State and Territory. In Victoria, the relevant legislation is section 21A of the *Crimes Act 1958* (Vic). Under this section, a person is guilty of stalking if he or she engages in a series of prohibited acts with the intention of causing physical or mental harm to a victim or causing fear or apprehension for the victim's safety. A person does not have to cause fear in the victim if the behaviour is engaged in with malicious intent.

Prohibited behaviour under section 21A of the *Crimes Act 1958* (Vic) includes following a person, contacting the person by any means such as telephone, text message or email and keeping the person under surveillance.

Victims of stalking behaviour can go to court to take out restraining orders (also called intervention orders) to prevent their stalker from continuing to engage in this behaviour. These orders indicate that a person is prohibiting from continuing their violence or harassment and may state, amongst other things, that a person is not allowed to hurt, threaten or stalk you, is not allowed to come to your home or work and must not try to see you or come near you.

Based on the portrayal of her behaviour in The Stalker, the woman in the advertisement is explicitly breaking the law. She describes following her ex-boyfriend and keeping him under surveillance while wearing a disguise. These are both prohibited activities under section 21A. Her statements also illustrate that she has been engaging in this course of conduct for some time - for the two years since she broke up with her ex-boyfriend.

In addition, the woman is engaging in further criminal behaviour by breaching a restraining order. She makes the statement that: “You see the thing about restraining orders, it’s just a piece of paper”. This creates the impression that her ex-boyfriend is aware of her behaviour and has taken out a restraining order against her to prevent her from engaging in further, similar behaviour. However, by her statements, the woman in the advertisement has actively continued to follow her ex-boyfriend without his knowledge [“Oh, I see him though but he doesn’t see meeee”], donning a disguise to remain undetected. By doing this, she is committing a further criminal offence under the *Crimes Act 1958* (Vic).

The Coalition considers that the Stalker advertisement is endorsing the illegal, criminal offence of stalking as socially acceptable. In effect, the advertisement suggests it is okay to stalk people for an extended period of time and to follow them around in disguise and in breach of a court order. The woman in the advertisement is depicted as trivialising and laughing about what is serious, criminal conduct. Restraining orders, which are designed to protect people against this criminal conduct, are also ridiculed

as “pieces of paper” with no substance to them. The end of the advertisement also continues to promote stalking behaviour by inviting viewers to “Stalk your mates at thestalker.com.au”.

In the Coalition’s view, The Stalker website also promotes illegal, stalking behaviour. People visiting the website are invited to: “Freak out your friend with a message from our very own bunny-boiler. You’ll have your mate looking over their shoulder and filling out an AVO in no time. But like The Stalker says, it’s just a piece of paper. They’ll need more than that to stop her. Happy stalking.”

This language suggests that the criminal offence of stalking is somehow socially acceptable and to send a message from a bunny-boiler⁸ is a funny, amusing activity to send to, or pursue with, your friends. The website further undermines the authority of restraining orders and, consequently, the court system by describing these orders as “just a piece of paper” and even stating that something more than that is needed to stop this stalker.

The type of messages you may choose to send from The Stalker website are also highly inappropriate. For example, “Hi big boy, remember me? What a crazy night. I think about you 24 / 7. I know it was 2 years ago but I’ll never let u go.”; or “Who is she? It’s not your sister ‘cause she’s tied up in my basement. I forgive you. It’s me or it’s no one! I hate u but I love u.” However, sending people SMSs may constitute criminal behaviour if it is part of a course of conduct that forms a stalking offence. In any case, the Coalition considers the content of these messages to be offensive, suggesting long-term obsession and threats in the relationship context. Enabling and actively encouraging people to send this kind of message is further offensive behaviour when the potential target audience may stretch well beyond a person’s so-called “friends”.

“Reasonable person”

Guidance Note 2 to ABAC indicates that the “reasonable person” test is intended to be a reflection of standards and attitudes of contemporary Australian society, which is a fair, tolerant and multicultural society.⁹

The Coalition considers that the probable impact of The Stalker advertisement and website on a reasonable person – for example, the promotion of stalking as acceptable, even amusing behaviour – would be that they depict behaviour that does not meet standards of acceptable community behaviour. It is neither fair nor tolerant and it explicitly breaks the law. It is not behaviour that should be encouraged in Australian society.

