

# ABAC

## ABAC Complaints Panel Final Determination No: 37A/14

### Complaint by the Alcohol Policy Coalition Product: Duff Beer Supplier: Woolworths Liquor Group

Professor The Hon Michael Lavarch – Chief Adjudicator  
Debra Richards – Member  
Professor Richard Mattick – Member

2 September 2014

#### Introduction

1. This final determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns the name and packaging of “Duff Beer” by the Woolworths Liquor Group (“the Supplier”) and arises from a complaint received on 10 June 2014.
2. On 17 July 2014, the Panel made a provisional determination on the complaint. In accordance with the rules and procedures which apply to the decision making process for complaints concerning the name and packaging of alcohol beverage products, a supplier is entitled to seek a rehearing of the provisional determination. The supplier sought a rehearing and provided additional submissions for the Panel’s reconsideration. This final determination flows from the rehearing process.
3. The complaint also raised concerns about related advertisements for the product. This aspect of the complaint is dealt with in a companion determination, 37B/14.

#### The Quasi-Regulatory System

4. Alcohol advertising and packaging 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 and packaging. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising and packaging as quasi-regulation. The most important provisions applying to alcohol advertising and packaging 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 (and Packaging) 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.
5. 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 complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.
  6. 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.
  7. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

### **The Complaint Timeline**

8. The complaint was received by the ABAC Scheme on 10 June 2014.
9. The Panel has a goal to determine complaints within 30 business days of receipt of the complaint. In relation to complaints about product names and packaging, the ABAC scheme rules and procedures provide for a two stage process which allows for the making of a provisional determination and a further opportunity for a product supplier to make submissions prior to the Panel making a final determination. As a result, the 30 day timeframe is not applicable to this complaint.

### **Pre-vetting Clearance**

10. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements and some packaging against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the product name or packaging, but was obtained for advertising featuring the product name.

### **Product material**

11. The complaint refers to a product named "Duff Beer".
12. The product is packaged in a red can and features the word "Duff" in large black text with an amber border over a white framed rectangle on the can. On the sides of the rectangle is an outline of ears of a grain. The words "Australian edition" appear at the top of the can and the words "BEER", "Premium lager" "355mL (12FLOZ)" and "4.7% ALC/VOL" is in smaller print below the name "Duff".

13. On the side of the can next to the barcode is the Drinkwise get the facts logo, recycling logo and symbol for 1.3 standard drinks. The following text also appears in small print "Product of U.S.A. Imported by Pinnacle Liquor Level 1, 26 Waterloo Street, Surry Hills NSW 2010 Australia *The Simpsons* TM & ©2014 Fox" followed by recycling refund information.
14. Below the barcode is the stylised signature of Matt Groening (creator of *The Simpsons*).
15. The carton for the product has red on the sides, white on the bottom and no top.
16. The short sides of the carton have the Duff Beer logo as on the front of the can. Next to the logo at the bottom of the panel is the stylized signature of Matt Groening. Next to the signature is the text "4x6x355mL CANS 4.7%ALC/VOL GROSS WEIGHT 9.3KG" above "24 x" and the standard drink logo for 1.3 standard drinks. On the right side of the panel is the barcode above the text "*The Simpsons* TM & ©2014 Twentieth Century Fox Film Corporation. All Rights Reserved".
17. The long sides of the carton on the left have the text "24 x 355ML 4.7% ALC/VOL GROSS WEIGHT 9.3KG". In the middle of the panel is the text "Australian edition" followed by the Duff Beer logo as featured on the can and the text "Premium Lager". On the bottom of the panel after the Duff Beer logo is the Matt Groening stylized signature. On the right side of the panel is the barcode above the text "*The Simpsons* TM & ©2014 Twentieth Century Fox Film Corporation. All Rights Reserved".
18. The bottom of the carton includes the text "Product of U.S.A. Imported by Pinnacle Liquor Level 1, 26 Waterloo Street, Surry Hills NSW 2010 Australia" followed by the Drinkwise Get the Facts logo and the text "Is your drinking harming yourself or others?" Below this information is the recycling logo, standards drinks logo and barcode.

### **The Complaint**

19. The complainant argues that the product through its name and packaging has strong or evident appeal to children or adolescents by reason of its creation by, depiction in and therefore association with *The Simpsons* television series. A detailed complaint was supplied and is 'Attachment A' to this determination. The complaint raises issues under both Part 1 and Part 2 of the Code, but this determination deals solely with Part 2. Determination 37B/14 deals with Part 1 of the Code.

### **The Code**

20. Part 2.1 of the ABAC provides that the naming and packaging of alcohol beverages (which is also referred to as "product material") must:
  - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
    - ii) must not encourage under-age drinking
  - b) not have a strong or evident appeal to children and adolescents....

21. Part 2.2 of the ABAC provides that the ABAC 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**

22. On 27 June 2014, the supplier responded to the complaint and questions posed by the Panel in advance of the making of its Provisional Determination on 27 June 2014. This response is 'Attachment B' to this Determination.
23. Following the Provisional Determination, the Supplier exercised its entitlement to seek a rehearing and made additional submissions dated 1 August 2014 to the Panel. This submission is 'Attachment C' to this Determination.

### **The Panel's View**

#### Introduction

24. *The Simpsons* is one of the longest aired and most successful animated television series of all time. Originating in the United States, *The Simpsons* is broadcast in many parts of the world, and has been a staple of Australian free to air and pay television networks since the early 1990s.
25. The program is a satirical portrayal of American lower-middle class life and is based upon a two parent, three child family living in a suburban setting. One relatively minor but not infrequent reference in the series is the use of the product 'Duff beer'. This complaint goes to the decision of Woolworths, one of Australia's largest retail alcohol outlets, to add an officially sanctioned 'Duff' beer to the Australian alcohol market.
26. The complainant is described as a coalition of Victorian based health and social agencies with a shared goal of reducing alcohol harm. The basic point raised by the complaint is that by converting the fictional Duff beer of *The Simpsons* into a real product must mean that the product will have a strong or evident appeal to children, because of the implication that *The Simpsons* has strong appeal to children and adolescents.
27. The Supplier refutes the concerns underpinning the complaint by arguing it is entitled to market a Duff beer product and that the Duff name itself falls within an exception to the Code, which means that it can be used without having to satisfy Code standards. Secondly, it is argued that its marketing has and will be done in a manner which will not have strong or evident appeal to children or adolescents.
28. The ABAC is structured so as to distinguish between complaints made about brand and retail advertising (Part 1) and complaints made about product name and packages (Part 2). While the standards of good marketing practice contained in Parts 1 and 2 of the Code are the same, the ABAC scheme treats complaints about product name and packages differently in several critical respects, namely:

- (a) The name or trademark of any product which has been supplied for bona fide retail sale in the ordinary course of business prior to 31 October 2009 are excepted from having to meet the Part 2 standards. There is no equivalent carve out in Part 1 based on the time in which an advertisement originated.
  - (b) The rules and procedures for decision making on a complaint under Part 2 consists of two stages, with the Supplier afforded the opportunity to seek a rehearing of a preliminary determination of the complaint. There is no rehearing opportunity for decisions made about brand and retail advertising under Part 1 of the Code.
  - (c) If a final determination upholds a complaint, the rules and procedures provide for a process by which a 'once and for all' approval can be given to a modified product name or package, which means that the approved product name and package cannot be subsequently questioned in further complaints. There is no similar process available for modified advertisements under Part 1 of the Code.
29. The rationale for the two stage decision making process for Part 2 determinations reflects the significant impact of an adverse decision for a supplier if a product name or package is held to be in breach of a Code standard. The impact could lead to a product effectively being removed from the marketplace or, at a minimum, the loss of significant intellectual property value if a brand has to be altered as a result of a Panel determination. Clearly, such a consequence is much greater for a supplier than the potential withdrawal of an individual advertising execution or even an entire advertising campaign occasioned by an adverse determination under Part 1.
30. On 17 July 2014, the Panel made a provisional determination upholding the complaint. The provisional determination is 'Attachment D' to this determination. The Supplier sought a rehearing of the provisional determination and supplied the Panel with additional arguments. The rehearing involves the Panel looking at the complaint afresh having reference to all of the relevant materials, including the complaint and the Supplier's original and additional submissions. The Panel is to arrive at a decision which is not confined to the consideration of any mistakes which were made in the Provisional Determination, but it is in effect a de novo consideration of the complaint.
31. Due to the reasonably complex issues raised by the complaint, this determination is divided into the following sections:
- (a) Summary of decision
  - (b) Background to ABAC scheme and coverage of product names and packaging
  - (c) The Provisional Determination and Supplier's additional submissions
  - (d) Does the product name fall within the exception contained in Part 2.2?
  - (e) Does the product name and packaging have strong or evident appeal to children or adolescents?

## Summary of Decision

32. The Panel has made a final determination to uphold the complaint in relation to the product material, namely the product name 'Duff' and the packaging of the product. In doing so, the Panel decided:
- (a) The Supplier's named 'Duff' product was not in bona fide retail sale in the ordinary course of business prior to 30 October 2009 and:
    - (i) the pre 30 October 2009 use of the name 'Duff' by unrelated parties on an unrelated product does not enable the Supplier to rely on the exception in Part 2.2 of the Code;
    - (ii) the spirit and intent of Part 2.2 of the Code was not to extend the protection of the exception to current circumstances.
  - (b) The product name 'Duff' and the product packaging which replicates the fictional use of the same items within *The Simpsons* associates the product material with *The Simpsons*.
  - (c) *The Simpsons* has wide appeal across a broad demographic of the population.
  - (d) *The Simpsons* has strong and evident appeal to children and adolescents.
  - (e) The association of *The Simpsons* with the product name and packaging is so strongly entrenched in Australian popular culture that the name and packaging will draw the attention of under 18 year olds and measures to market the product without references to *The Simpsons* characters or images cannot be effective to overcome the strong and evident appeal of the product material to underage persons.

## Background to ABAC scheme and coverage of product names and packaging

33. The ABAC scheme commenced operations in 1998 as a self-regulatory code of good advertising practice by the core participants in Australia's alcohol beverage industry. Since that time, the scheme has been revised on several occasions, notably:
- (a) 1 May 2004 when the reach of the ABAC was extended to internet based advertising and the governance arrangements for the scheme were revised so as to give the scheme a quasi-regulatory nature.
  - (b) 1 November 2009 when the code was extended to apply standards to alcohol beverage product names and packaging through the inclusion of a new Part 2 of the code.
  - (c) 1 July 2014 with the commencement of a new code incorporating Part 1 and Part 2 of the former code into a consolidated and revised set of standards.

34. While the new code named the 'ABAC Responsible Alcohol Marketing Code' commenced on 1 July 2014, the current determination will be decided under the provisions of the former code (Alcohol Beverage Advertising (and Packaging) Code). This is because of the transitional arrangements facilitating the implementation of the new code provide that complaints received prior to 1 July 2014 will be decided under the former code. The current complaint was received on 10 June 2014.

Provisional Determination and Supplier's additional submissions

35. The Provisional Determination made by the Panel on 17 July 2014 is Attachment D to this Determination. In short, the Panel:
- (a) found that the product did not fall within the exception of Part 2.2 because the earlier sale of a beer product named 'Duff' by unrelated parties did not amount to a 'bona fide retail sale' within the meaning of that phrase in Part 2.2; and
  - (b) the association of *The Simpsons* with the product name and packaging is so strongly entrenched in Australian popular culture that measures to market the product without references to *The Simpsons* characters or images cannot be effective to overcome the strong and evident appeal of material to underage persons.
36. The further submission from the Supplier is at Attachment C to this Determination. The Supplier's summary of its submission is as follows:
- (a) WLG, a Code signatory, has mature, balanced and responsible measures in place, both generally and specifically in relation to marketing Duff Beer products, to ensure that there is no encouragement of under-age drinking, no appeal to children or adolescents and no breach of the Code.
  - (b) No such restrictions apply to vendors of unauthorised versions of Duff Beer who are not likely to be Code signatories and who may fill the vacuum if the complaint is upheld regarding genuine products sold responsibly by WLG.
  - (c) As an adverse determination in relation to the Duff Beer name has such serious implications:
    - (i) the Panel must be careful to apply the relevant Code provisions correctly; and
    - (ii) in particular, the Panel must apply the provisions of Part 2.2 as they are unambiguously expressed rather than according to its belief as to what may have been intended.
  - (d) The Part 2.2 Code exception applies as there were bona fide retail sales of Duff Beer in the ordinary course of business in Australia prior to 31 October 2009.

