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# Alcohol advertising and youth drinking in Australia — what are the available complaints mechanisms, legal and otherwise?

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*Youth drinking is regarded as a major social problem in Australia. This paper examines the regulations presently in place, legal or otherwise, relating to the advertising of alcohol beverages in Australia, focusing on the complaints mechanisms available to those who are concerned that these alcohol advertisements have the potential to promote under-age drinking and binge drinking in young people. The paper discusses the Trade Practices Act 1974 (Cth), Broadcasting Services Act 1992 (Cth), the role of the Australian Competition and Consumer Commission, Australian Communications and Media Authority, Australian Press Council, and advertising self-regulation through the Advertising Standards Bureau and the Alcohol Beverages Advertising Code.*

## **Introduction**

This paper examines the regulations presently in place, legal or otherwise, relating to the advertising of alcohol beverages in Australia. The focus is principally on the complaints mechanisms available to those members of the community who are concerned that these alcohol advertisements have the potential to promote under-age drinking and binge drinking in young people. This potential is particularly evident when the advertisements contain, as they almost invariably do, inferences relating to alcohol and lifestyle, such as success with the opposite sex, perceived maturity of the participants, easing the constraints of socialising, and it being 'cool' to drink. While acknowledging that there are many ways by which advertising is conveyed, including cinema, billboards, and increasingly the internet, the following discussion will be limited to regulation of the print and broadcast media (radio and television). The print and broadcast media are the sources of advertising that are currently the most likely to have the greatest impact on the age group in question. The various alcohol licensing systems and associated legislation in individual states and territories will not be discussed.

## **Background**

In February 2004 the Australian Drug Foundation (hereafter, ADF), a non-government, not-for-profit organisation, made a submission to the

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'Review of alcoholic beverages that may target young people' conducted by the NSW Department of Gaming and Racing. Under the heading 'Context', the submission says:

Underage drinking is not a new phenomenon; however, concern is growing over current drinking patterns of Australian youth. Recent research shows young people are starting to drink at earlier ages, consuming larger quantities and binge drinking at a high rate . . . More than 11,200 children under 15 years were hospitalised between 1993–2001 as a result of high risk drinking . . . while over 2,300 10–19 year olds sought treatment for alcohol related problems during 2001–2002 . . . (citations omitted)<sup>1</sup>

The ADF followed this up in October 2004 with a document entitled *Consultation on Underage Drinking: Response to the Department of Health and Ageing by the Australian Drug Foundation*. The document identifies the ADF's two priority issues for 2004–2006, the first of which is 'The harm experienced by young people through the heavy and unsafe use of alcohol':

This submission avoids the term 'underage drinking' as the ADF finds this misleading, implying that the harm lies in the fact that the drinkers are not 18 years of age rather than the harmful pattern and levels being consumed. It makes it a legal issue rather than a health or welfare issue. The terms 'youth drinking' and 'harmful use of alcohol by young people' will be used instead.

The fact that the ADF has identified the harm experienced by young people through the heavy and unsafe use of alcohol, as one of its two priority issues for 2004–2006 is evidence of the level of commitment that the ADF has to this issue.<sup>2</sup>

In a September 2002 media release, the Australian Medical Association (hereafter, AMA) announced:

Chair of the AMA's Doctors-in-Training Committee, Dr Joseph Sgroi, said today that alcohol abuse, including binge drinking, was a major health problem in Australia, especially among young people.

Dr Sgroi said the findings of the Salvation Army's Alcohol Awareness Survey reinforce the fact that it is legal drugs such as alcohol and tobacco that have the greatest social, economic and health impact in the Australian community . . .

It is sad but true that this pattern of excessive consumption is often considered normal and has become part of the Australian culture . . .<sup>3</sup>

An AMA media release in December 2004 said:

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1 Australian Drug Foundation, *Submission by the Australian Drug Foundation to the 'Review of alcoholic beverages that may target young people' by the NSW Department of Gaming and Racing*, February 2004, p 1 <http://www.adf.org.au> (accessed 19 May 2005). Concerns about 'the patterns of high risk drinking among young people . . .' are also expressed by the Alcohol and Other Drugs Council of Australia, *Alcohol* September 2003, pp 1, 3 [http://www.adca.org.au/policy/policy\\_positions/1.2Alcohol\\_9.11.03.pdf](http://www.adca.org.au/policy/policy_positions/1.2Alcohol_9.11.03.pdf) (accessed 3 October 2005).

2 Australian Drug Foundation, *Consultation on Underage Drinking: Response to the Department of Health and Ageing by the Australian Drug Foundation*, October 2004, pp 1–2. The second priority is 'The capacity of the Australian community to respond promptly and effectively to emerging and current drugs and drug use patterns', <http://www.adf.org.au> (accessed 19 May 2005).

3 AMA, *Alcohol Abuse a Major Health Problem*, Media Release, 4 September 2004, <http://www.ama.com.au> (accessed 25 May 2005).

AMA President, Dr Bill Glasson, said today that binge drinking is on the rise among young Australians and the health effects of this blatant alcohol abuse can stay with many of them throughout life. Dr Glasson said binge drinking is a blight on Australia's young that can take lives, cause physical and mental harm, and lead to events and consequences that affect innocent bystanders and passers-by. 'Binge drinking by our kids is a major problem for families and communities,' Dr Glasson said . . .<sup>4</sup>

In April 2005, under the heading 'Surge in alcopops sparks calls for health warning', *The West Australian* reported that there had been a big increase in the consumption by teenagers of alcopops, also known as designer drinks/alcoholic sodas/RTDs (ready-to-drinks). The article included the comment of a research fellow at the National Drug Research Institute that 'alcoholic sodas were one factor behind an increase in alcohol abuse by young women from 1% in 1998 to 10% in 2001'.<sup>5</sup>

Further on the issue of youth drinking, the ADF says 'a worrying development' is that 'research shows that these drinks [alcopops] have been enthusiastically taken up by young drinkers. Designer drinks are popular with underage drinkers'. Included in a list of key strategies which the ADF believes will make a difference to harmful youth alcohol use is 'Greater restrictions on alcohol advertising . . . There is an urgent need for more government influence'.<sup>6</sup>

Thus it seems that youth drinking is regarded as a major social problem in Australia. There are many reasons why young people drink alcohol, such as cultural, parental and peer influences for example. There are, however, two opposing views of the role of advertising in contributing to the misuse of alcohol by young drinkers.<sup>7</sup> On the one hand the alcohol beverages industry is of the view that '[e]vidence around beverage alcohol advertising and drinking patterns is inconclusive':

- Advertising has not been shown to increase aggregate consumption by adults or young people.
- A causal link has not been established between alcohol advertising and harmful of excessive drinking patterns and resulting problems.<sup>8</sup>

On the other hand advertising is consistently mentioned as being a factor in youth drinking in submissions to government and academic papers on the subject. For example:

In Australia, alcoholic consumption is very much guided by cultural forces . . . with advertising in particular often being singled out as one of the major factors influencing people's attitudes and values with respect to products, consumption and lifestyles . . .