The Coalition also believes that another probable impact on a reasonable person is that the advertisement has failed to present a mature and responsible approach to the consumption of alcohol through the association of the Jim Beam product with the offensive behaviour of stalking.

It is certainly not irresponsible per se to sit in a bar and consume alcohol. However, the overall context of the advertisement provides a direct association between alcohol and stalking through the title, setting and, in particular, the statements of the women portrayed in the advertisement, which encourage and trivialise criminal stalking behaviour following the consumption of an alcoholic drink.

One may argue that The Stalker advertisement and accompanying website are attempting to be humorous and are deliberately treating stalking in a light-hearted manner. However, the Panel has previously noted that this argument alone will not save an advertisement, which is otherwise in breach of the ABAC but it is a factor to be taken into account in assessing the impact of the advertisement on a reasonable viewer.¹⁰

⁸ “Bunny-boiler” is a slang term for an obsessive, jilted lover who is stalking the person who has purportedly spurned him or her. It is commonly used to refer to a female stalker.

⁹ As per Footnote 3.

¹⁰ ABAC Adjudication Panel Determination No 35/05, *In the Complaint of Ms Janette Moss: Mid Strength Beer: Carlton & United Beverages*, 1 September 2005. Accessed 12/08/08 at <http://www.abac.org.au/uploads/File/Final%20Determination%20-%20Carlton%20Mid%20-%201%20Sept%202005.pdf>

In the Coalition's view, it does not matter whether The Stalker advertisement and website are intended to be tongue-in-cheek or not. Even if a reasonable viewer did perceive the advertisement as humorous, the Coalition believes that the impact of the advertisement on a reasonable person would still be for them to oppose the kind of behaviour it portrays. This is because the advertisement is endorsing what is, at law, criminal behaviour. Further, in the Coalition's view, it is probable that a reasonable person would recognise The Stalker advertisement as reflecting a real-life situation rather than a humorous exaggeration. While the advertisement is depicting a fictional relationship and situation, the impact of The Stalker on a reasonable person would be for them to recognise that people can and do engage in the sort of behaviour described in the advertisement following a relationship break-up. A reasonable person would also find it realistic that a person would sit drinking in a bar when describing such behaviour.

This perception is reinforced by unfortunate, frequent media reports of people breaching restraining orders with sometimes devastating consequences. The Coalition considers that stalking is a traumatic experience for the victim and can result in considerable stress and anxiety. Given this, the Coalition finds the advertisement's treatment of restraining orders as particularly offensive. They are designed to halt stalking behaviour but are flagrantly breached and treated as "just a piece of paper" by both The Stalker advertisement and website. Indeed, according to The Stalker website, "they'll need more than that [a restraining order] to stop her."

In the Coalition's view, it is not at all appropriate for Jim Beam, through The Stalker advertisement and website, to be endorsing this kind of behaviour. Taken humorously or not, the advertisement portrays a course of anti-social conduct that is illegal in every state and territory under criminal legislation. It is highly unsuitable and offensive to depict this sort of behaviour in any manner in an alcohol (or any other kind of) advertisement. Consequently, the Coalition considers The Stalker advertisement and website to be a clear breach of offensive behaviour under the ABAC. It promotes and trivialises the illegal, criminal conduct of stalking and undermines the integrity of restraining orders and the court system, which enforces them. The Coalition also believes that the probable impact of The Stalker advertising campaign on a reasonable person would be for them to share this view. The behaviour portrayed in The Stalker advertisement and website is not at all reflective of a fair or tolerant Australian society.

Australian Association of National Advertisers Code of Ethics

The Coalition submits that The Stalker advertisement is in breach of the AANA Code on the grounds of presenting or portraying violence (2.2.1) and depicting material contrary to prevailing community standards on health or safety (2.6). The Coalition requests the adjudication of the Advertising Standards Board (the Board).

2.2.1 Advertising shall not present or portray violence unless it is justifiable in the context of the product or service advertised.

The Coalition considers that The Stalker advertisement presents or portrays violence. Stalking is a form of aggressive and violent behaviour that has been sanctioned as illegal by the criminal law. The woman depicted in the advertisement is engaged in this behaviour. By her own description, she follows her ex-boyfriend for extended periods and is actively breaching an intervention order.