- (e) The bona fide retail sales referenced in Part 2.2 do not relate to authorised use of a name, but to real or genuine commercial sales, as opposed to token or promotional sales.
- (f) Concepts regarding the 'spirit and intent' of the Code and 'grandfathering' do not affect the unambiguous meaning of Part 2.2, and should not be taken into consideration by the Panel.
- (g) The Duff Beer advertisements incorporated prominent images of the Duff Beer product and name and were approved by pre-vetting experts who did not suggest that they breached the Code, including by encouraging under-age drinking or having a strong or evident appeal to children or adolescents. It follows that the Duff Beer name, packaging and advertisements do not breach the Code.
- (h) In any event, as the use of the Duff Beer name is permitted by Part 2.2, no other aspects of the packaging or advertisements, including small print, taken individually or together, breach the Code by encouraging under-age drinking or having a strong or evident appeal to children or adolescents.

Does the product name fall within the exception contained in Part 2.2?

- 37. As stated, the ABAC was extended on 1 November 2009 to cover product names and packaging. This extension was implemented by inserting a new Part 2 into the code. Part 2 in substance repeated the same standards that had applied to alcohol advertising since 1998, but the extension was subject to an exception.
- 38. The exception is at Part 2.2 and provides that the standards 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.**
- 39. The proper scope and operation of Part 2.2 is critical to this Determination. While the Supplier makes a number of arguments in response to the complaint, a great deal turns on whether the Supplier's 'Duff' named beer product, falls within the Part 2.2 exception.
- 40. The basis of the Supplier's contention is that in or about November 1995, two Australian brewers, namely the South Australian Brewing Company and Lion Nathan Australia launched and promoted a beer within Australia under the name 'Duff beer'. This product was not sanctioned or licensed by the owners of the intellectual property in *The Simpsons*, and the release of the product resulted in the intellectual property owners taking legal action to have the product removed from the market place. This legal action was successful and the reasons for this are stated in a Federal Court decision dated 17 May 1996.
- 41. The Supplier, in both its initial response to the complaint and its additional submission following the Provisional Determination, argues that the actions of South Australian

Brewing and Lion Nathan in placing a Duff beer product on the market in late 1995 and early 1996 means that the current Duff beer product falls within Part 2.2.

42. In its Provisional Determination, the Panel concluded that the Part 2.2 exception did not apply. In doing so, the Panel relied on a view that the previous use of the 'Duff' name by unrelated parties on an unrelated product did not amount to a bona fide retail sale within the meaning of that phrase in the Code. This was because the earlier use of the name was in breach of the intellectual property rights of the owners of *The Simpsons* and, as a result, was unlawful. The Panel also relied on the spirit and intent of Part 2.2 to conclude that it was not intended that the exception should apply in the current circumstances.
43. The Supplier's additional submission argues that the Panel's view in the Provisional Determination was mistaken. It contends that "bona fide" in the context of Part 2.2 qualifies the term "sale" and not the term "name". Several court decisions on the operation of Australia's trademark law are cited by the Supplier in support of its contention. In the Supplier's view, the Panel would be embarking on fraught and misconceived examination to assess if laws had been broken in determining whether a product name had been used in a bona fide manner.
44. The Supplier goes on to argue that the Panel's reliance on the 'spirit and intent' of the Code in reinforcing the conclusion that the Part 2.2. exception should not apply was also flawed. This is because the Panel's explanation of the intent of the exception is argued to not be supported by the language of Part 2.2 itself and, secondly, if the exception is triggered then "questions regarding the spirit and intent of the Code cannot arise".
45. The Panel has looked afresh at Part 2.2. and its application to the circumstances of the current complaint. Careful consideration has been given to the detailed arguments made by the Supplier in its additional submission, as well as its original response to the complaint. The complainant's submissions have also been reviewed.
46. The Panel accepts the Supplier's additional submission on the proper understanding of "bona fide retail sale" within Part 2.2. While the earlier sale of a 'Duff' named beer product was in breach of the intellectual property rights of the owners of *The Simpsons* and this made its use unlawful, upon reconsideration the Panel believes this fact does not mean the South Australian Brewing/Lion Nathan Duff named product was not on bona fide or genuine retail sale.
47. The Panel, however, does not accept that the spirit and intent of the Code plays no part in understanding the proper scope of Part 2.2. The Panel has from its earliest decisions stated that it is mindful of the spirit and intent of the Code and the ABAC Scheme in undertaking its task, and the Code Preamble commits the sponsors and signatories to the Scheme to comply with the spirit and intent of the Code. There is no convincing reason as to why the understanding of Part 2.2 of the Code should be excised from the other Code provisions in this regard.
48. The critical issue is how the phrase "name of any product" is to be understood within the meaning of Part 2.2. The Supplier's contention is that the use of the name 'Duff' on an unrelated beer product by unrelated parties is sufficient to enable the Supplier to

now market its product of the same name, consistent with the scope of the Part 2.2 exception. It supports this argument by advancing:

- (a) Alcohol products can move in and out of sale for periods (e.g. seasonal or nostalgic offerings) and hence a product need not be continuously in the market after 31 October 2009, provided it was at some point on bona fide retail sale prior to that date; and
- (b) “it is common for different entities to be involved in retail sale of such products at different times”.

49. It goes on to state that the Panel cannot be expected to know the details of such market offerings or the relationships between various alcohol market participants. It is clear that the Panel is limited in its capacity to make independent reviews of commercial relationships, but it does not have to. Part 2.2 states expressly that the onus is on the Supplier to make the case for the application of the exception. In other words, it is the Supplier’s responsibility to satisfy the Panel that the circumstances give rise to the exception application.
50. The Panel believes that the name of any product cannot be separated from the underlying product itself within a proper understanding of Part 2.2. In other words a “name” is not a free standing thing which is on bona fide retail sale in the ordinary course of business, but rather, a product with a name might be on retail sale. The exception is applying to a product on retail sale prior to 31 October 2009. The product’s name is then given the protection provided through the exception in Part 2.2.
51. The Supplier does not submit that there is a relationship between its new product and the former product marketed by South Australian Brewing/ Lion Nathan which used the ‘Duff’ name (i.e. it is not claimed that the Supplier’s beer is the same physical beverage or that some legal outcome was achieved whereby the South Australian Brewing/ Lion Nathan product was adopted or acquired by the Supplier). The only connection between the two products is the use of the ‘Duff’ name, which the Supplier’s business associate, the owners of *The Simpsons*, went to court to stop South Australian Brewing/ Lion Nathan from using.
52. The Supplier’s additional submission drew attention to another Duff named alcohol product, which apparently came onto the Australian market briefly in 2012. If the Supplier’s argument was accepted, which separates the name from an underlying product, then this unauthorised ‘Duff’ named product would also fall within the Part 2.2 exception because of the use of the ‘Duff’ name by South Australian Brewing/Lion Nathan in 1995/1996.
53. The Panel believes that such outcomes are inconsistent with the intent of Part 2.2 which is to provide an exception to the application of the ABAC standards for alcohol beverage products currently on sale in Australia if that same product was on bona fide sale prior to 31 October 2009. The exception is not intended to apply to a new product by reason only that an unrelated product had adopted the same name prior to 31 October 2009.
54. Accordingly the Panel has not been satisfied that the Supplier’s product (as opposed to a different product bearing the same name) had been supplied for bona fide retail

sale in the ordinary course of business prior to 31 October 2009. As a result, the Part 2.2 exception does not apply.

Does the product name and packaging have strong or evident appeal to children or adolescents?

55. The complainants' contentions might be paraphrased as follows:

- (a) *The Simpsons* series is well known and very popular with children and adolescents.
- (b) Duff beer has been repeatedly depicted within *The Simpsons* and promoted by the cartoon and its characters.
- (c) The Duff beer name and packaging now released on the Australian market is officially licensed by Twentieth Century Fox and is identical in appearance to the portrayal of Duff within *The Simpsons*.
- (d) As a result the product name and packaging will have strong and evident appeal to children and adolescents because of its association with *The Simpsons*.
- (e) This is supported by both the Federal Court decision and the evidence before the Court from Mr Groening, the creator of *The Simpsons*, that an actual beer named Duff "might encourage children to drink alcohol".

56. The Supplier's argument in its initial and additional submissions in response might be summarised as follows:

- (a) The use of the 'Duff' name is entitled to the benefit of the Part 2.2 exception, and hence cannot be found in breach of the Code.
- (b) Accordingly, to breach the Code there must be elements beyond the product name in the packaging which could be said to have strong or evident appeal to children or adolescents.
- (c) Advertisements which display the product packaging have been subjected to pre-vetting and the approvals granted have not identified any actual or potential breach of the Code, including in relation to strong or evident appeal to children or adolescents.
- (d) While pre-vetting approval is not binding, those involved in pre-vetting are experts and the pre-vetting occurred without the 'clutter' of extraneous material and was based solely on an assessment of the advertising featuring the name and packaging. The Panel should regard this as highly persuasive.
- (e) Strict controls are in place in relation to the marketing of the product, which is limited to inside licensed outlets.

- (f) If the 'Duff' name cannot be a breach of the Code (due to the Part 2.2 exception), then the marketing controls taken mean that it cannot reasonably be suggested that elements of the packaging, such as the use of colour or small print on the packaging (which does recognise *The Simpsons* intellectual property ownership) would have strong or evident appeal to children or adolescents.
- 57. The Supplier's initial response to the complaint addresses issues going to the associated advertising which has also been taken into account by the Panel in considering this determination. These points include:
  - (a) No Simpsons television series references or Simpsons characters are used.
  - (b) There is no depiction of alcohol use involved in the product packaging or its advertising.
- 58. The Supplier's additional submission to the Provisional Determination also makes another point as to why the Panel should be wary of finding the product material in breach of the Code. It is stated that unauthorised Duff beer products are marketed around the world, including a product placed on the Australian market briefly in 2012. The Supplier goes on to argue that if its product name and packaging were found inconsistent with the Code, there is "an appreciable risk that unauthorised products marketed with no reference to the Code would fill the vacuum".
- 59. Taken as a whole, the Supplier's arguments raise three issues to be addressed, namely:
  - (a) The argument that breaching the Supplier's product naming and packaging could see less principled alcohol marketers "fill the vacuum";
  - (b) The argument, that the Panel should be particularly influenced by the pre-vetting approval given to the associated advertising featuring the product name and packaging;
  - (c) The rebuttal of the complainant's contentions based on the appeal of *The Simpsons*, and the portrayal of Duff beer within *The Simpsons*, to children and adolescents.

*'Filling the vacuum'*

- 60. The Supplier is one of Australia's major alcohol retailers and markets a range of products for which it has produced for its outlets. While Woolworths has only recently joined the ABAC Scheme as a signatory, it has interacted with the Scheme, and particularly Panel processes, for many years. During this time, it has always cooperated with the Panel and accepted Panel determinations, even when not contractually bound to do so. The Panel accepts that the Supplier is committed to the standards of good alcohol beverage marketing contained in the ABAC.
- 61. The Panel has accordingly given thought to the argument that if the Supplier's 'Duff' named beer product is found in breach of the Code, then other suppliers may choose

to market unauthorised 'Duff' named products and do so in a manner which does not respect Code standards.