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4 AMA, *Binge Drinking a Blight on Australia's Young*, Media Release, 22 December 2004 <http://www.ama.com.au> (accessed 25 May 2005).

5 T Laurie, 'Surge in alcopops sparks calls for health warnings', *The West Australian* (Perth), 9 April 2005, p 4.

6 Australian Drug Foundation, above n 2, pp 3, 5.

7 The views of both sides are neatly encapsulated in Charlotte Wood, 'What's so bad about alcohol ads?', December 1998/January 1999, *Connexions* 4.

8 International Center for Alcohol Policies: Policy Issues: Marketing, <http://www.icap.org> (accessed 12 May 2005).

Although a causal link is difficult to establish, numerous studies have found a correlation between alcohol advertising and alcohol knowledge, beliefs and intentions of people under 18 years of age (citations omitted).<sup>9</sup>

The AMA adopts a more cautionary approach to issues of causation:

The AMA, in recognising that advertising of alcoholic beverages could encourage hazardous levels of consumption, recommends that all such advertising be clearly aimed at encouraging no more than the NHMRC-recommended levels of consumption. All advertisements should draw attention to the NHMRC recommendations about hazardous and harmful consumption.<sup>10</sup>

It is noteworthy that the print and broadcast media are in the 'win-win' position of promoting alcohol through advertising, and reporting on the negatives effects of alcohol in news stories.

While it is difficult to say with certainty that alcohol advertising is definitely an influence in youth drinking, that possibility is clearly a cause of concern. Therefore it is worthwhile examining those regulations as are presently in place, legal or otherwise, to ascertain whether they are of assistance in preventing the advertising of alcohol when the advertisements may have the potential to promote under-age drinking and binge drinking in young people.

Because of Australia's federal system of government, and the constitutional difficulties involved in passing valid legislation at the commonwealth level (which applies universally across Australia), legal regulations relating to advertising are complicated, multi layered, and to some extent overlapping. The Trade Practices Act 1974 (Cth) (hereafter, TPA), together with the legislation in the states and territories mirroring the consumer protection provisions of the TPA, provides the broadest coverage. The Broadcasting Services Act 1992 (Cth) (hereafter, BSA) regulates the electronic media whereas the print media is self regulated, but both the electronic and print media are covered by the TPA. There is also a system of self-regulation in place for the advertising industry. Each of these will be examined for efficacy and financial cost in terms of regulating alcohol advertising.

## Legal regulation

### Trade Practices Act 1974 (Cth)

#### Relevant provisions

The most all embracing legislation is the TPA, and Pt V of the TPA is of most relevance to advertising regulation; it is entitled 'Consumer Protection' and Div 1 is headed 'Unfair Practices'. As a commonwealth Act, the TPA applies to the whole of Australia. It is based on the corporations power granted to the commonwealth government by virtue of s 51(xx) of the Australian Constitution, and for this reason applies only when the defendant is a corporation, or in certain other limited circumstances. Because the states are

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<sup>9</sup> S C Jones and R J Donovan, 'Messages in alcohol advertising targeted to youth' (2001) 25(2) *Australian and New Zealand Journal of Public Health* 126, 126 (referring to a number of different sources).

<sup>10</sup> AMA, *AMA Position Statement: Alcohol Consumption and Alcohol Related Problems*, 1998, <http://www.ama.com.au> (accessed 25 May 2005).

able to legislate with respect to individuals, thereby overcoming the requirement that the defendant is a corporation, the commonwealth government sought the agreement of the states at the time of passing the TPA that each would pass mirror legislation to Pt V. This has taken place slowly over the intervening years.<sup>11</sup> For the purposes of this paper, the advertising is likely to be carried out by an entity (for example a corporation) over which the TPA has jurisdiction.

The most important, and the most litigated, section in Pt V is s 52, which reads as follows:

*SECTION 52 MISLEADING OR DECEPTIVE CONDUCT*

52(1) [Prohibited conduct] A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

52(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

Section 52 is a 'catch-all provision', and its potential is therefore unlimited. The focus of s 52 is to prevent conduct, which includes the making of representations (statements), 'in trade or commerce' that are false. Because advertising is all about the making of representations of one sort or another, this is one of the sections most relevant to the advertising of alcohol. It is possible that s 53 'False or misleading representations', discussed later, may also apply. The other sections in Pt V Div 1 relate to specific forms of proscribed conduct which do not apply to the circumstances being discussed, for example s 53A 'False representations in relation to land', or s 53B 'Misleading conduct in relation to employment'.

Contravention of s 52 gives rise principally to injunction and 'statutory damages'.<sup>12</sup> Section 79 makes contravention of most of the provisions of Pt V a punishable offence, but s 52 is an exception because of the generality of the wording. While the intention was to protect the consumer, the section has often been used in actions brought by rival traders.

The operation of s 52 requires the existence of three factors:<sup>13</sup>

**(a) A corporation**

Although it is the general rule that the TPA applies only to corporations, s 6(3) of the Act extends Div 1 to catch a person (ie an individual) 'not being a corporation' engaging in conduct involving the use of postal, telegraphic or telephonic services or which takes place in a radio or television broadcast; this still would not trap the activity of an individual using the print media for advertising. It is unlikely that any party involved in the advertising of alcohol would escape the ambit of the Act, because most advertisers and their agencies are 'corporations' or the advertisements are broadcast. Even if the advertiser is not subject to the TPA the state or territory mirror legislation applies anyway.

11 Fair Trading Act 1987 (NSW), Fair Trading Act 1987 (SA), Fair Trading Act 1987 (WA), Fair Trading Act 1989 (Qld), Fair Trading Act 1990 (Tas), Consumer Affairs and Fair Trading Act 1990 (NT), Fair Trading Act 1992 (ACT), Fair Trading Act 1999 (Vic).

12 Trade Practices Act 1974 (Cth) ss 80, 82 respectively.

13 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd* (1978) 140 CLR 216 at 223 (Stephen J).

**(b) Its engagement in misleading or deceptive conduct**

In *Weitmann v Katies Ltd*,<sup>14</sup> Franki J used the *Oxford Dictionary* definition to derive meanings for ‘misleading’ and ‘deceptive’:

The most appropriate meaning for the word ‘deceive’ in the *Oxford Dictionary* is: ‘to cause to believe what is false; to mislead as to a matter of fact; to lead into error; to impose upon, delude, take in’. The most appropriate definition in that dictionary for the word ‘mislead’ is: ‘to lead astray in action or conduct; to lead into error; to cause to err’.