Of particular concern is the combined effect of The Stalker's advertisement and website in undermining the integrity and validity of restraining orders. The woman in the advertisement laughs about the restraining order that has been taken out against her, treating it as a bit of a joke. In fact, she is breaching the criminal law by ignoring it. Both the advertisement and website refer to it as a "bit of paper" that is not going to stop her from pursuing her stalking behaviour in any case.

The Coalition's concern is that a person in the community may adopt a similar view or use it to justify an existing one. Intervention orders are intended to prevent violence. They can only be taken out if a court is

provided with evidence that a person is engaged in violence and aggressive behaviour against another person. They specifically state that a person is prohibited from continuing their violence or harassment. However, The Stalker advertising campaign flagrantly disregards this idea and instead challenges the effectiveness of intervention orders to prevent violence.

Indeed, one may perceive that The Stalker advertisement is actively encouraging people to pursue stalking behaviour. For example, The Stalker advertisement invites viewers to “stalk your mates at the thestalker.com.au” and the website enables people to send their “friends” inappropriate and offensive text messages.

From the Coalition’s perspective, there is no justification for The Stalker advertisement and website to portray violence through stalking behaviour in this way. Suggesting that The Stalker campaign is intended to be humorous or merely an exaggeration of existing behaviour is, from the Coalition’s viewpoint, unacceptable. Stalking is dangerous, criminal behaviour regardless of how it is portrayed. Given this, the Coalition considers it is inappropriate and irresponsible for Jim Beam to associate its product with the portrayal of violent, stalking behaviour and it is certainly not consistent with the responsible and safe consumption of alcohol.

2.6 Advertising shall not depict material contrary to Prevailing Community Standards on health and safety

The Coalition considers that The Stalker advertisement and website depict material that is contrary to prevailing community standards on health and safety.

Section 21A of the *Crimes Act 1958 (Vic)* and its equivalents around Australia, which make stalking behaviour illegal, arguably constitute the applicable standard that endorses stalking as unacceptable, community behaviour.

The idea of the law as reflecting prevailing community standards is consistent with a previous decision made by the Bureau. In Complaint 426/07, the Bureau heard and upheld a complaint under 2.6 of the AANA Code. The Bureau determined that an outdoor advertisement that showed people riding a bicycle without a helmet and with more than one person contravened prevailing community standards on bicycle safety. In particular, this behaviour was contrary to the Australian Road Rules, which prohibited these activities. The Board further found that the Australian Road Rules were the appropriate expression of the prevailing community standard.¹¹

If the *Crimes Act 1958 (Vic)* is considered to be the appropriate expression of the prevailing community standard in this context, The Stalker advertisement and website are clearly in breach of it. They promote and trivialise behaviour that is illegal under criminal law and, indeed, endorse the flouting of this standard through a woman actively breaching a restraining order and laughing about it.

The Coalition also believes that The Stalker campaign undermines commonly held perceptions of public health and safety. The Australian community has long supported and upheld the idea of people having the right to peacefully enjoy and pursue whatever activity they choose (as long as it is not illegal and they are not harming others).

Stalking, however, is an intentional weapon through which a person can undermine public health and safety. People engaged in stalking behaviour deliberately choose to disturb the peace, enjoyment and security of their victims for their own ends. Often, victims of such behaviour end up suffering from severe physical and emotional anxiety and are unable to feel secure in their place of work or residence. In

¹¹ Advertising Standards Bureau. *Complaint Reference Number 426/07: Fosters Australia (Corona)*, 16 January 2008. Accessed on 12/08/08 at <http://www.adstandards.com.au>.

turn, this leads to a decrease of their physical and emotional health and, often, in the people around them such as their friends and relatives.

The views of individuals in unfortunate situations such as these collectively contribute to the broader public perception of the health and safety of the entire community. "Successful" stalking, therefore, ultimately undermines the prevailing community standard of the public's right to safety and security in the peaceful enjoyment of their activities and, in the Coalition's view, The Stalker advertisement and website actively contribute to challenging this perception.