62. The Panel, however, must reject this as an argument to dismiss the complaint against the Supplier's product name and packaging. The Panel applies the standards contained in the Code to the best of its ability and based on its assessment of the merits on a case by case basis. It would be patently unacceptable to decide a complaint not on assessment of the merits of the arguments advanced and the Panel's own view of the consistency of an advertisement or product material with the Code standards because of a concern of what unrelated third parties may or may not do in the future.

#### *The effect of pre-vetting*

63. The Supplier obtained pre-vetting approval for advertising which features the product name and packaging. It argues that the Panel should be particularly mindful of this approval.
64. As recognised by the Supplier, pre-vetting approval does not bind the Panel. While as a matter of statistics it is clear that an advertisement or product material that has obtained pre-vetting approval has a strong likelihood of not subsequently being found in breach of a Code standard by the Panel, this is not a guaranteed outcome. Inevitably, there are examples of marketing material where reasonable minds can disagree on whether the material is on the right or wrong side of a standard.
65. In the current case, it must be stressed that the Supplier did not seek pre-vetting approval of the product name or packaging. As a result, the pre-vetting occurred on the basis that the product name and packaging was a given and, hence, the question was how this product material would be incorporated into advertising executions in a manner consistent with Code requirements. In other words, the pre-vetter was not asked the question that the Panel has been posed via the complaint.
66. Even though pre-vetting approval was given to the associated advertising, it is apparent that the principal concern dealt with through the pre-vetting process was the potential of the advertising to not meet the standards regarding strong or evident appeal to children or adolescents. This concern was centered on the relationship of *The Simpsons* television series and the appeal of the series to children and adolescents, with the marketing of the product under the 'Duff' name.

#### *Strong or evident appeal to children or adolescents*

67. It is reasonable to say that if there was no Simpsons association, then simply having an alcohol product named 'Duff', and the packaging, colour scheme and layout used could not of itself be said to have strong or evident appeal to underage persons. Without *The Simpsons* connection, it would simply be another beer in a red can which is no more or less appealing than any other product. But of course the product name and packaging is entirely associated with *The Simpsons*.
68. The close association of product name and packaging with *The Simpsons* was the entire basis of Justice Tamberlin's decision in *Twentieth Century Fox Film Corporation and Matt Groening Productions Inc v. The South Australian Brewing Co Ltd and Lion*

*Nathan Australia Pty Ltd* [1996] FCA 1484. His Honour's reasoning makes it clear that the two breweries involved released the unlawfully branded Duff beer in order to achieve and exploit the strong association between the name 'Duff' and *The Simpsons*. The best part of 20 years has passed since his Honour's decision, and in that time *The Simpsons* has been continuously broadcast within Australia. The close association between *The Simpsons* and Duff beer could not be said to have diminished in the intervening period.

69. The issue then turns on whether the close association of the product name and packaging with *The Simpsons* television series means that Part 2(a)(ii) and (b) have been breached. In making this assessment, the Panel is to have regard to the probable impact of the product name and packaging upon a reasonable person within the class of persons to whom the product material is directed and other persons to whom the product material may be communicated, taking its content as a whole.
70. The Panel has previously considered both Part 2(a)(ii) and (b) and equivalent provisions in Part 1 of the Code. On these previous occasions, the Panel has had regard to matters including:
  - (a) 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.
  - (b) Product material might have consequential or residual appeal to children or adolescents and not breach the Code.
  - (c) What is not permitted is product material which has strong or evident appeal to children or adolescents.
  - (d) Assessment of consistency is a case by case exercise in which imagery, use of characters and context is important in deciding the overall or probable impact of the product material.
71. *The Simpsons* is an animated program which means it uses a technique commonly seen in children's programming. But not all animation is directed towards children by any means and various animated programs, such as Japanese anime and other American television shows such as 'Family Guy' and 'American Dad', are clearly adult in nature. Accordingly, it is misleading to conclude that *The Simpsons* is a 'cartoon' and hence targeted at children.
72. The story lines in *The Simpsons* appeal to a wide demographic, including but not limited to children or adolescents. But there can be little doubt that the series does have a very real appeal to under 18 year olds.
73. The Supplier contends that while *The Simpsons* and the Duff beer product are strongly associated, it does not automatically follow that the actual Duff beer product name and packaging will have strong or evident appeal to children or adolescents. This may be so, but it was not the view of the creator of *The Simpsons*, Mr Groening, in 1996 when he provided evidence to the Federal Court to the effect:
  - (a) Duff beer would be readily identifiable with the characters within the program.

(b) He had considered licensing a beer called 'Duff', but decided not to give permission due "to his concern that it might encourage children to drink alcohol".

74. As a general proposition, the Panel has assessed complaints against an advertisement or product material without reference to implications drawn from outside the content of the advertising or material. This is because the Panel is not a research body and generally claims are highly contested as to the nature of the inferences which can be drawn.
75. The current case, however, is different due to long term and arguably cultural level influence *The Simpsons* has had on Australian society. Clearly, the program does have strong appeal to children and adolescents, and this appeal will mean that the 'Duff' name and its Simpsons replica packaging, will bring the product to the immediate and close attention of under 18 year olds who have grown up with the program. While the Supplier might seek to market the product in a way without reference to any characters from *The Simpsons*, the ubiquitous nature of the program and its characters means that these measures, however well intended, cannot alter the fact that the name 'Duff' and the packaging does have strong or evident appeal to children or adolescents in breach of Part 2, sections (a)(iii) and (b) of the Code.
76. Accordingly the complaint in relation to the product name and packaging of the Supplier's Duff Beer product is upheld.

## Attachment A



6 June 2014

ALSO BY FAX: (02) 6262 9833

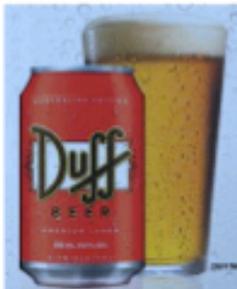
Fiona Jolly  
CEO, Advertising Standards Bureau  
Level 2  
97 Northbourne Avenue  
TURNER ACT 2612

Dear Madam

### **ABAC complaint: Duff Beer**

The Alcohol Policy Coalition (APC) is a collaboration of Victorian-based health and social agencies, with the shared goal of reducing alcohol harm through evidence-based policy responses.

The APC wishes to lodge a complaint about the Woolworth's Duff Beer product (the **Product**) depicted below. The Product is currently being sold in Dan Murphy's and BWS outlets and advertised on the internet through the following websites:



*(Image reproduced from the DuffBeerAu twitter account)*

- <https://www.facebook.com/pages/Duff-Beer/1458654804372284> (see Annexure 1);
- <https://twitter.com/DuffBeerAU> (see Annexure 2) also through the use of the hash tag #DuffBeer;
- <http://duffbeer.com/home.php> (see Annexure 3).

It is also being marketed through media releases and by encouraging press to use social media hashtags, as evidenced by an article from Australian Brew News (see Annexure 4).

For the reasons set out below, this Product has a strong and evident appeal to children and/or adolescents and therefore the Product and any advertisements that depict the Product clearly violate Part 1(b) and Part 2(b) of the Alcohol Beverages Advertising (and Packaging) Code (ABAC).

### **Strong and evident appeal to children**

The Simpsons is a well-known television series in Australia, which is and has for many years, been very popular with children and young people. The "Duff Beer" concept was created in The Simpsons cartoon series. For the last 25 years, the Duff Beer product has been depicted in and, in effect

promoted by, the cartoon and its characters. A review of recent viewing data for The Simpsons programs aired in Victoria indicates that children and young people under the legal drinking age make up as much as 55% of the viewing audience for this program.

The Product currently being sold by Woolworths is officially licensed by Twentieth Century Fox and is branded to mimic the Duff Beer product that is depicted in and promoted by the Simpsons television program (examples below).



Image reproduced from [www.geekosystem.com](http://www.geekosystem.com)



Image reproduced from [www.brandsandfilms.com](http://www.brandsandfilms.com)

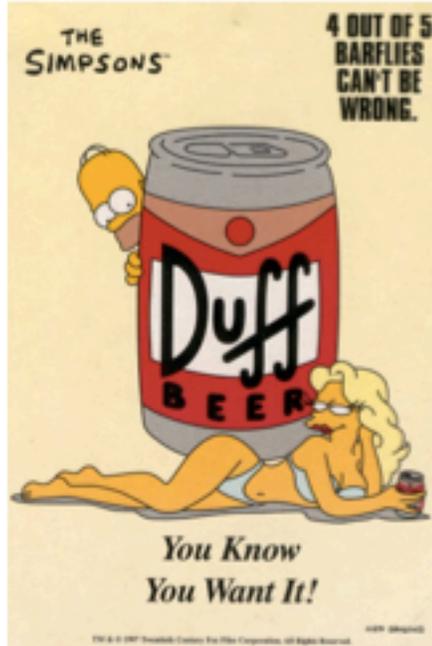


Image reproduced from [www.beer-universe.com](http://www.beer-universe.com)

The likelihood that an alcoholic product using the name "Duff" will appeal to children because of its association with the Simpsons has already been accepted by the Federal Court of Australia. In *Twentieth Century Fox Film Corporation and Anor v South Australian Brewing Co Ltd and Anor* (copy enclosed),<sup>1</sup> Tamberlin J held that use of the name "Duff" on a beer product was sufficient to misappropriate the reputation of The Simpsons, and its use in relation to an alcohol product had the potential to "cause harm and damage" and "interfere with the integrity of the licensing and merchandising programs" of the producers of The Simpsons.<sup>2</sup> This was because the Court accepted that the Duff Beer product had the potential to appeal, and therefore be detrimental, to children and at that time Fox had taken a firm decision not to create a Duff Beer product because of this risk.<sup>3</sup> These findings were made despite the fact that the "Duff" product in question used different branding to the product depicted in the television series and had no association with any of the

<sup>1</sup> *Twentieth Century Fox Film Corporation and Anor v South Australian Brewing Co Ltd and Anor* [1996] FCA 1484. In this case the creators of The Simpsons successfully sued for passing off and the Duff beer product in question was withdrawn from the market.

<sup>2</sup> *Twentieth Century Fox Film Corporation and Anor v South Australian Brewing Co Ltd and Anor* [1996] FCA 1484 [141].

<sup>3</sup> *Ibid* [24], [32].

characters. These findings would certainly be affirmed by the current circumstances, especially because The Simpsons series has been broadcast for a further 18 years since the Federal Court decision and the Product the subject of this complaint is branded as to be indistinguishable from the until now fictional product depicted in the famous cartoon series.

It is inarguable that an alcoholic product that is branded in the get-up of The Simpsons "Duff Beer" will be instantly recognisable and highly appealing to children and young people under the legal drinking age in Australia. The Product is effectively merchandise for the show and materialises a product unsuitable for children, that was not previously available for purchase. This outcome was recognised by the creator of The Simpsons, Matt Groening in his evidence to the Federal Court of Australia. As set out by Tamberlin J, Mr Groening gave evidence that:

*"...in 1990 and 1994, he discussed the question of licensing a beer called "Duff" but decided not to give permission to such a proposal due to his concern that it might encourage children to drink alcohol. His concern arose from the fact that children formed a significant portion of the audience for "The Simpsons". He adopted a similar attitude in relation to the possibility of merchandising cigarettes." (emphasis added)<sup>4</sup>*

As is supported by Mr Groening's evidence, it is clear that the Woolworths' Product (that is branded in the same way as the previously fictitious product popularised by The Simpsons cartoon) will have a strong and evident appeal to children and adolescents.

The Product will not only have a strong appeal to children, it will, in effect, be marketed to children through a popular cartoon series shown during children's viewing hours. The APC considers that the Product breaches both the provisions and the spirit of the ABAC, of which Woolworths Liquor Group is a signatory.

#### **Overt association with The Simpsons or its characters is not required**

The APC considers that the Product will appeal to children regardless of whether or not it is overtly promoted in conjunction with The Simpsons cartoon or its characters. The product is branded specifically to be recognisable as the beer from The Simpson's cartoon series. It is inarguable that this cartoon series has a strong appeal and is very popular with children and young people under the legal drinking age in Australia. If Woolworths did not intend to associate its new beer Product with The Simpsons series or to trade off the existing reputation of the brand created by the show there would be no reason to adopt this very well-known brand.