In *Taco Company of Australia Inc v Taco Bell Pty Ltd*,<sup>15</sup> Deane and Fitzgerald JJ listed four propositions to assist in determining whether the misrepresentation is misleading:

First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested . . . Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it . . .

Thirdly, evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential . . . Finally, it is necessary to enquire why proven misconception has arisen . . . it is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent.<sup>16</sup>

In terms of just who is the ‘relevant section’ of the public in any given case, Franki J said ‘it is now accepted that those persons must be a significant section of people who are likely to be exposed to the conduct of which complaint is made’.<sup>17</sup> There has been some judicial analysis of whether the effect is to be measured against all members of the so identified ‘relevant section’. Various decisions have narrowed the investigation to include only the likely effect of the conduct on ‘reasonable members’. In the words of Gibbs CJ:

[T]he section must . . . be regarded as contemplating the effect of conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.<sup>18</sup>

This notion, that the court is to examine the effect of the conduct on reasonable members of the class, was elaborated upon in *Campomar Sociedad, Limitada v Nike International Ltd* (hereafter, *Campomar*).<sup>19</sup> In this case the High Court in a unanimous and joint judgment, noted that:

[I]n an assessment of the reactions or likely reactions of the ‘ordinary’ or ‘reasonable’ members of the class of prospective purchasers of a mass marketed

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14 *Weitmann v Katies Ltd* (1977) 29 FLR 336 at 343.

15 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303. (hereafter, *Taco Company of Australia Inc*).

16 *Taco Company of Australia Inc*, above n 15 at 43,751–43,752 (Deane and Fitzgerald JJ).

17 *Ibid*, 43,736 (Franki J).

18 *Parkdale Custom Built Furniture v Puxu* (1982) 149 CLR 191 at 199 (Gibbs CJ).

19 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45.

product for general use . . . the court may well decline to regard as controlling the application of s 52 those assumptions by persons whose reactions are extreme or fanciful.<sup>20</sup>

The Gibbs CJ approach has been rightly criticised as follows:

By any standards, that is a peculiar statement to make. The whole point of consumer protection legislation, including Pt V of the Trade Practices Act, is that people do *not* take reasonable care of their own interests, that traders need to be restrained from taking advantage of the innate susceptibility of so many of us to modern marketing methods. (emphasis in original)<sup>21</sup>

The *Campomar* judgment has also been criticised by the same authors on the basis that it has ‘significantly muddied the waters’ by not differentiating between ‘ordinary’ members and ‘reasonable’ members of the relevant class, thereby failing to make a ‘clear distinction that can (and arguably should) be drawn between them’.<sup>22</sup>

Using Franki J’s analysis, in the context of alcohol advertising, the ‘relevant section’ of the public is anyone who is exposed to the advertisements, and this would include young drinkers. An obvious response of alcohol advertisers is that they are not targeting this group, but, because the test is an objective one, evidence that young people watch the advertisements makes them part of the ‘relevant section’. Given the above judicial discussion of how to assess who is an ‘ordinary’ or ‘reasonable’ person in the respective target group, it might be difficult to persuade the court that a particular alcohol advertisement contravened s 52 by the inferences relating to alcohol and lifestyle. If the ‘relevant section’ of the public includes young drinkers, it is arguable that all the subtle messages implied, such as success with the opposite sex, perceived maturity, it being ‘cool’ to drink and so on, are potentially misleading and deceptive. The test of who is a ‘reasonable’ or ‘ordinary’ member of the ‘relevant section’ should be predicated on young drinkers, although they are only a part of that group. This is so even though what is reasonable to a person in that age group may not be reasonable to an older person with more experience of the world, and even if it seems apparent young drinkers are indeed failing to take reasonable care of their own interests.

The use of fine print or disclaimers in advertisements is of interest here. Where the general thrust of the advertisement conveys one message but the fine print or disclaimer says something different, the alternate meaning must be very clearly conveyed if a breach of s 52 is to be avoided.<sup>23</sup> A similar situation occurs where the overall impression given in an advertisement (which may or may not include disclaimers) corrects the falsity of the whole. In *Telstra Corp Ltd v Optus Communications Pty Ltd*<sup>24</sup> Merkel J in the Federal Court granted interlocutory relief restraining Optus from continuing with a

20 Ibid, 86 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

21 J McKeough, A Stewart and P Griffith, *Intellectual Property in Australia*, LexisNexis Butterworths, 2004, p 484.

22 Ibid.

23 See generally P Venus, ‘Advertising and the TPA’ (2004) 20(7) *Australian & New Zealand Trade Practices Law Bulletin* 100.

24 *Telstra Corp Ltd v Optus Communications Pty Ltd* (1997) ATPR 41-451.

series of advertisements comparing Telstra and Optus products:

They [*the Optus commercials*] will be seen by the casual but not overly attentive viewer viewing a free-to-air program with only a marginal interest in the advertisements shown between the segments of the program. In that context it will be the first impressions conveyed to that viewer, rather than an analysis of the cleverly crafted constituent parts of the commercial which will be determinative.

The observations I have referred to above are of particular relevance to television advertising where the message is basically one of the impression conveyed. In television and print advertising where a false dominant impression is conveyed, its message will not be ameliorated by the accuracy of the detailed message which is derived from a careful analysis of all the constituent parts of the advertisement.<sup>25</sup>

The general thrust of alcohol advertising conveys messages relating to lifestyle; any fine print or exhortatory messages with respect to sensible usage, or usage only by those of legal drinking age, must be very clearly stated. The absence of such 'fine print' may of itself be misleading and deceptive.

The issue of subtleties in the advertising message was considered in *Mark Foys Pty Ltd v TVSN (Pacific) Ltd*.<sup>26</sup> The case concerned an appeal to the Full Court of the Federal Court by Mark Foys relating to the use of the name and associated image by the respondent, the television shopping channel TVSN. Mark Foys had been a prestigious department store which operated between 1909 and 1980 in a building in Sydney known as 'The Piazza'. TVSN wanted to enhance and re-brand its image, and, after incomplete negotiations with the parties currently holding the rights to Mark Foys, began to use the name Mark Foys and the image of the Piazza Store in its programs and on the internet. The applicant, Mark Foys, alleged, inter alia, breach of ss 52 and 53(c) TPA (s 53(c) TPA is discussed below) but lost at first instance. Whitlam J could 'not see how it could be contended that the television programs broadcast by TVSN contain a representation of any "licence, sponsorship or approval" of the defunct company'.<sup>27</sup> The appeal on these matters was allowed, the court taking a broader view of what amounted to misleading and deceptive conduct in the circumstances:

A submission was made for TVSN that the only representation made was to the effect that TVSN subscribed to similar values as those which historically Old Mark Foys had subscribed to and may represent. Such an approach in our view is too sophisticated and does not reflect a sufficiently practical approach to the question whether there has been a representation . . .