On this basis, the Coalition considers The Stalker advertising campaign to be in breach of prevailing health and safety community standards. These standards advocate against the nature and effect of stalking behaviour as illustrated by the creation of stalking as a criminal offence under Australian law. The Coalition also considers that the stalking behaviour illustrated is also contrary to the commonly understood idea of a person's right to peaceful enjoyment and security in their daily lives in Australia.

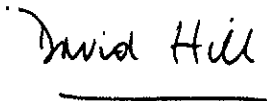
Thank you for the opportunity to submit a complaint to the Advertising Standards Bureau. The Coalition would urge you to take prompt action against The Stalker advertising campaign. For all inquiries relating to this complaint, please contact Elissa Campbell, Legal Policy Officer – Alcohol, at the Cancer Council Victoria on (03) 9635 5614 or email Elissa.Campbell@cancervic.org.au.

The Coalition looks forward to the outcome of the Bureau's consideration of this complaint.

Yours sincerely



John Rogerson
Chief Executive Officer
Australian Drug Foundation



Professor David Hill AM
Director
The Cancer Council Victoria



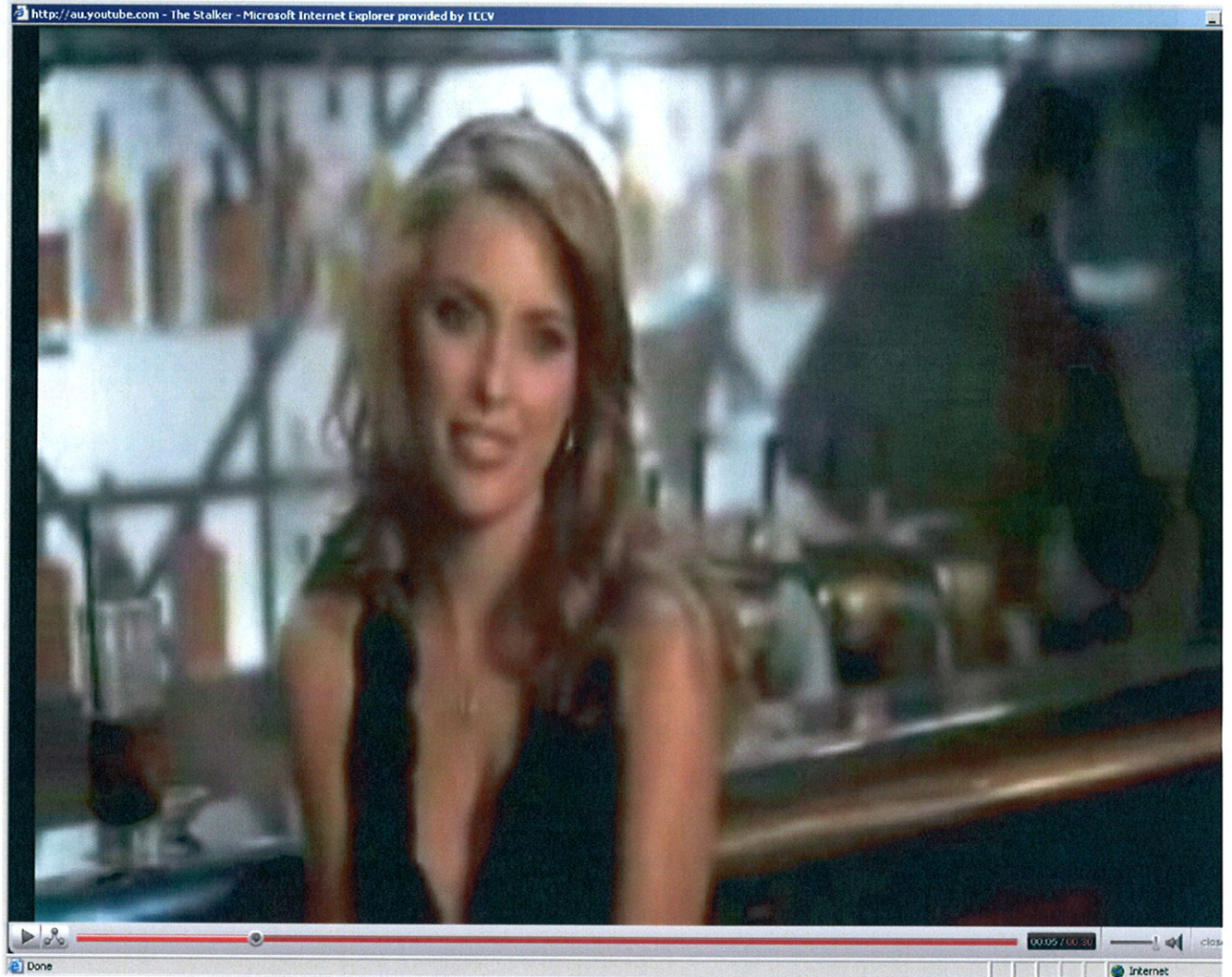
Trevor King
Deputy Director
Turning Point Alcohol & Drug Centre