The appeal and recognisability of a Duff Beer branded product was the subject of extensive evidence in *Twentieth Century Fox Film Corporation and Anor v South Australian Brewing Co Ltd and Anor*. There was evidence in that case from market research about a "Duff" beer branded product that:

*"The beer can rely on widespread popularity of The Simpsons among this age group. It will need little, if any, promotion to generate trial."<sup>5</sup>*

<sup>4</sup> *Twentieth Century Fox Film Corporation and Matt Groening Productions Inc v the South Australian Brewing Co Ltd and Lion Nathan Australia Pty Ltd* [1996] FCA 1484 [24], [32].

<sup>5</sup> *Twentieth Century Fox Film Corporation and Matt Groening Productions Inc v the South Australian Brewing Co Ltd and Lion Nathan Australia Pty Ltd* [1996] FCA 1484 [55].

*"Our attempts to portray Duff as a brand without any association with the Simpsons (by using alternative meanings from the Dictionary) also doesn't work as it removes the brand from its source of current franchise and its fun positioning. The link with the Simpsons need not be overt - the target already assume this and the new brand can be just presented as it is, to the public at large."<sup>6</sup>(emphasis added)*

Based on that evidence Tamberlin J found that:

*"those advising the breweries considered the ground had already been laid by the promotion of "The Simpsons" for the target audience to make an immediate association with "The Simpsons".<sup>7</sup>*

Tamberlin J also held:

*"There is no need to reinforce the name with an image of any character or any other title or description or indeed any reference to the words "The Simpsons". To paraphrase the words of Dixon J in the Disney case, supra at 457, the breweries, in using the name "Duff Beer", are making use of an element which belongs to "the reputation and fame" of Matt Groening's creations to create the association."<sup>8</sup>*

*"The breweries knew that they were able by use of the name "Duff" alone to evoke the powerful association without using names or images."<sup>9</sup>*

*"The evidence supports the view that there is a very large number of consumers who will have been exposed to the series during the five years it has been broadcast nationally and rebroadcast in prime time.... Therefore not only will such viewers make the observation that the name "Duff" on the breweries' can is the same name as that in "The Simpsons" but will also immediately be conscious of a strong and clear connection with the series and its main characters, their personalities, institutions ("Duff Brewery", "Moe's Bar") and other products which are elements in the "fictional universe" of "The Simpsons"."<sup>10</sup>*

*"This association will arouse and recall the connotations of fun, irreverence and parody which surround "The Simpsons" episodes. It is this element of the goodwill and reputation of "The Simpsons" which the breweries seek to exploit in the launch and promotion of their beer."<sup>11</sup>*

(emphasis added)

These findings are equally relevant to the Product. By virtue of using the "Duff" name and adopting the get-up of the Duff Beer product that appears in the Simpsons cartoon, the Product will immediately evoke recall of The Simpsons cartoon series and of the "fun, irreverence and parody which surround the "The Simpsons" episodes". These findings about recall and association are just as applicable to children and young people as they are to an older audience of the Simpsons. The

<sup>6</sup> Ibid [64].

<sup>7</sup> Ibid [65].

<sup>8</sup> Ibid [96].

<sup>9</sup> Ibid [103].

<sup>10</sup> Ibid [106].

<sup>11</sup> Ibid [107].

outcome is that Woolworths' alcoholic Product has an inherent, strong and evident appeal to children and adolescents resulting from its association with the popular cartoon series. It is clear from the Woolworths' press release extracted in the news article extracted in Annexure 4 that Woolworths is fully aware that the connection with the Simpsons is readily "apparent".

#### **Packaging**

For the reasons set out above, the APC submits that the Product packaging, by virtue of its affiliation with The Simpsons cartoon series will have a strong and evident appeal to Children and adolescents and is a blatant breach of Part 2(b) of the ABAC.

The Product name or the trade mark used on the Product has not been used on an alcoholic beverage that has been supplied for bona fide retail sale in the ordinary course of business in Australia prior to 31 October 2009.

#### **Advertisements**

For the reasons set out above, the APC submits that any advertisement that depicts either the name and/or the image of the Product will have a strong and evident appeal to Children and adolescents in breach of Part 1(b) of the ABAC.

#### **Conclusion**

The APC submits that there is no modification that can be made to the packaging of the Product that will rectify its inherent appeal to children. As was held by the Federal Court of Australia, the use of the name "Duff" alone (regardless of whether it is used on a product that replicates the product depicted in the cartoon series) without any explicit reference to the cartoon series, is sufficient to conjure recall and a connection with The Simpsons cartoon series with the effect that the product has a clear and strong appeal to children.

The APC submits that the Product breaches the ABAC and should be removed from the market. The APC submits this is the only remedy that would accord with the provisions and spirit of the ABAC. To this end, it would not be permissible nor palatable for an alcohol company to seek to integrate a well-known beer product into a cartoon series popular with children. Similarly, it should not be possible for alcohol producers to create and sell an alcohol product that has an established reputation because of its portrayal in a cartoon series popular with children.

**Alcohol Policy Coalition  
June 2014**

**The APC** comprises the Australian Drug Foundation, Australian Medical Association (Victoria), Cancer Council Victoria, Foundation for Alcohol Research and Education, Jewish Community Council of Victoria, Public Health Association of Australia (Victoria), the Royal Australasian College of Surgeons, Turning Point, the Uniting Church and the Victorian Alcohol and Drug Association,

ANNEXURE 1

Extracts from Duff Beer Facebook page (captured 2 June 2014)





ANNEXURE 2

Extracts from Duff Beer AU twitter account and twitter posts using the hash tag #DuffBeer

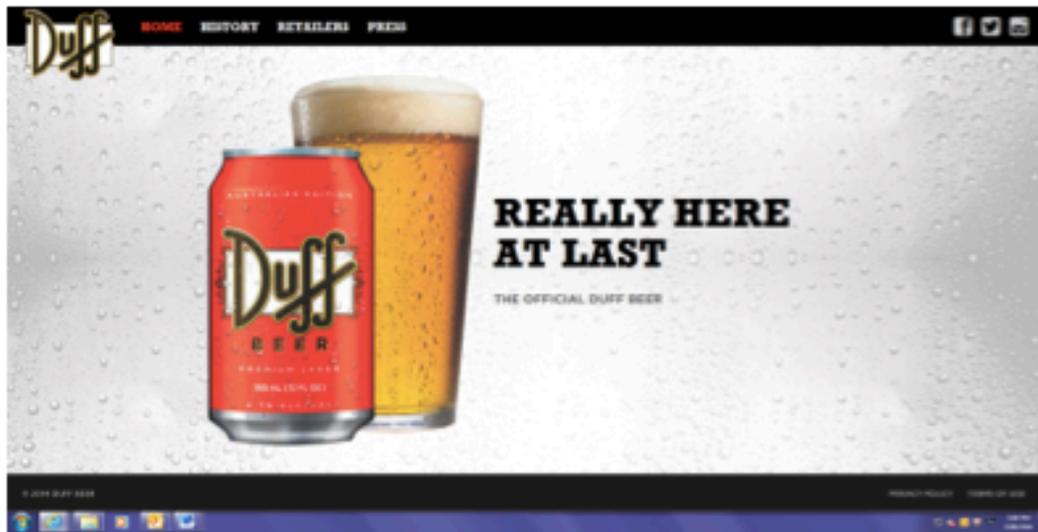




#DuffBeer

ANNEXURE 3

Extracts from [www.duffbeer.com](http://www.duffbeer.com) (captured 2 June 2014)



#### ANNEXURE 4

Article posted on Australian Brew News (available at <http://www.brewsnews.com.au/2014/06/the-duffinition-of-nonsense/>)

## The Duffinition of nonsense

June 5, 2014

By [Matt Kirkegaard](#)

[inShare](#)12

Whatever you do, don't mention what Duff is the "official" beer of...(Nudge nudge. Wink wink.)

I'm catching up on the multitude of things that were let slide during Good Beer Week, including my mail.

There are so many beer releases, launches and events these days that Brews News makes no pretense of trying to keep up with them all — why duplicate what [The Crafty Pint](#) does so brilliantly. Instead, we try to focus on things that stand out, or give context to bigger issues, or just things that we just find interesting. Consequently the Brews News waste bin is often filled with press releases that add nothing to the conversation about beer, such as that for products such as Duff Beer.



However, every now and then a media release lands that is so egregiously bad that, even if the product a product is inherently forgettable, it is worthy of the time it takes to excoriate it. Duff Beer is one such release.

While a beer that is worthy of being reviewed is always worthy of the dollars it costs, Duff was one that would never have ended up in my fridge but for a PR provided sample. Given the free beer sample, the media release would have been skimmed as a courtesy to the PR person who took the time out of their busy schedule to arrange for an unpaid intern to post it to me and then — usually — binned. But in this case, it was the little note that came with the media release that caught my attention and raised my ire.

*Hey Matt,*

*As promised I've enclosed a couple of cans of DUFF BEER for you.*

*Just a note with regards to Duff, whilst the connection is apparent, we would request that you to take caution when referencing Duff Beer back to The Simpsons. We want ensure we are not promoting the brand to a younger audience. But feel free to post anything about the beer on social media pages. (emphasis in original)*

The note came complete with a handy hashtag and social media list.

So, I can write about the beer, but I have to be careful about mentioning the Simpsons. That's kinda like being given a bad porno to review and being asked not to mention the sex.

Is there a single other reason to buy this beer other than it is known solely through The Simpsons.

Yet, while those writing about the beer are warned to be careful referencing it back to the Simpsons, the trademark owners don't feel the same need for caution. In order to protect their intellectual property rights "The Simpsons <sup>TM</sup>" is inscribed on the side of the each and every can.

It is obvious that they need need to assert their IP rights as the media release proclaims that:

*In the past Duff has only been available through counterfeit and imitations. This is the first official Duff Beer from the people who created the Duff brand.*

(Purely as an aside, it's amazing that a beer that has never really existed, except as a frame of celluloid and an item of intellectual property, can be said to have been 'counterfeited'. Isn't a counterfeit a fake replica of a *real* product.)

But anyway, whatever we do, we must not be accused of promoting it to a 'younger audience'. I mean if we were accused of doing that, [the ensuing media storm](#) might prevent them from promoting Duff to their intended audience: mindless muppets who don't actually get the biting irony intended in the creation of the cartoon brand but just want to get shitfaced swilling the same beer as the fat, fictional satire of themselves.

God forbid.

As for the taste, I'm not sure whether its the pointlessness of the product or the the astringent lingering bitterness and chemical aftertaste that leaving the bad taste in my mouth. At \$45 a carton, it may well finally prove conclusively the maxim that a fool and his money are soon parted.

## Attachment B



**WOOLWORTHS**  
**LIQUOR**  
**GROUP**

27 June 2014

Ms Jayne Taylor  
Executive Officer  
ABAC Scheme  
PO Box 519  
Stirling SA 5152

Via email: [info@abac.org.au](mailto:info@abac.org.au)

Dear Ms Taylor

### **ABAC COMPLAINT NO 37/14 - Duff Beer product naming, packaging and advertisements**

Thank you for the opportunity to respond to the complaint you have received with respect to Duff Beer product naming, packaging and advertisements.

We understand that the ABAC Adjudication Panel (**Panel**) is considering whether Duff Beer product naming or packaging breach Part 2 Section 1(a)(ii) or Section 1(b) of the Alcoholic Beverages Advertising (and Packaging) Code (**Code**) and whether advertisements for Duff Beer products referred to in the complaint breach Part 1(a)(ii) or Part 1(b) of the Code.

This response addresses advertising, marketing and retail activities under the control of Woolworths Liquor Group (WLG).