We also consider that the representations made in the present case cause more than mere wonderment or confusion and travel into the areas of positive misrepresentation. A reasonable prospective purchaser, looking at the material placed before the court, would not simply wonder or be confused as to whether there was an association between Old Mark Foys and TVSN but rather he or she would be likely to infer that in fact an association existed.<sup>28</sup>

By analogy the general thrust of alcohol advertising conveys subtle messages relating to lifestyle, and these messages are potentially misleading and deceptive for viewers of all ages. Young drinkers in particular, many of whom

<sup>25</sup> Ibid, 43,514 (Merkel J).

<sup>26</sup> *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2001) ATPR 41-795.

<sup>27</sup> Ibid, 42,467-42,568 (citing the judgment of Whitlam J at first instance).

<sup>28</sup> Ibid, 42,574 (Beaumont, Tamberlain and Emmett JJ).



'lack sophistication', may not even wonder or be confused about these subtle messages, simply accepting them without questioning them at all. To take this a step further, the issue of psychological techniques in advertising is one that has not been dealt with particularly well by the law. Blakeney and Barnes point out that advertisements are either informative or persuasive, and 'persuasive advertising' using psychological techniques has mostly been dismissed as 'puffery' by the courts.<sup>29</sup> Their concern about persuasive advertising focuses in particular on unhealthy products, such as cigarettes, alcohol and junk food, where information is outweighed by persuasion, for example the idealised lifestyle portrayed in cigarette advertising, or the status symbols of youth culture that feature in junk food advertisements. They comment that: 'legal controls over advertising claims have been confined to the informative content of advertisements. Even the much vaunted Trade Practices Act 1974 merely prohibits conduct, statements or representations that are misleading deceptive or false'.<sup>30</sup> Blakeney and Barnes appreciate that there would be difficulties convincing a court, or even a psychological tribunal, that the psychological techniques used in persuasive advertising are misleading and deceptive. They recognise that prohibiting the use of such techniques would make advertising boring and be 'at best paternalistic and at worst totalitarian', but conclude that in the case of unhealthy products these techniques may go too far.<sup>31</sup>

For the purpose of s 52 there is no need to prove that there was any intention to deceive, nor is it necessary to prove any negligence or fault.<sup>32</sup> Finally there must be a causal link between the conduct of the respondent and the misconception arising in the target group. It is on this latter point that there is disagreement between the alcohol beverages industry, taking the view that the link between alcohol advertisements and youth drinking is not proven, and concerned members of the community who believe the opposite to be true.

### (c) In trade or commerce

The courts have interpreted this broadly to include, and, in any event, the advertising of alcohol satisfies this requirement.

The remedies for a breach of s 52 are injunction, damages, corrective advertising or disclosure of information, and ancillary orders.<sup>33</sup>

Section 53 'False or misleading representations' may also be applicable, giving rise to civil remedies. Breach of s 75AZC, the clone provision of s 53 in Pt VC 'Offences', results in criminal sanctions. Sections 53 and 75AZC include several different types of proscribed activity, the most relevant being as follows:

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29 M Blakeney and S Barnes, 'Psychological Advertising and the Law' (1980) 18 *New Doctor* 16.

30 *Ibid.*, 16.

31 *Ibid.*, 17.

32 See, eg, *Hornsby Building Information Centre v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; *Parkdale Custom Built Furniture v Puxu* (1982) 149 CLR 191.

33 Trade Practices Act 1974 (Cth) ss 80, 82, 86D, 87 respectively.

### Section 53 false or misleading representations<sup>34</sup>

A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

- falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; . . .
- represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

Here the activity relates to ‘representation’, a narrower concept than the ‘conduct’ of s 52. With respect to s 53(a) intent is not a necessary component of a false representation:

For example, under sec 53(a), a corporation shall not falsely represent that goods are of a particular quality. If a corporation does make such a representation there is a breach of sec 53(a) and it is irrelevant whether there was a guilty mind or not.<sup>35</sup>

However, where a prosecution takes place under s 75AZC, defences are available in s 85. These are, inter alia, a reasonable mistake of fact, including one caused by reasonable reliance on information supplied by another or establishing that reasonable precautions were taken and due diligence was exercised to avoid the contravention. The criminal standard of proof, beyond reasonable doubt, applies.<sup>36</sup> The representation ‘may be oral or in writing or arise by implication from words or conduct’,<sup>37</sup> and it is this implication from words or conduct (in respect of the inferences relating to alcohol and lifestyle) that might permit use of either s 53 or s 75AZC in the context of this paper. The penalty for breach of s 75AZC by a corporation is 10,000 penalty units.<sup>38</sup>

#### Ancillary matters

Difficulties arise when it comes to the logistics of bringing a legal action under the TPA against an advertiser. An individual may do this, but it involves lawyers, time and expense. The question of who would actually bring the action also raises some interesting issues. It is unlikely that a young drinker would use s 52 or s 53 to complain about misleading and deceptive alcohol advertisements because they see the issues as socially acceptable within their group. It is also unlikely that a commercial competitor would complain as it might rebound, bringing unwanted and unintended consequences upon themselves. Since 1992 it has been possible for one person to take a class action in the Federal Court (this is the court that hears TPA matters), so there is the potential for one disaffected young drinker to bring an action on behalf

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<sup>34</sup> Section 53 comprises one subsection only whereas s 75AZC has two, s 75AZC(1) being identical to s 53, s 75AZC(2) saying:

Subsection (1) is an offence of strict liability.

<sup>35</sup> *Riley McKay Pty Ltd v Bannerman* (1977) ATPR 40-036, 17,406–17,407 (Bowen CJ). See also *Given v CV Holland (Holdings) Pty Ltd* (1977) ATPR 40-029, 17,386 (Franki J).

<sup>36</sup> *Ballard v Sperry Rand Australia* (1975) ATPR 40-006.

<sup>37</sup> *Given v Pryor* (1979) ATPR 40-109, 18,100 quoting *Halsbury's Laws of England*, 3rd ed, vol 26, para 1515 (Franki J).

<sup>38</sup> Section 4AA Crimes Act 1914 (Cth) lists a penalty unit as \$110.

of a named group of seven or more persons.<sup>39</sup> Alternatively the task of bringing an action against an advertiser would fall to a lobby group or other interested party.