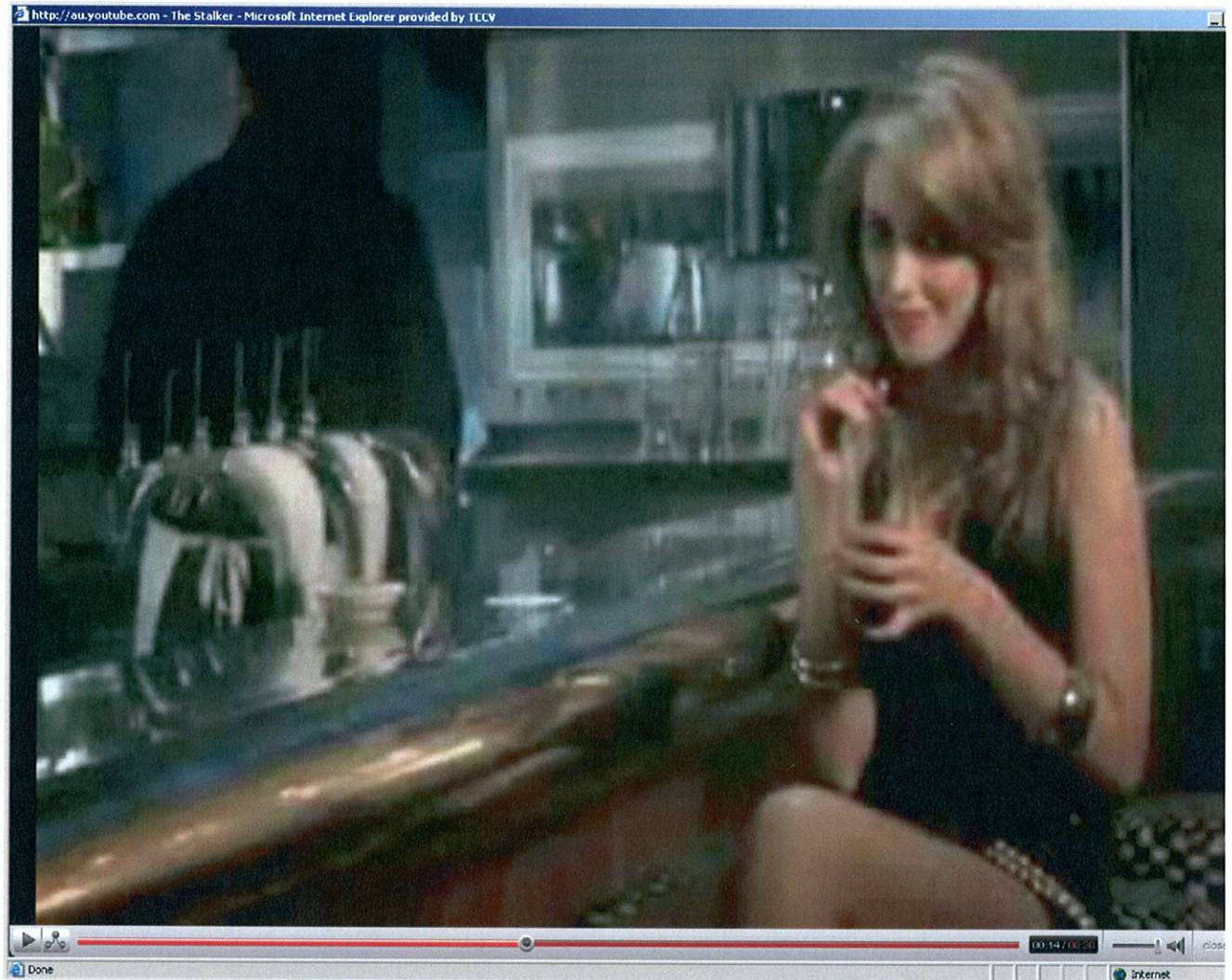
Todd Harper
Chief Executive Officer
VicHealth