WLG is Australia's most responsible retailer of alcoholic beverages. Last year we formalised our status as a signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme. Prior to becoming a signatory, WLG demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. WLG maintains strict internal and external processes in addition to those required by the ABAC Scheme, which are highly relevant in this context.

WLG has also instigated a range of industry-leading initiatives to ensure that children are not served alcohol, including:

- ID25 (ask for ID from anyone who looks under 25)
- Don't Buy It For Them (stopping secondary supply to minors)

- Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award winning training program "Safe".

In marketing Duff Beer products, WLG has been fully aware of the requirement not to encourage under-age drinking or to appeal to children or adolescents. We have been careful to observe this, including by ensuring that our marketing has been strictly limited to promotion of the beer to adults without reference to The Simpsons TV series or characters. We have expressly prohibited the use of The Simpsons or its characters by staff and in any in-store display.

WLG has ensured from the outset that it has advertised Duff Beer products only to adults, and that they have been sold only to adults in a carefully controlled environment. This has been clearly communicated across our business with strict guideline advice to all marketing, promotional and store staff. The only exposure of the product is inside our licensed premises. WLG has not featured and will not feature Duff Beer on any external signage at stores, on billboards, or in press or website advertisements. Our marketing has been subjected to review by our internal marketing compliance team to ensure adherence to internal best practice policies. There have also been multiple Alcohol Advertising Pre-Vetting Service (AAPS) approvals regarding the marketing of the Duff Beer products.

We consider it important that the Panel understands this background as we are confident that the mature, balanced and responsible measures we have been taking in marketing the Duff Beer products put it beyond any doubt that there has been and will be no encouragement of under-age drinking, no appeal to children or adolescents (whether strong or evident or otherwise) and no breach of the Code.

#### **Complaint regarding naming and packaging**

The relevant provisions of the Code are as follows:

##### ***Part 2 – Standards to be applied to the naming and packaging of alcohol beverages***

*1. The naming or 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 – ...*
  - ii) must not encourage under-age drinking; ...*
- b) not have a strong or evident appeal to children or adolescents and, accordingly –*
  - i) adults appearing in product material must be over 25 years of age and be clearly depicted as adults;*
  - ii) children and adolescents may only appear in product material in natural situations (e.g. family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and*
  - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene ...*

*2. 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.*

As to the **naming** of the Duff Beer products, Part 2 Section 1 (a) and (b) do not apply due to the operation of Part 2 Section 2. You refer in your letter to the 1996 Federal Court decision regarding Duff Beer. In that case, the respondent breweries, South Australian Brewing Co Limited and Lion Nathan Australia Pty Limited, were found by the Judge (at paragraphs 19 and 22) to have launched and promoted a beer using the name Duff Beer in about November 1995, selling it in various States during November and December 1995 and in January 1996. This clearly meets the Part 2 Section 2 exception of products being supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia at a time which was prior to 31 October 2009. The other findings in the case do not affect the fact that the products were supplied by the breweries for bona fide retail sale in the ordinary course of business.

This means that the use of the name Duff Beer is not a breach of the Code. As indicated below, this has important consequences for the other elements of the complaint. In particular, it means that there must be one or more significant features in the packaging or advertisements over and above the use of the Duff Beer name which encourage under-age drinking or which appeal to children or adolescents. There are no such features.

As to the **packaging** of the Duff Beer, there have been multiple Alcohol Advertising Pre-Vetting Service (AAPS) approvals (12826, 13081, 13101, 13110, 13121, 13124, 13125, 13134), copies of which are enclosed, many of which related to advertisements and marketing materials which incorporated images of Duff Beer products. There was no suggestion by AAPS that there was any actual breach or potential for breach of the Code, including in relation to the encouragement of under-age drinking or there being strong or evident appeal to children or adolescents. This accords with our view that the packaging does not breach the Code.

It appears that the essence of the complaint regarding the packaging is that it is the use of the name Duff Beer on packaging which itself encourages under-age drinking or strongly or evidently appeals to children or adolescents. As it is clear that there is no restriction on the use of the Duff Beer name under the Code (see above), the use of the name on packaging cannot breach the Code. When that is taken into account, together with the strict requirements as to advertising and selling Duff Beer products indicated above, we do not accept that it can reasonably or realistically be suggested that elements such as the colour scheme or small print encourage under-age drinking or have a strong or evident appeal to children or adolescents.

#### **Complaint regarding advertising**

The relevant provisions of the Code are as follows:

##### ***Part 1 – Standards to be applied to advertisements for alcohol beverages***

*Advertisements for alcohol beverages must –*

- a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly – ...*
- ii) must not encourage under-age drinking; ...*

*b) not have a strong or evident appeal to children or adolescents and, accordingly –*

- i) adults appearing in advertisements must be over 25 years of age and be clearly depicted as adults;*
- ii) children and adolescents may only appear in advertisements in natural situations (eg family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and*
- iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene;*

The comments we have made above in relation to packaging also apply to advertising. It is clear from the careful and systematic marketing approach taken by WLG that our advertisements for Duff Beer products present a mature, balanced and responsible approach to the consumption of alcoholic beverages and do not in any way encourage under-age drinking or have strong or evident appeal to children or adolescents.

The pre-vetted taglines "The Official Duff Beer" and "Duff Beer, Really Here At Last" reference the unauthorised heritage of Duff Beer in the Australian market. They do not encourage under-age drinking or have any appeal to children or adolescents, and neither does a simple product shot. The images used by WLG on social media pages referred to in the complaint were from previously pre-vetted material, although the ABAC Scheme does not require posts and activity on social media pages to be pre-vetted.

There are no production or design elements in WLG's advertising that a reasonable person could assume encourage under-age drinking or have strong or evident appeal to children or adolescents. No cartoon imagery is used. No reference is made to The Simpsons TV series or any of The Simpsons characters. There is no depiction of alcohol being consumed and no one appears in any advertisements: no child, no adolescent, no adult and no cartoon character. There is no implication that children or adolescents will consume or serve Duff Beer products. Other than the Duff Beer name, which we are clearly allowed to use without breaching the Code, there is no significant connection with The Simpsons TV series.

There is quite simply no encouragement at any point of the consumption of alcohol by underage persons and nothing to appeal to children or adolescents.

Accordingly, the complaint should be dismissed, and the Panel should determine that there has been no breach of the Code.

Please feel free to contact me should the Adjudication Panel require any further information from WLG.

Yours sincerely



Andrew Wilsmore  
Manager, Public Affairs

## **Attachment C**

1 August 2014

Professor the Honourable Michael Lavarch  
Chief Adjudicator  
ABAC Adjudication Panel  
PO Box 519  
Stirling SA 5152

Via email: [info@abac.org.au](mailto:info@abac.org.au)

Dear Professor Lavarch

### **PROVISIONAL DETERMINATION 37/14 - DUFF BEER**

We refer to your letter of 17 July 2014 advising us of Provisional Determination 37/14 made by the ABAC Adjudication Panel upholding aspects of a complaint regarding the product name and packaging of Duff Beer.

We seek a rehearing of the Provisional Determination, and in this letter provide our formal written response and further submissions.

We understand that the aspect of the complaint that addresses advertisements for the product will be considered by the Panel after it issues its final determination in relation to the name and packaging of the product.

In this letter we respond to the Provisional Determination and provide further submissions covering the following matters: a summary of our submissions; the applicable provisions of the ABAC Code; the potential impact of the final determination to be made by the Panel; the Part 2.2 exception; and the Part 2.1 provisions relating to children and adolescents.

We also rely on the submissions in our letter of 27 June 2014, and ask the Panel to consider them in its reconsideration of the issues.

### **Summary of submissions**

1. WLG, a Code signatory, has mature, balanced and responsible measures in place, both generally and specifically in relation to marketing Duff Beer products, to ensure that there is no encouragement of under-age drinking, no appeal to children or adolescents and no breach of the Code.
2. No such restrictions apply to vendors of unauthorised versions of Duff Beer who are not likely to be Code signatories and who may fill the vacuum if the complaint is upheld regarding genuine products sold responsibly by WLG.
3. As an adverse determination in relation to the Duff Beer name has such serious implications:
  - (i) the Panel must be careful to apply the relevant Code provisions correctly; and
  - (ii) in particular, the Panel must apply the provisions of Part 2.2 as they are unambiguously expressed rather than according to its belief as to what may have been intended.
4. The Part 2.2 Code exception applies as there were bona fide retail sales of Duff Beer in the ordinary course of business in Australia prior to 31 October 2009.
5. The *bona fide* retail sales referenced in Part 2.2 do not relate to authorised use of a name, but to real or genuine commercial sales, as opposed to token or promotional sales.
6. Concepts regarding the 'spirit and intent' of the Code and 'grandfathering' do not affect the unambiguous meaning of Part 2.2, and should not be taken into consideration by the Panel.
7. The Duff Beer advertisements incorporated prominent images of the Duff Beer product and name and were approved by pre-vetting experts who did not suggest that they breached the Code, including by encouraging under-age drinking or having a strong or evident appeal to children or adolescents. It follows that the Duff Beer name, packaging and advertisements do not breach the Code.
8. In any event, as the use of the Duff Beer name is permitted by Part 2.2, no other aspects of the packaging or advertisements, including small print, taken individually or together, breach the Code by encouraging under-age drinking or having a strong or evident appeal to children or adolescents.

### **Applicable Code provisions**

As set out at paragraph 28 of the Provisional Determination, although a new code named the 'ABAC Responsible Alcohol Marketing Code' commenced on 1 July 2014, it is the provisions of the former Alcohol Beverage Advertising (and Packaging) Code (**Code**) which are applicable. This reflects the fact that the complaint was received on 10 June 2014, and complaints received prior to 1 July 2014 are to be decided under the Code.

As set out at paragraph 17 of the Provisional Determination, the aspect of the complaint addressed by the Panel in the Provisional Determination is that the product through its name and packaging is said to

have strong or evident appeal to children or adolescents by reason of its creation by, depiction in and therefore association with “The Simpsons” television series.

The Provisional Determination deals solely with Part 2 of the Code, and we limit our response and further submissions accordingly.

The relevant provisions of the Code are as follows:

***Part 2 – Standards to be applied to the naming and packaging of alcohol beverages***

*1. The naming or 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 – ...*

*ii) must not encourage under-age drinking; ...*

*b) not have a strong or evident appeal to children or adolescents and, accordingly –*

*i) adults appearing in product material must be over 25 years of age and be clearly depicted as adults;*

*ii) children and adolescents may only appear in product material in natural situations (e.g. family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and*

*iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene ...*

*2. 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.*

**Potential impact of final determination**

In his December 2010 Report on the implementation of the Ministerial Council on Drug Strategy's five dot points on alcohol advertising, Stephen Strachan, Chairman of The ABAC Scheme Ltd, referred to industry discussions on naming and packaging and stated that:

*there is a world of difference in asking a CEO of a company to change an advertisement for a product than to change the product itself.*

This is an acknowledgment of the potentially serious commercial impact of ABAC Panel determinations which relate to products as opposed to advertisements. It also underlines the importance of there being a thorough and careful reconsideration of the facts in this case, and particularly of the meaning of the relevant provisions of the Code and how they are applied before the final determination is made, the very name of a genuine and valuable product being in jeopardy.

There is a further potential impact that is relevant in this case. Unauthorised DUFF BEER products are marketed around the world, including in Australia. For instance, in 2012, a company in Western Australia imported and sold significant quantities of unauthorised DUFF branded beer products across Australia, as reported at:

- <https://au.news.yahoo.com/a/14047377/doh-duff-deal-costs-2m/>

In our previous submission we provided details as to the mature, balanced and responsible measures we have taken in the marketing of Duff Beer products, as a signatory to the Code. This does not appear to have been questioned by the Panel.

If, despite the applicability of the Part 2.2 exception, the Panel upholds the complaint regarding the name of the authorised Duff Beer product that is sold responsibly by our company, there is an appreciable risk that unauthorised products, marketed with no reference to the Code, would fill the vacuum. This would be a strange result, certainly contrary to the policy of the Code.