A second difficulty relates to the party against whom the action should be brought. The advertiser is an obvious choice as is the advertising agency who prepares the advertisements, but recent cases have illustrated that care should be taken if the advertising agency is to be joined as a party in the action. One strand of the appeal to the Full Court of the Federal Court in *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy* (hereafter, *Bevins*)<sup>40</sup> related to the accessorial liability of the advertising agency, Bevins, under s 12GD(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (hereafter, ASIC Act). This ASIC Act section is the equivalent, in respect of financial services, of s 75B TPA which states:

- (1) A reference . . . to a person involved in a contravention of a provision of Part . . . V or VC . . . shall be read as a reference to a person who:
- has aided, abetted, counselled or procured the contravention;
  - has induced, whether by threats or promises or otherwise, the contravention;
  - has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
  - has conspired with others to affect the contravention.

Medical Benefits Fund placed advertisements for its private health care product in newspapers, on television and on billboards. The television and billboard advertisements were created by Bevins who also arranged for them to be published. The series of advertisements were in story form featuring a pregnant woman before and immediately after the birth by caesarean section of her baby. A voiceover said 'Join any MBF hospital cover before 30 June and they'll waive the two and six month waiting periods', this was followed by a five second scene of the MBF logo with small text underneath reading '12 month waiting periods such as pre existing conditions and obstetrics apply'. The primary judge, Hill J, found the MBF liable on the basis that the advertisements were misleading and deceptive, and imposed accessorial liability on Bevins. Both appealed and the appeal by MBF was dismissed because the disclaimer was a disproportionately small part of each advertisement. The issue in Bevins appeal concerned s 12GD(1)(e) ASIC Act, the same as s 75B(1)(c) TPA above, and in particular 'whether an accessory, to be liable under such a provision, must be aware that the proscribed conduct of the principal was either misleading or deceptive conduct or conduct likely to mislead or deceive'.<sup>41</sup> Moore J reviewed previous cases which showed 'fairly clearly a division or judicial opinion' on this point, and concluded that:

where representations are made to the public and whether they are misleading or deceptive is to be approached at a level of abstraction . . . it seems inapt to explore the question of whether the alleged accessory knows the representations were false or misleading in some objective sense . . . [I]t is probably appropriate to consider,

39 ACCC Publishing Unit, *Summary of the Trade Practices Act 1974*, Australian Government Printing Services, 2003.

40 *Medical Benefits Fund of Australia Ltd v Cassidy; John Bevins Pty Ltd v Cassidy* (2003) ATPR 41-971.

41 *Ibid*, 47,812 (Moore J).

and only consider, the question of whether the alleged accessory knows that the conduct of the of the principal might lead members of the public to assume a state of affairs which was not the true state of affairs.<sup>42</sup>

Mansfield J concurred with Moore J. Stone J took a different approach, requiring a much greater degree of knowledge of the exact nature of the misleading and deceptive conduct on the part of the accessory, but including wilful blindness within the scope of liability. In the event all three judges allowed the appeal by Bevins.

*Cassidy v Saatchi & Saatchi Australia Pty Ltd*<sup>43</sup> is the appeal to the Full Court of the Federal Court by the ACCC against the first instance decision in favour of the respondent advertising agency, Saatchi & Saatchi. The respondent prepared advertisements for a new health insurance product being offered by the NRMA. The ACCC brought an action under s 12DA(1) of the ASIC Act, the equivalent, in respect of financial services, of s 52 TPA. Both the NRMA and Saatchi & Saatchi were treated as principals in the action and both admitted that the advertisements were misleading. The NRMA settled with the ACCC,<sup>44</sup> but Saatchi & Saatchi denied liability as a principal on the basis that it was not the 'maker' of the misleading representation. Two things in particular did not help applicant's case. Firstly the applicant did not seek to prove accessorial liability against the respondent, and, secondly, the applicant relied on the 'making' of the representation by the respondent, with echoes of s 53 TPA, rather than the more neutral language of 'conduct' in s 52 (or s 12DA(1) ASIC Act). Jacobsen J at first instance concluded that: 'There is nothing here to suggest that the representation was conveyed in circumstances in which Saatchi could be regarded by the relevant section of the public as adopting the representations made in the advertisement'.<sup>45</sup> The ACCC argued on appeal that the respondent had made the representations because it had prepared the advertisements knowing that in all probability they would be published. The appeal was dismissed, major factors being that the in-house legal advisors of the NRMA had final approval of the advertisements, and the NRMA arranged for their publication rather than the respondent.<sup>46</sup>

Both these decisions are criticised by Sweeney, who comments that while the potential liability of advertising agencies has been clarified, it is now 'significantly more difficult for the ACCC or ASIC to control false advertising by targeting advertising agencies'.<sup>47</sup> Sweeney points out that the Saatchi case appears to give immunity to agencies where the principal has the final sign off. The decision also makes a distinction between preparing advertisements and placing advertisements which could lead to the strange result that 'the mere act of placing the advertisement then exposed the agency to greater liability than the act of creation'.<sup>48</sup>

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42 Ibid, 47,812 and 47,818 (Moore J).

43 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* (2004) ATPR 41-980.

44 *Cassidy v NRMA Health Pty Ltd* (2002) ATPR 41-891, 45,234 (Jacobsen J).

45 Ibid, 45,241 (Jacobsen J).

46 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* (2004) ATPR 41-980, 48,503 (Moore and Mansfield JJ); 48,509 (Stone J).

47 B Sweeney, 'Advertising agencies: their role in consumer protection' (2004) 12 *Competition and Consumer Law Journal* 114, p 114.

48 Ibid, 117.

The third matter that may give rise to difficulties relates to evidentiary matters, in particular survey evidence and the use of expert evidence. Survey evidence is a useful way of showing the effect of advertisements on the relevant section of the community. Early cases on the TPA showed unwillingness by the courts to accept survey evidence, partly because it was regarded as hearsay.<sup>49</sup> The use of survey evidence has now been resolved to some extent by Practice Note No 11 *Survey Evidence* issued by the Federal Court in April 1994. The Practice Note directs that notice be given in writing to the other party in the proceeding if a survey is to be conducted. The notice must contain information such as the proposed form and methodology, the particular questions to be asked, and includes the instruction that the parties should attempt to resolve their differences with respect to the conduct of the survey.