APPENDIX

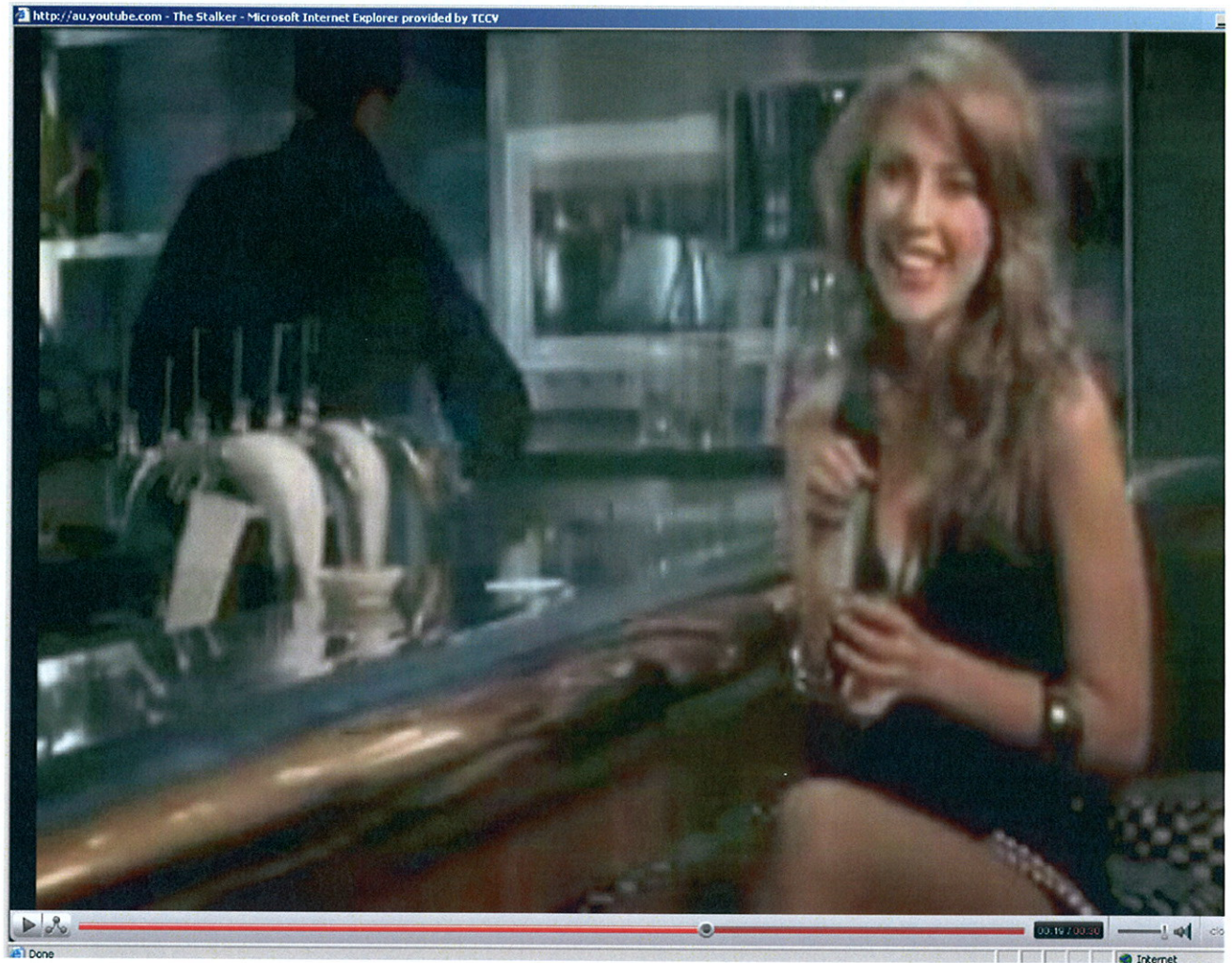
ATTACHMENT 1