### **Part 2.2 exception**

We have submitted and now resubmit that the Part 2.2 exception applies, based on the supply for bona fide retail sale of Duff Beer in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009. In its Provisional Determination, the Panel did not accept this submission for two reasons, summarised at paragraph 26(a):

- the prior use of the name 'Duff' by unrelated parties was not bona fide as it was in breach of Australia's intellectual property law and hence unlawful; and
- the spirit and intent of Part 2.2 of the Code was not to extend the protection of the grandfathering provisions to current circumstances.

### **Bona fide retail sale**

The Panel accepts that the 'Duff' name was used on an alcohol beverage which was available for sale in Australia prior to 31 October 2009 (paragraph 36 of the Provisional Determination), but does not consider that the product was supplied for 'bona fide' retail sale.

The Panel interprets the words 'bona fide' as requiring lawful use of the relevant product name, without breaching intellectual property rights (paragraph 37 of the Provisional Determination). We submit that this is not the meaning of 'bona fide' for the purposes of Part 2.2.

It should be noted that a stylised form of DUFF is registered as a trade mark in Australia, number 1293382, in class 32 for goods including beer and lager. This mark has been registered since 7 April 2009 (ie before 31 October 2009) in the name of Twentieth Century Fox Film Corporation. It was not registered at the time of the prior use of the name 'Duff' by unrelated parties.

Part 2.2 relevantly provides that the Part 2.1 standards apply to the naming and packaging of all alcohol beverages supplied in Australia with the exception of the name of any product ... which had been

supplied for bona fide retail sale in the ordinary course of business in ... Australia prior to 31 October 2009. The Part 2.2 exception does not extend to packaging.

'Bona fide' is the Latin term for 'good faith'. In Part 2.2, 'bona fide' qualifies the noun 'sale'. It does not qualify the noun 'name'. It follows that for the Part 2.2 exception to apply it is the retail sale in the ordinary course of business that must be in good faith. There is no requirement that the use of the name of the product be in good faith. The retail sales must have been real or genuine in a commercial sense, as opposed to merely token or promotional sales. Questions as to who, if anyone, owned or was entitled to use the name or any trade marks appearing on the product, or whether there was conduct concerning them that may have been deceptive, do not arise.

This means that the straightforward question for the Panel to consider is whether the product was supplied for real or genuine retail sale in a commercial sense in the ordinary course of business in Australia prior to 31 October 2009.

This common sense and natural interpretation of the words of Part 2.2 is strongly supported by Court decisions regarding the use of trade marks in good faith in a similar context. Examples include:

- *Woolly Bull Enterprises Pty Ltd v Reynolds* [2001] FCA 261 in which Drummond J observed that the expression "use in good faith" has a well understood meaning in terms of s 92 of the Trade Marks Act 1995 (Cth), namely "real" as opposed to token use in a commercial sense
- *Electrolux Ltd v Electrix Ltd & Anor* (1953) 70 RPC 127 in which Lloyd-Jacob J rejected a submission that the use in question could not be bona fide if commenced with knowledge that the product "Electrix" was in the market and that there may be deception. On appeal Lord Evershed MR (1954) 71 RPC 23 said at [36]:

*[T]he use here shown does not seem to me in any real sense capable of being described as a pretended use. There is...no evidence which would justify the conclusion that the use was merely spasmodic or temporary. Commercially speaking, it is not shown that the use made by the Plaintiffs of this mark was not an ordinary and genuine use, and it certainly was substantial. If that is so, then it seems to me that the use is not disqualified...*

- *Johnson & Johnson Australia Pty Ltd v Stirling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326 in which Gummow J considered the meaning of the expression "use in good faith" as a criterion for infringement pointing out that:

*There is, in relation to the comparable provisions in the British Act of 1938, authority to the effect that in order to qualify as such use there must be a real or genuine use in a commercial sense, rather than colourable activity and "token" use designed to lead trade rivals to think that the registered proprietor was using its mark in a way which gave it the protection of the legislation.*

These examples were cited by the Full Federal Court in *Liquideng Farm Supplies Pty Ltd v Liquid Engineering 2003 Pty Ltd* (2009) 175 FCR 26 in which the Court rejected a broad approach to the meaning of good faith in the context of section 92 of the Trade Marks Act 1995 (Cth). The focus is on

whether the sales were genuine commercial sales, not on broader issues such as the motivation for or effect of the vendor's conduct.

Indeed, to interpret 'bona fide retail sale' as, in effect, a sale which did not breach any law, would require a consideration of every aspect of any prior sale to determine whether it breached any law, be it a law relating to misleading conduct or a law relating to compliance with food standards or a law relating to packaging. That is an interpretation of 'bona fide' which is both contrary to its ordinary meaning and to any 'spirit and intent' of the Code.

The difficulty such an approach creates for the Panel and its determinations in relation to Part 2.2 is well illustrated by its consideration of the 1996 Federal Court decision regarding Duff Beer. In paragraph 35 of the Provisional Determination, the Panel makes the statement that:

*A 'trade mark' has a particular meaning under the Trade Marks Act 1995 and cannot be relied upon in the current argument. This is because it is clear from the Federal Court decision that the name 'Duff' fell within the intellectual property of the owners of The Simpsons and hence the unsanctioned use of the name could not constitute a trade mark.*

It is not clear what the Panel means when it says that *the unsanctioned use of the name could not constitute a trade mark*. The statement does not accord with any established concept of trade mark or other intellectual property law. For instance, it is a fundamental principle of registered trade mark law that the relevant name or sign has to be used as a trade mark (even if the use is unsanctioned) before there can be an infringement. The 1996 case did not in fact involve any issue pursuant to the Trade Marks Act as there were no relevant registered trade marks at the time. That does not mean that there was no use of a trade mark: the use of DUFF BEER by the respondents was clearly trade mark use.

The decision that is referred to was handed down on 17 May 1996. No remedy was granted at the time. On 19 June 1996, certain remedies were granted, including a particular form of injunction regarding a particular form of Duff Beer can. There was consideration given to other possible forms of Duff Beer cans, incorporating disclaimers. This raises the important possibility that as there was no registered trade mark at the time, it may have been possible for an unauthorised Duff Beer can to be sold without Court intervention.

Further, the Panel does not know whether at a later time any payment was made by the respondents to the applicant in the nature of a notional royalty or there was some other settlement of the dispute which had the effect of authorising and sanctioning the past use retrospectively. It is not uncommon for trade mark owners to adopt past sales of unauthorised products, including by the purchase of the relevant goodwill and reputation.

It follows that the Panel is quite simply not in a position to make a reliable call on the issue of whether any given use of a name has been authorised, whether at the time or subsequently. This is so even when there is a Federal Court case which is apparently on point. The Panel cannot be sure it has all the relevant information and it is not in a position to make all necessary enquiries. The Supplier and the complainant cannot be expected to have the relevant information. This is recognised in paragraph 50 of the Provisional Determination: there is no basis to depart from the Panel's general approach in this case.

Part 2.2 very sensibly and appropriately does not require the Panel to make any such call.

We submit that the sales by South Australian Brewing Co Limited and Lion Nathan Australia Pty Ltd referred to in our earlier letter were bona fide retail sales in the relevant sense. On that basis, the Part 2.2 exception applies to the name Duff Beer.

### **Spirit and intent of Part 2.2 and 'grandfathering'**

In paragraph 38 of the Provisional Determination, the Panel refers to the Code Preamble stating that the 'spirit and intent' of the Code is important.

The Preamble expresses commitment to the goal that all advertisements for alcohol beverages produced for publication or broadcast in Australia, other than point of sale material produced by alcohol beverage retailers, and all naming and packaging of alcohol beverages comply with the spirit and intent of the Code.

However, Part 2.2 of the Code operates to provide a simple exception to the Part 2.1 standards: if Part 2.2 applies in relation to a product name, the Part 2.1 standards do not apply to that name. If the exception is triggered, questions regarding the spirit and intent of the Code cannot arise.

In paragraphs 29, 30, 31, 32, 34, 35 and 36 of the Provisional Determination, the Panel refers to Part 2.2 as a 'grandfathering' clause. In that context the Panel makes certain statements as to the meaning of Part 2.2, including:

- that the effect of such a provision is to create a category of existing persons or entities whose rights or obligations continue to be governed by the old arrangements in place at the time the law or policy changed; and
- for alcohol beverage names and packages, it meant that alcohol products in the market place as at 30 October 2009 did not have to be consistent with Part 2 of the Code.

These statements do not appear in and are not supported by Part 2.2. Specifically, there is no reference in Part 2.2 to grandfathering, to existing persons or entities, to their rights and obligations or to alcohol products in the market place as at 30 October 2009. The Part 2.2 exception plainly does not have such limitations. These statements cannot therefore provide a sound basis for the Panel to determine that Part 2.2 does not apply.

Further, the Panel characterises our submissions regarding the Part 2.2 exception as 'procedural' rather than 'substantive' (paragraph 24 of the Provisional Determination). The implication is that the Panel considers Part 2.2 to be somehow a lesser provision than or subsidiary to Part 2.1. Part 2.2 is a critically important provision of the Code in the context of a Panel determination regarding the name of a product which has precursors in the Australian market. It is a substantive and not merely a procedural provision of the Code, and the Panel should consider and apply it as such, not discounting it in any way in comparison with other provisions.

Part 2.2 would have been expressed differently if the exception were only to apply to products in the market place as at 30 October 2009 or only to the particular entity or entities which had been responsible for the prior retail sales. It is common, particularly for beer products, for there to be significant breaks between genuine retail sales in which the same name is used. Examples are seasonal

and nostalgic offerings. The fact that they may be occasional does not remove them from the protection of the Part 2.2 exception, and the Panel is not required to consider which side of a notional line they may fall. Equally, it is common for different entities to be involved in retail sales of such products at different times. The Panel cannot be expected to undertake a detailed review of these entities and what their respective rights and functions may be, or may be claimed to be, or whether their use of trade marks is authorised at the time or retrospectively: understandably that is not required by Part 2.2.

With respect, the Panel must apply the Part 2.2 exception as a substantive, not merely procedural, provision of the Code as it is unambiguously expressed, and not according to the Panel's beliefs as to what was intended (paragraph 38 of the Provisional Determination). This is particularly the case in view of the potentially grave impact of a misapplication of Part 2.2.

### **Part 2.1**

We repeat our previous submissions in relation to Part 2.1.

We understand that the pre-vetting process cannot bind the Panel, and that it related to approval of the advertisements rather than the name and packaging. However, taking into account the content of the advertisements, it is highly relevant that no objection was raised during that process.

Those engaged in pre-vetting are experts in relation to marketing matters and the provisions of the ABAC Code, including regarding appeal to children and adolescents. They are taking a relatively uncluttered view of the issues raised by the proposed advertisements, without extraneous material such as is provided in a complaint or response to a complaint. They are just looking at the material and considering its effect on the likely audience. In this case, they considered the advertisements and provided their approvals at a critical time, immediately before we launched the product. We relied on their approvals in going ahead with the launch.

It was not apparent to those experts that the proposed publications, which included prominent images of the product and the name Duff Beer, would have strong or evident appeal to children or adolescents. This is not surprising as the product was created for adults only.

It cannot be assumed that simply because the name or appearance of a product may be recognisable from a TV series which includes children as a small proportion of its viewing demographic, the product itself must therefore have strong or evident appeal to children or adolescents.

The connection between such a product and such a TV series does not necessarily give rise to the relevant appeal for the purposes of Part 2.1. They are two separate matters. In this case the Panel appears to have confused them. At paragraph 51 of the Provisional Determination, the Panel states that The Simpsons clearly does have strong appeal to children. It then goes on to state that it is a fact that the name 'Duff' and its (presumably the Duff Beer product's) Simpsons replica packaging do have strong or evident appeal to children or adolescents in breach of Part 2 of the Code. The Panel does this without acknowledging that the second proposition does not necessarily follow from the first, and without exposing any reasoning as to how it has reached this conclusion.