An expert witness can provide important information and elucidation in relation to the issues that may arise, but the admissibility of expert evidence is a complex matter mainly because it is essentially opinion evidence. However, the use of such evidence in TPA litigation is becoming more common and an expert witness may be appointed by the court, or by one of the parties. The use of expert evidence is subject to ss 76–80 of the Evidence Act 1995 (Cth), which provides, in the case of specialised knowledge, an exception to the bar on opinion evidence in litigation. Expert opinion evidence is also subject to a Practice Direction, issued in March 2004 entitled *Guidelines for Expert Witnesses in the Federal Court of Australia*. The Practice Direction includes details on the nature of the expert evidence, the form of the report and the conduct of the expert witness. A final point to be made about the inclusion of survey evidence, expert evidence and expert witnesses in litigation is that an increase in the cost of running the case is an inevitable result.

### **The TPA and industry codes**

Part IVB of the TPA, inserted in 1998, puts in place a regime for industry codes. These may be voluntary, or ‘where industry is unable to maintain appropriate standards through self-regulatory means, and when there is severe market failure’ the Minister will consider making the code mandatory for that particular industry.<sup>50</sup> This is done by prescribing the relevant code by regulations under s 51AE of the TPA, and, once this has occurred, the ACCC then monitors compliance within the industry. Thus far the only mandatory code is the Franchising Code, which became operative in 1998. The commonwealth parliament is reluctant to prescribe codes because of the potential administration costs, and also because it does not desire to be seen as over regulating. However, the following are reasons for prescription:

- a code would remedy an identified market failure or promote a social policy objective;
- it would be the most effective means of remedying the problem;

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<sup>49</sup> See for example, *McDonald's System of Australia Pty Ltd v McWilliam's Wines Pty Ltd* (1973) ATPR 40-108: ‘nor are the persons answering subject to any cross-examination’, (Franki J).

<sup>50</sup> Ministerial speech launching the industry code ‘Policy Guidelines’ in 1999, cited in the *Australian Trade Practices Reporter*, 1999, p 15,243.

- the benefits to the community as a whole would outweigh the costs;
- there are significant and irremediable deficiencies in an existing self-regulatory scheme;
- a systemic enforcement issue exists;
- a range of light-handed options has been demonstrated to be ineffective;
- there is a need for national application of the code.<sup>51</sup>

If the Alcoholic Beverages Advertising Code (hereafter, ABAC) (discussed further below) were to be prescribed under s 51AE of the TPA, the ACCC would enforce compliance within the industry.

### **Action by the ACCC**

Rather than initiate litigation, an aggrieved party may register a complaint with the ACCC. This is a simple matter and can be done by phone or on the internet.<sup>52</sup> There is no guarantee that the matter will progress any further after consideration by the ACCC. The best outcome is if the ACCC itself decides to take legal action. This it will do if the impugned behaviour is industry wide and affects many consumers, and particularly if it reaches a wide audience through national television or Australia wide newspaper coverage. The ACCC bases any decision on whether or not to institute a case on complaints received, marketplace information and its own inquiries.<sup>53</sup> A search of the ACCC website in February 2005 indicated that the only activities with a connection to alcohol were in relation to infringements of Pt IV, such as price fixing or exclusive dealing. However, regardless of whom it is who starts the legal proceedings, the process is expensive and slow and there are no guarantees of success.

### **Summary**

The consumer protection provisions of the TPA, and the mirror legislation in the states and territories, apply universally to the electronic media, the print media, and to the advertisers themselves. There is time and expense involved in pursuing legal proceedings under the Act, and there are also issues relating to who would initiate the action in the first place, who is the most appropriate party to bring the action against, and evidentiary matters. If the ACCC receives a sufficient number of complaints, it may instigate s 52 or s 53 actions on its own account, or prosecute under s 75AZC. Alternatively, if it can be shown that there has been a severe market failure in respect of adherence to the ABAC, it is possible for the ACCC to prescribe the Code under s 51AE of the TPA, and the ACCC would enforce compliance by the alcohol beverages industry.

## **Broadcasting Services Act 1992 (Cth)**

### **Relevant provisions**

Regulation of the electronic media is made possible by the Australian Constitution, s 51(v) allowing the commonwealth government to make laws

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<sup>51</sup> *Australian Trade Practices Reporter*, above n 50 at 15,251.

<sup>52</sup> <http://www.accc.gov.au> (accessed 8 February 2005).

<sup>53</sup> *Ibid.*

with respect to 'postal, telegraphic, telephonic and other like services'. The ability of the commonwealth government to make valid laws regulating the electronic media has withstood several challenges in the High Court which found that electronic broadcasting was a 'telephonic' service, or on the basis that it is a 'like service'.<sup>54</sup> The Broadcasting Services Act 1992 (Cth) (hereafter, BSA) came into effect on the 1st of October 1992, replacing the Broadcasting Act 1942 (Cth) which was repealed. Until 1 July 2005 the Australian Broadcasting Authority (hereafter, ABA) was responsible for the operation of the BSA, since then it has been the Australian Communications and Media Authority (hereafter, ACMA).<sup>55</sup> In s 6, the 'Interpretation' section of the BSA, the definition of 'program' includes 'advertising or sponsorship matter, whether or not of a commercial kind'.

Part 2 of the BSA describes the categories of broadcasting service, and these are described by their nature rather than their technical means of delivery (to avoid constant amendment as technology advances). Different degrees of regulation apply to each category of service based on an assessment, against listed criteria, as to how influential the service is. The categories are national broadcasting services (ABC and SBS), commercial broadcasting services, community broadcasting services, subscription broadcasting services and subscription and open narrowcasting services. Understandably, because it draws the largest viewing audience, commercial television is the most heavily regulated.

Part 9 of the BSA deals with 'Program standards', with focus being for the most part on self-regulation, but before examining the operation of Part 9 it is worthwhile taking a brief look at issues of validity in relation to program standards that arose under the previous regime. Under the Broadcasting Act 1942, program standards were controlled by the Australian Broadcasting Tribunal (hereafter, ABT), the predecessor of the ABA and ACMA. Two cases illustrate that the power to control program standards as granted by the Broadcasting Act 1942 had to be exercised by the ABT with full and careful consideration of the relevant statutory provisions. In *Herald Sun TV Pty Ltd v Australian Broadcasting Tribunal*,<sup>56</sup> the High Court, in a unanimous judgment allowing an appeal by the commercial broadcaster, overturned the decision of the Full Court of the Federal Court, which in turn had upheld the decision of Wilcox J at first instance.<sup>57</sup> The High Court found that part of a determination by the ABT in relation to Children's Television Standards was invalid because the Broadcasting Act 1942 (Cth) gave no requisite grant of power to the ABT. The impugned part read 'representative samples of which have been classified by the tribunal as complying with the C program criteria . . .', and while the Broadcasting Act 1942 granted power to determine standards, it did not 'go further and give the tribunal power to decide that a

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<sup>54</sup> See, eg, *R v Brislan* (1935) 54 CLR 262; *Jones v Commonwealth (No 2)* (1965) 112 CLR 206; *The Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418.