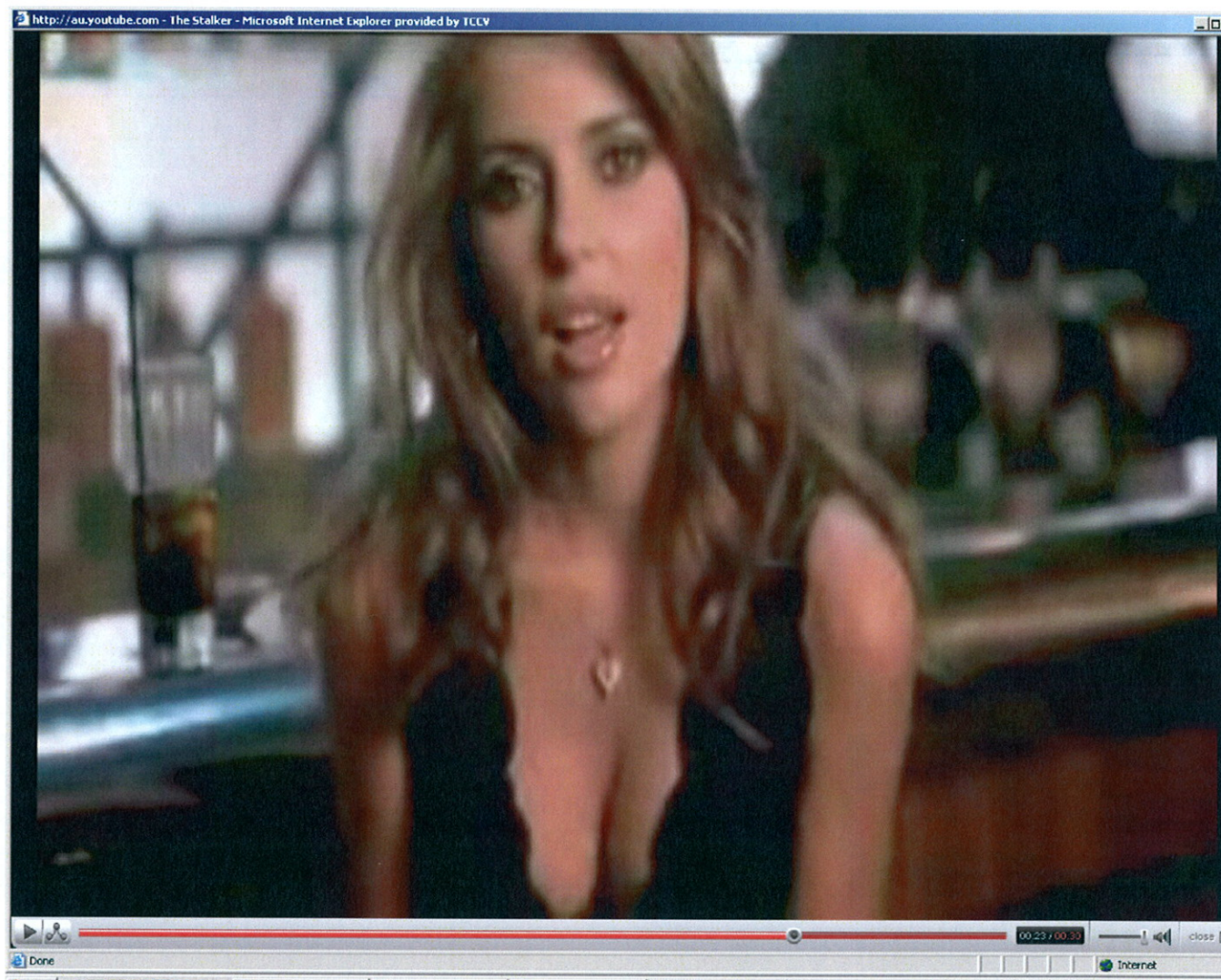
ATTACHMENT 2



ATTACHMENT 3



ATTACHMENT 4



ATTACHMENT 5