Any conclusion as to the appeal of a product must of course be highly contingent on the nature of the product itself, and how it is presented and marketed. In this case, the expert pre-vetters, looking at the

proposed advertisements with their clear and prominent depictions of the product and the product name, did not make the connection with appeal to children or adolescents, or at least to any such appeal being strong or evident enough to warrant an objection. It follows that there is a real question as to whether the name and the appearance of the product have that effect. We submit that they do not.

The Panel refers to the small print on the product and its packaging. It is the Duff Beer name that creates the overwhelming visual impact, appearing twice in large lettering on the can. Comparatively little space is afforded to the informational small print, which is very small, and indeed is not evident unless a special effort is made to find and read it. Realistically it would not be noticed by the great majority of people and is not an attractant to a potential purchaser or consumer. It cannot be suggested that any of the small print gives the product a strong or evident appeal to children or adolescents.

Indeed, none of the packaging elements, whether taken separately or together, give rise to the required strong or evident appeal to children or adolescents.

Yours sincerely

Andrew Wilshire  
Manager, Public Affairs

# **ABAC**

**ABAC Complaints Panel  
Provisional Determination No: 37/14**

**Complaint by the Alcohol Policy Coalition  
Product: Duff Beer  
Supplier: Woolworths Liquor Group**

Professor The Hon Michael Lavarch – Chief Adjudicator  
Jeanne Strachan – Member  
Debra Richards – Member  
Professor Richard Mattick – Member  
Professor Louisa Jorm – Member

17 July 2014

## **Introduction**

1. This provisional determination by the Alcohol Beverages Advertising Code ("ABAC") Adjudication Panel ("The Panel") concerns the name and packaging of "Duff Beer" by the Woolworths Liquor Group ("the Supplier") and arises from a complaint received on 10 June 2014. The complaint also addresses advertisements for the product. This aspect of the complaint will be dealt with in a subsequent separate determination.

## **The Quasi-Regulatory System**

2. Alcohol advertising and packaging 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 and packaging. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising and packaging as quasi-regulation. The most important provisions applying to alcohol advertising and packaging 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 (and Packaging) 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 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 10 June 2014.
7. The Panel has a goal to determine complaints within 30 business days of receipt of the complaint. In relation to complaints about product names and packaging, the ABAC scheme rules and procedures provide for a two stage process which allows for the making of a provisional determination and a further opportunity for a product supplier to make submissions prior to the Panel making a final determination. As a result, the 30 day timeframe is not applicable to this complaint.

#### **Pre-vetting Clearance**

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements and some packaging against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the product name or packaging, but was obtained for advertising featuring the product name.

#### **Product material**

9. The complaint refers to a product named "Duff Beer".
10. The product is packaged in a red can and features the word "Duff" in large black text with an amber border over a white framed rectangle on the can. On the sides of the rectangle is an outline of ears of a grain. The words "Australian edition" appear at the top of the can and the words "BEER", "Premium lager" "355mL (12FLOZ)" and "4.7% ALC/VOL" is in smaller print below the name "Duff".
11. On the side of the can next to the barcode is the Drinkwise get the facts logo, recycling logo and symbol for 1.3 standard drinks. The following text also appears in small print "Product of U.S.A. Imported by Pinnacle Liquor Level 1, 26 Waterloo Street, Surry Hills NSW 2010 Australia The Simpsons TM & ©2014 Fox" followed by recycling refund information.
12. Below the barcode is the stylised signature of Matt Groening (creator of The Simpsons).

13. The carton for the product has red on the sides, white on the bottom and no top.
14. The short sides of the carton have the Duff Beer logo as on the front of the can. Next to the logo at the bottom of the panel is the stylized signature of Matt Groening. Next to the signature is the text "4x6x355mL CANS 4.7%ALC/VOL GROSS WEIGHT 9.3KG" above "24 x" and the standard drink logo for 1.3 standard drinks. On the right side of the panel is the barcode above the text "The Simpsons TM & ©2014 Twentieth Century Fox Film Corporation. All Rights Reserved".
15. The long sides of the carton on the left have the text "24 x 355ML 4.7% ALC/VOL GROSS WEIGHT 9.3KG". In the middle of the panel is the text "Australian edition" followed by the Duff Beer logo as featured on the can and the text "Premium Lager". On the bottom of the panel after the Duff Beer logo is the Matt Groening stylized signature. On the right side of the panel is the barcode above the text "The Simpsons TM & ©2014 Twentieth Century Fox Film Corporation. All Rights Reserved".
16. The bottom of the carton includes the text "Product of U.S.A. Imported by Pinnacle Liquor Level 1, 26 Waterloo Street, Surry Hills NSW 2010 Australia" followed by the Drinkwise Get the Facts logo and the text "Is your drinking harming yourself or others?" Below this information is the recycling logo, standards drinks logo and barcode.

#### **The Complaint**

17. The complainant argues that the product through its name and packaging has strong or evident appeal to children or adolescents by reason of its creation by, depiction in and therefore association with "The Simpsons" television series. A detailed complaint was supplied and is attached to this determination. The complaint raises issues under both Part 1 and Part 2 of the Code, but this determination deals solely with Part 2.

#### **The Code**

18. Part 2.1 of the ABAC provides that the naming and packaging of alcohol beverages (which is also referred to as "product material") must:
  - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
    - ii) must not encourage under-age drinking
  - b) not have a strong or evident appeal to children and adolescents .
19. Part 2.2 of the ABAC provides that the ABAC 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

20. The Supplier responded to the complaint and questions posed by the Panel on 27 June 2014. The principal points made by the Supplier are:
- (a) The Supplier formalised its status as a signatory to the ABAC Scheme last year and prior to becoming a signatory demonstrated a long-standing commitment to supporting and adhering to ABAC and Advertising Standards Bureau principles. It maintains strict internal and external processes in addition to those required by the ABAC Scheme. It has instigated a range of industry-leading initiatives to ensure that children are not served alcohol, including:
    - ID25 (ask for ID from anyone who looks under 25)
    - Don't Buy It For Them (stopping secondary supply to minors)
    - Staff training that exceeds legal requirements, including "Don't Guess, Just Ask", team talkers, regular refresher and reminder courses, and implementation of the award winning training program "Safe".
  - (b) In marketing Duff Beer products the Supplier has been fully aware of the requirement not to encourage under-age drinking or to appeal to children or adolescents. This has been carefully observed, including by ensuring that marketing has been strictly limited to promotion of the beer to adults without reference to The Simpsons TV series or characters by staff or in any in-store display. The Supplier has ensured from the outset that it has advertised Duff Beer products only to adults, and that they have been sold only to adults in a carefully controlled environment. This has been clearly communicated across the business with strict guideline advice to all marketing, promotional and store staff. The only exposure of the product is inside our licensed premises. Duff Beer hasn't and won't be featured on any external signage at stores, on billboards, or in press or website advertisements. The marketing has been subjected to review by the Supplier's internal marketing compliance team to ensure adherence to internal best practice policies. There have been multiple AAPS approvals regarding the marketing of the Duff Beer products. The mature, balanced and responsible measures taken in marketing the Duff Beer products put it beyond any doubt that there has been and will be no encouragement of under-age drinking, no appeal to children or adolescents (whether strong or evident or otherwise) and no breach of the Code.
  - (c) As to the naming of the Duff Beer products, Part 2 Section 1(a) and (b) do not apply due to the operation of Part 2 Section 2. In the 1996 Federal Court decision regarding Duff Beer, South Australian Brewing Co Limited and Lion Nathan Australia Pty Ltd, were found by the Judge (paras 19 and 22) to have launched and promoted a beer using the name Duff Beer in about November 1995, selling it in various States during November and December 1995 and in January 1996. This clearly meets the Part 2 Section 2 exception of products being supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia at a

time which was prior to 31 October 2009. The other findings in the case do not affect the fact that the products were supplied by the breweries for bona fide retail sale in the ordinary course of business.

- (d) As the name Duff Beer is not a breach of the Code this means that there must be one or more significant features in the packaging or advertisements over and above the use of the Duff Beer name which encourage under-age drinking or which appeal to children or adolescents. There are no such features.
- (e) As to the packaging of Duff Beer, there have been multiple Alcohol Advertising Pre-vetting Service Approvals (12826, 13081, 13101, 13121, 13124, 13125 & 13134), many of which related to advertisements and marketing materials which incorporated images of Duff Beer products. There was no suggestion by AAPS that there was any actual potential for breach of the Code, including in relation to the encouragement of under-age drinking or there being strong or evident appeal to children or adolescents. This accords with our view that the packaging does not breach the Code. It appears that the essence of the complaint regarding the packaging is that it is the use of the name Duff Beer on packaging which itself encourages under-age drinking or strongly or evidently appeals to children or adolescents. As it is clear that there is no restriction on the use of the Duff Beer name under the Code, the use of the name on packaging cannot breach the Code. When that is taken into account, together with the strict requirements as to advertising and selling Duff Beer products indicated above, we do not accept that it can reasonably or realistically be suggested that elements such as colour scheme or small print encourage under-age drinking or have a strong or evident appeal to children or adolescents.
- (f) The comments made in relation to packaging also apply to advertising. It is clear from the careful and systematic marketing approach taken by the Supplier that the advertisements for Duff Beer products present a mature, balanced and responsible approach to the consumption of alcoholic beverages and do not in any way encourage under-age drinking or have a strong or evident appeal to children or adolescents. The pre-vetted taglines "The Official Duff Beer" and "Duff Beer, Really Here At Last" reference the unauthorized heritage of Duff Beer in the Australian market. They do not encourage underage drinking or have any appeal to children or adolescents, and neither does a simple product shot. The images used on social media pages referred to in the complaint were from previously pre-vetted material, although the ABAC Scheme does not require posts and activity on social media pages to be pre-vetted.
- (g) There are no production or design elements in the advertising that a reasonable person could assume would encourage under-age drinking or have a strong or evident appeal to children or adolescents. No cartoon imagery is used. No reference is made to The Simpsons TV series or any of The Simpsons characters. There is no depiction of alcohol being consumed and no one appears in any advertisements, no child, no adolescent, no adult and no cartoon character. There is no implication

that children or adolescents will consume or serve Duff Beer products. Other than the Duff Beer name, which we are clearly allowed to use without breaching the Code, there is no significant connection with The Simpsons TV series. There is quite simply no encouragement at any point of the consumption of alcohol by underage persons and nothing to appeal to children or adolescents.

## The Panel's View

### Introduction

21. The Simpsons is one of the longest aired and most successful animated television series of all time. Originating in the United States, the Simpsons is broadcast in many parts of the world, and has been a staple of Australian free to air and pay television networks since the early 1990s.
22. The program is a satirical portrayal of American lower-middle class life and is based upon a two parent, three child family living in a suburban setting. One relatively minor but not infrequent reference in the series is the use of the product 'Duff beer'. This complaint goes to the decision of Woolworths, one of Australia's largest retail alcohol outlets, to add an officially sanctioned 'Duff' beer to the Australian alcohol market.
23. The complainant is described as a coalition of Victorian based health and social agencies with a shared goal of reducing alcohol harm. The basic point raised by the complaint is that by converting the fictional Duff beer of the Simpsons into a real product must mean that the product will have a strong or evident appeal to children, because of the implication that The Simpsons has strong appeal to children and adolescents. The complaint has two parts, firstly relating to the product name and labelling, which replicates the appearance of the fictional Duff beer in the Simpsons. Secondly, the complaint raises concerns about associated advertising of the product.
24. For its part, the Supplier replies to the complaint with both substantive and procedural arguments. The procedural point is that the ABAC scheme standards do not apply to 'Duff' as a product name for reasons which are canvassed at paragraphs 29 to 39. Substantively, it is argued that the marketing of the product has been done carefully so as not to draw upon any references or characters featured in The Simpsons and as such cannot be said to have strong or evident appeal to children or adolescents.
25. Due to the reasonably complex issues raised by the complaint, this determination is divided into the following sections:
  - (a) Summary of decision
  - (b) Background to ABAC scheme and coverage of product names and packaging
  - (c) Does the product name fall within the grandfathering provision?
  - (d) Does the product name and packaging have strong or evident appeal to children or adolescents?