<sup>55</sup> The Australian Communications and Media Authority combines the Australian Broadcasting Authority and the Australian Communications Authority.

<sup>56</sup> *Herald Sun TV Pty Ltd v Australian Broadcasting Tribunal* (1985) 156 CLR 1 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

<sup>57</sup> *Herald Sun TV Pty Ltd v Australian Broadcasting Tribunal* (1984) 2 FCR 24 (Wilcox J); (1984) 57 ALR 309 (McGregor and Davies JJ, Morling J dissenting).

particular program should not be shown during those hours'.<sup>58</sup>

The decision in *Australian Broadcasting Tribunal v Saatchi & Saatchi Compton (Vic) Pty Ltd*<sup>59</sup> is also instructive with respect to the validity of the power to determine standards of television advertisements. The Full Court of the Federal Court, by a 2-1 majority, dismissed the appeal by the ABT. The court found that by virtue of the BSA power did exist for the ABT to determine the conditions subject to which advertisements may be televised. However, in making standards in respect of the production of advertisements, as distinct from the quality or nature of the end product, the ABT had exceeded the power granted by the particular provisions in the Broadcasting Act 1942 on which it was relying. Bowen CJ stated:

In my opinion, where an administrative body which states it is exercising a particular power in laying down a general rule lacks power on the stated ground, but could have laid down the rule validly under another head of power, it would generally be wrong for a court to uphold the rule as if it had been made under the unstated head of power, particularly where the consequences for the citizen of each exercise of power are different.<sup>60</sup>

Although the focus with respect to the development of program standards has changed in the BSA, these two decisions demonstrate that broadcasters will probe any perceived overstepping of the mark by the body responsible for the operation of broadcasting regulation.

By virtue of s 123 of the BSA, headed 'Development of codes of practice', each category of broadcaster is required to develop its own code of practice in consultation with ACMA. Section 123(2) commences with the words 'Codes of practice developed for a section of the broadcasting industry may relate to', and includes the following which is relevant to the advertising of alcohol:

- (b) methods of ensuring that the protection of children to program material which may be harmful to them is a high priority; and
- (c) methods of classifying programs that reflect community standards, and . . .
- (e) preventing the broadcasting of programs that:
  - (i) simulate news or events in a way that misleads . . . the audience; . . .
  - (iv) use or involve the process known as *subliminal perception* or any other technique that attempts to convey information to the audience by broadcasting messages below or near the threshold of normal awareness . . .
- (l) such other matters relating to program content as are of concern to the community.<sup>61</sup>

Section 123(3) commences with the words: 'In developing codes of practice relating to matters referred to in paras (2) (a) and (c), community attitudes to the following matters are to be taken into account'. It includes the following:

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<sup>58</sup> *Herald Sun TV Pty Ltd v Australian Broadcasting Tribunal* (1985) 156 CLR 1, 4 and 5 respectively (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

<sup>59</sup> *Australian Broadcasting Tribunal v Saatchi & Saatchi Compton (Vic) Pty Ltd* (1985) 60 ALR 756.

<sup>60</sup> *Ibid*, 765 (Bowen CJ). Bowen CJ and Fox J dismissed the appeal, Wilcox J would have allowed the appeal.

<sup>61</sup> The emphasis is in the legislation [www.austlii.edu.au/au/legis/cth/consol\\_act/bsa1992214/s123.html](http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/s123.html) (accessed 2 July 2005).



- (d) the portrayal in programs of the use of drugs, including alcohol and tobacco;  
...
- (f) such other matters relating to program content as are of concern to the community.

As an aside at this point it is worth digressing briefly to consider whether it is possible that the subtle messages in alcohol advertising could be construed as utilising subliminal perception. The use of psychological techniques in persuasive advertising has been mentioned earlier in the discussion of the TPA. There the methods mentioned, such as the idealised portrayal of lifestyle, are comprehended at a mostly conscious level. Usually subliminal perception is regarded as something which is not comprehended at a conscious level.<sup>62</sup> An example of an advertisement containing subliminal messages is the one for Gilbey's London Dry Gin which appeared in an edition of *Time* magazine in 1971. According to Key there were a number of subliminal messages in the picture comprising this advertisement, the most obvious, once it has been pointed out, being the word 'sex' depicted in some ice cubes in a glass tumbler.<sup>63</sup> Presumably this is the kind of activity barred by the wording of s 123(2)(e)(iv) above in relation to broadcast advertising.

Even when they do not contain subliminal messages, however, advertisements use other techniques, such as signs, signals, symbols and imagery, to transmit the message, and while these are visible they are not comprehended at a conscious level. In addition there is a huge amount of visual information provided in advertisements and most people are not trained or equipped physiologically to handle it all immediately on the conscious level. In his book, *Subliminal Seduction: Ad Media's Manipulation of a Not so Innocent America*, Key has a section entitled 'Maximal Meaning in Minimal Space and Time' in which he says, inter alia:

At the unconscious level, every minute detail in a photograph is recorded instantly within the brain. Conscious perception apparently works more slowly. With pictorial stimuli, conscious perception follows focal points in the picture as the eye is led from one major detail to another. If the picture has been professionally designed, the eye will cover most major details within a second or two . . .

What appears to be happening, however, is that the total, instantaneous perception is repressed in favour of certain obvious details. *All the information and meaning are recorded instantly and totally*, but the mind plays what amounts to a trick, permitting only certain details — often what we want to see or what we can identify with — to filter through into conscious awareness. This could be the mechanism by which the brain enables us to survive the vast totality of data passing each day through our sensory inputs into storage areas within the brain. Humans simply cannot consciously handle all this information . . .

. . . [M]ost of the meanings applied consciously have really been interpreted by our brains from data in both the conscious and unconscious mechanisms. Greater significance and meaning are derived, apparently, from the unconscious — from the enormous quantity of subliminal information stored and available since the moment of our birth, possibly even before.<sup>64</sup>

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62 See W B Key, *Subliminal Seduction: Ad Media's Manipulation of a Not so Innocent America*, 1973, Ch 2 for a discussion of the meaning of subliminal perception.

63 Ibid, 3–10.

64 Ibid, 52–54. (emphasis in original) For the most part Key's discussion focuses on print

Drawing from the above, a carefully drafted survey along with the use of expert evidence and expert witnesses, might sustain a legal argument that the subtle messages in alcohol advertising constitute subliminal perception and amount to a contravention of s 123(2)(e)(iv) of the BSA.