- (e) Procedural aspects

#### Summary of Decision

26. The Panel has made a provisional determination to uphold the complaint in relation to the product material, namely the product name 'Duff' and the packaging of the product. In doing so, the Panel decided:
- (a) The name 'Duff' was not in bona fide retail sale prior to 30 October 2009 due to
    - (i) the prior use of the name 'Duff' by unrelated parties was not bona fide as it was in breach of Australia's intellectual property law and hence unlawful; and
    - (ii) the spirit and intent of Part 2.2 of the Code was not to extend the protection of the grandfathering provisions to current circumstances.
  - (b) The product name 'Duff' and the product packaging which replicates the fictional use of the same items within The Simpsons associates the product material with The Simpsons.
  - (c) The Simpsons has wide appeal across a broad demographic of the population.
  - (d) The Simpsons has strong and evident appeal to children and adolescents.
  - (e) The association of The Simpsons with the product name and packaging is so strongly entrenched in Australian popular culture that measures to market the product without references to The Simpsons characters or images cannot be effective to overcome the strong and evident appeal of the product material to underage persons.

#### Background to ABAC scheme and coverage of product names and packaging

27. The ABAC scheme commenced operations in 1998 as a self-regulatory code of good advertising practice by the core participants in Australia's alcohol beverage industry. Since that time, the scheme has been revised on several occasions, notably:
- (a) 1 May 2004 when the reach of the ABAC was extended to internet based advertising and the governance arrangements for the scheme were revised so as to give the scheme a quasi-regulatory nature.
  - (b) 1 November 2009 when the code was extended to apply standards to alcohol beverage product names and packaging through the inclusion of a new Part 2 of the code.

- (c) 1 July 2014 with the commencement of a new code incorporating Part 1 and Part 2 of the former code into a consolidated and revised set of standards.

28. While the new code named the 'ABAC Responsible Alcohol Marketing Code' commenced on 1 July 2014, the current determination will be decided under the provisions of the former code (Alcohol Beverage Advertising (and Packaging) Code). This is because of the transitional arrangements facilitating the implementation of the new code provide that complaints received prior to 1 July 2014 will be decided under the former code. The current complaint was received on 10 June 2014.

Does the product name fall within the grandfathering provision?

- 29. As stated, the ABAC was extended on 1 November 2009 to cover product names and packaging. This extension was implemented by inserting a new Part 2 into the code. Part 2 in substance repeated the same standards that had applied to alcohol advertising since 1998, but the extension was subject to a grandfathering provision.
- 30. A 'grandfathering' provision is essentially a formal transitional device used when laws, policies or programs are substantially altered. The effect of a grandfathering provision is to create a category of existing persons or entities whose rights or obligations are continued to be governed by the old arrangements in place at the time the law or policy changed. This permits the new arrangements to be phased in over time. For the alcohol beverage names and packages, it meant that alcohol products in the market place as at 30 October 2009 did not have to be consistent with Part 2 of the Code, while products coming into the marketplace after that date need to meet the Part 2 requirements.
- 31. The grandfathering provision in Part 2 of the Code is at Part 2.2 and provides that the standards 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.**
- 32. Given that the Duff beer product has been added to the Australian market place in recent times, at first blush it would be thought that the grandfathering provision would not be relevant. This, however, is not the case and the Supplier has expressly argued that the product name does in fact fall within the scope of Part 2.2.
- 33. The basis of this contention is that in or about November 1995, two Australian brewers, namely the South Australian Brewing Company and Lion Nathan Australia launched and promoted a beer within Australia under the name 'Duff beer'. This product was not sanctioned or licensed by the owners of the intellectual property in The Simpsons, and the release of the product resulted in the intellectual property owners taking legal action to have the product removed from the market place. This legal action was successful and the reasons for this are stated in a Federal Court decision dated 17 May 1996.
- 34. The Supplier now argues that the actions of South Australian Brewing and Lion Nathan in having an unauthorised and ultimately judicially decided unlawfully named version of

Duff beer released to the Australian market for less than six months in late 1995 and early 1996 means that the current Duff beer product name falls within Part 2.2 of the Code. It is not argued that the product packaging also falls within the protection of the grandfathering provision.

35. To fall within the grandfathering protection, the supplier must satisfy the Panel that the product name or trade mark 'had been supplied for bona fide retail sale in the ordinary course of business'. A 'trade mark' has a particular meaning under the Trade Marks Act 1995 and cannot be relied upon in the current argument. This is because it is clear from the Federal Court decision that the name 'Duff' fell within the intellectual property of the owners of The Simpsons and hence the unsanctioned use of the name could not constitute a trade mark.
36. The Federal Court decision however confirms that the 'Duff' name was used on an alcohol beverage which was available for sale in Australia prior to 31 October 2009. The grandfathering provision, requires more than this and specifies that the name be used with an alcohol product supplied for 'bona fide' retail sale.
37. Bona fide is a legal concept which goes to parties acting in good faith, with honesty, and without deceit or fraud. While the 'Duff' name was previously used, it was done so in breach of Australia's intellectual property law and this prior use was unlawful as a result. The Panel is of the opinion that the fact that the product name was unlawfully used due to the breach of the intellectual property rights of the owners of The Simpsons means that the sale of the earlier variety of Duff beer cannot be said to be bona fide within the intended meaning of Part 2.2.
38. Further, the Panel has from its earliest decisions stressed that in interpreting the Code that a common sense and not a legalistic approach should be adopted. In this regard, the Code Preamble states that the 'spirit and intent' of the Code is important. The spirit and intent of Part 2.2 is that new standards extended to product names should not be unfairly applied to fundamental product brand attributes which were developed and in place prior to the adoption of the new standards (i.e. the standards should not have retrospective effect). The Panel does not believe that it was ever intended that a new product line introduced nearly five years after the adoption of the standards should not be subject to the standards on the grounds that unrelated parties had once briefly and unlawfully used the same name.
39. Accordingly, the Panel is not satisfied that the protection of Part 2.2 is enlivened by the current use of the 'Duff' name.

Does the product name and packaging have strong or evident appeal to children or adolescents?

40. The complainants' contentions might be paraphrased as follows:
  - (a) The Simpsons series is well known and very popular with children and adolescents.
  - (b) Duff beer has been repeatedly depicted within The Simpsons and promoted by the cartoon and its characters.

- (c) The Duff beer name and packaging now released on the Australian market is officially licensed by Twentieth Century Fox and is identical in appearance to the portrayal of Duff within The Simpsons.
  - (d) As a result the product name and packaging will have strong and evident appeal to children and adolescents because of its association with The Simpsons.
  - (e) This is supported by both the Federal Court decision and the evidence before the Court from Mr Groening, the creator of The Simpsons, that an actual beer named Duff "might encourage children to drink alcohol".
41. The Supplier's argument in response might be summarised as follows:
- (a) The use of the 'Duff' name is entitled to the benefit of the grandfathering provision, and hence cannot be found in breach of the Code.
  - (b) Accordingly, to breach the Code there must be elements beyond the product name in the packaging which could be said to have strong or evident appeal to children or adolescents.
  - (c) Advertisements which display the product packaging have been subjected to pre-vetting and the approvals granted have not identified any actual or potential breach of the Code, including in relation to strong or evident appeal to children or adolescents.
  - (d) Strict controls are in place in relation to the marketing of the product, which is limited to inside licensed outlets.
  - (e) If the 'Duff' name cannot be a breach of the Code (due to the grandfathering provision), then the marketing controls taken mean that it cannot reasonably be suggested that elements of the packaging, such as the use of colour or small print on the packaging (which does recognise The Simpsons intellectual property ownership) would have strong or evident appeal to children or adolescents.
42. The Supplier also goes on to address issues going to the associated advertising which has also been taken into account by the Panel in considering the current determination. These points include:
- (a) No Simpsons television series references or Simpsons characters are used.
  - (b) There is no depiction of alcohol use involved in the product packaging or its advertising.
43. It is reasonable to say that if there was no Simpsons association, then simply having an alcohol product named 'Duff', and the packaging, colour scheme and layout used could not of itself be said to have strong or evident appeal to underage persons. Without The Simpsons connection, it would simply be another beer in a red can which

is no more or less appealing than any other product. But of course the product name and packaging is entirely associated with The Simpsons.

44. The close association of product name and packaging with The Simpsons was the entire basis of Justice Tamberlin's decision in *Twentieth Century Fox Film Corporation and Matt Groening Productions Inc v. The South Australian Brewing Co Ltd and Lion Nathan Australia Pty Ltd* [1996] FCA 1484. His Honour's reasoning makes it clear that the two breweries involved released the unlawfully branded Duff beer in order to achieve and exploit the strong association between the name 'Duff' and The Simpsons. The best part of 20 years has passed since his Honour's decision, and in that time The Simpsons has been continuously broadcast within Australia. The close association between The Simpsons and Duff beer could not be said to have diminished in the intervening period.
45. The issue then turns on whether the close association of the product name and packaging with The Simpsons television series means that Part 2(a)(ii) and (b) have been breached. In making this assessment, the Panel is to have regard to the probable impact of the product name and packaging upon a reasonable person within the class of persons to whom the product material is directed and other persons to whom the product material may be communicated, taking its content as a whole.
46. The Panel has previously considered both Part 2(a)(ii) and (b) and equivalent provisions in Part 1 of the Code. On these previous occasions, the Panel has had regard to matters including:
  - (a) 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.
  - (b) Product material might have consequential or residual appeal to children or adolescents and not breach the Code.
  - (c) What is not permitted is product material which has strong or evident appeal to children or adolescents.
  - (d) Assessment of consistency is a case by case exercise in which imagery, use of characters and context is important in deciding the overall or probable impact of the product material.
47. The Simpsons is an animated program which means it uses a technique commonly seen in children's programming. But not all animation is directed towards children by any means and various animated programs, such as Japanese anime and other American television shows such as 'Family Guy' and 'American Dad', are clearly adult in nature. Accordingly, it is misleading to conclude that The Simpsons is a 'cartoon' and hence targeted at children.
48. The story lines in The Simpsons appeal to a wide demographic, including but not limited to children or adolescents. But there can be little doubt that the series does have a very real appeal to under 18 year olds.
49. It is notable but not decisive that in evidence placed before the Federal Court that Mr Groening stated:

- (a) Duff beer would be readily identifiable with the characters within the program.
  - (b) He had considered licensing a beer called 'Duff', but decided not to give permission due "to his concern that it might encourage children to drink alcohol".
- 50. As a general proposition, the Panel has assessed complaints against an advertisement or product material without reference to implications drawn from outside the content of the advertising or material. This is because the Panel is not a research body and generally claims are highly contested as to the nature of the inferences which can be drawn.
- 51. The current case, however, is different due to long term and arguably cultural level influence The Simpsons has had on Australian society. Clearly, the program does have strong appeal to children or the Supplier would not have been so careful to ensure there are no references to The Simpsons in marketing the product. These measures, however well intentioned, cannot alter the fact that the name 'Duff' and its Simpsons replica packaging does have strong or evident appeal to children or adolescents, in breach of Part 2, sections (a)(iii) and (b) of the Code.

#### Procedural Aspects

- 52. In accordance with the rules and procedures governing the ABAC Scheme, this determination is provisionally made. The Supplier may seek a rehearing of the provisional determination by providing a formal written response and further submission.
- 53. As explained in Determination 104 and 106/2011, if a rehearing is requested by the Supplier, then this will result in a complete reconsideration of the issues canvassed and is not confined to any mistakes the Supplier contends the Panel has made in its provisional determination.
- 54. Upon making a final determination, the Panel will consider the associated advertising and make a determination on this advertising.