As already noted, each category of broadcaster must develop a code of practice, but for the purposes of this paper (advertising of alcohol) only the codes of the commercial broadcasters will be examined as these are the most relevant in terms of impact. The Commercial Television Industry (hereafter, CTI) Code of Practice was developed by Free TV Australia, and it was registered by the ABA in July 2004. Free TV Australia 'is an industry body which represents all of Australia's commercial free-to-air television licensees. It is one of the few industry bodies in Australia which represents every organisation in its industry'.<sup>65</sup>

The CTI Code of Practice is divided up with seven major headings, each of which is called a 'Section' (the word 'Part' would be the equivalent in a statute).<sup>66</sup> In Section 1 (entitled 'Introduction') of the July 2004 version of the CTI Code of Practice Clause 1.10 is headed 'Requirements for Television Commercials', and says in part, 'Television advertisers are expected to ensure that their commercials comply with Advertiser Code of Ethics and the Code of Advertising to Children'. These two Codes of Ethics, that is the 'AANA Advertiser Code of Ethics' and the 'AANA Code for Advertising To Children' are featured as Appendix 1 and Appendix 2 respectively to Section 1 of the CTI Code of Practice. The first of these, the Australian Association of National Advertisers (hereafter, AANA) Advertiser Code of Ethics, includes the following:

The object of this code is to ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors . . .

1.1 Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory.

1.2 Advertisements shall not be misleading or deceptive or be likely to mislead or deceive . . .

2.6 Advertisements shall not depict material contrary to prevailing community standards on health and safety.

Children are defined as being 'children 14 years old or younger' in the AANA Code for Advertising to Children, and it states that advertisements to children 'must not mislead or deceive Children' or be ambiguous.<sup>67</sup> Clause 2.2 of the AANA Code for Advertising to Children, headed 'safety', says in part:

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media advertising, partly because the book contains photos of advertisements which demonstrate the issues being examined, but references to television advertising are also threaded through the book.

<sup>65</sup> <http://www.ctva.com.au> (accessed 7 February 2005). Free TV Australia was previously known as CTVA and before that FACTS.

<sup>66</sup> Section 1: Introduction, Section 2: Classification, Section 3: Program Promotions, Section 4: News and Current Affairs Programs, Section 5: Time Occupied by Non-Program Matter, Section 6: Classification and Placement of Commercials and Community Service Announcements, Section 7: Handling of Complaints to Licensees.

<sup>67</sup> AANA Code of Advertising for Children clauses 1(d), 2.1.1(a) and (b) respectively. As noted, this Code appears as Appendix 2 of Section 1 of the CTI Code of Practice.

## 2.2.1 Advertisements to Children:

must not portray images or events which depict unsafe uses of a Product or unsafe situations which may encourage Children to engage in dangerous activities; . . .

## 2.9 Alcohol

2.9.1 Advertisements to Children must not be for, or relate in any way to, alcoholic drinks or draw any association with companies that supply alcoholic drinks.

The AANA definition of children being 14 years or under means that from 15 years onwards young people can be exposed to alcohol advertising, an anomalous situation when the legal drinking age coincides with the legal age of majority which is 18. Interestingly the Children's Television Standards (hereafter, CTS) says 'children are people younger than 14 years of age', presumably meaning 13 years old or younger.<sup>68</sup> If the CTS definition applied, the exposure would start at 14.

Section 2 of the CTI Code of Practice, headed 'Classification', divides each broadcast day up into classification zones, based on who is likely to be watching (in terms of age group). Only suitable material can be shown in each zone. The most restricted times are those when children are likely to be watching. This includes the broadcasting of commercials. Section 6 of the CTI, headed 'Classification and placement of commercials and community service announcements', incorporates a separate sub heading entitled 'Commercials which Advertise Alcoholic Drinks'.<sup>69</sup> Direct advertising for alcoholic drinks may only be broadcast in the following classification periods when it is supposed that children are not watching television: M (mature) weekdays ( schooldays) 8.30pm to 5.00am, 12noon to 3.00pm, weekdays and weekends (school holidays) 8.30pm to 5.00am; MA (mature audience) 9.00pm to 5.00am; AV (adult violence) 9.30pm to 5.00am.<sup>70</sup> Direct advertising for alcoholic drinks may be also be broadcast as 'an accompaniment to the live broadcast of a sporting event on weekends and public holidays', meaning these advertisements will creep into the time zones usually reserved for programs suitable for children's viewing, however even they cannot be broadcast during a C (children's) classification period.<sup>71</sup> The C period is 7.00am to 8.00am Monday to Friday; 4.00pm to 8.30pm Monday to Friday; 7.00am to 8.30pm Saturday, Sunday and school holidays.<sup>72</sup>

Direct advertising of alcoholic drinks does not include sponsorship announcements, advertisements for licensed restaurants or a commercial for a company that has other interests as well.<sup>73</sup> Appendix 6 to Section 6 is entitled 'Children's Television Standards relevant to commercial placement'. Bearing

68 CTS 1 (Definitions) 1. For a discussion on this definition of children see the report by the Australian Broadcasting Tribunal, *Kidz tv: Inquiry into Children's Television Standards Vol 1* (1991), 29. Previously children were defined as being '6-13 years'. Possibly the AANA definition may have been adopted because it fits more tidily with the time zones during which programs can be broadcast, ie, M programs are for persons aged 15 years or over.

69 CTI Code of Practice 6.7-6.13 inclusive.

70 Ibid, 2.10-2.12, 6.7.

71 Ibid, 6.7, 6.9 and CTS 23.

72 CTS 1 Definitions (1).

73 CTI Code of Practice 6.11.

in mind that children are defined as '14 years old or younger' in the AANA Code for Advertising to Children, CTS 17 — 'Content of Advertisements' says 'No advertisement may mislead or deceive children, and nothing in these standards shall be taken to limit the obligation imposed by this standard'; CTS 23 — 'Advertising of Alcoholic Drinks' says 'Advertisements for alcoholic drinks may not be broadcast during "C" programs'.<sup>74</sup> The M and MA periods are designated suitable for those aged 15+, so children in the 15–17 year age bracket will be exposed to alcohol advertising. Allowing direct advertising of alcoholic drinks during live sporting broadcasts places them before children in an even younger age group.

All advertisements must be classified and have a classification number prior to being accepted for broadcast by a television station. The classification process, which ensures that advertisements are shown only in suitable classification zones, is carried out for a fee by Commercial Advice Pty Ltd (hereafter, CAD), a company that is operated on behalf of Free TV Australia.<sup>75</sup> Under the CAD placement codes, 'L Liquor' designated advertisements (a direct advertisement for alcoholic drinks) can only be shown during certain prescribed periods. These essentially coincide with the times mentioned above under Section 6 of the CTI Code of Practice.

The industry body representing commercial radio broadcasters in Australia is Commercial Radio Australia Ltd (it was previously known as FARB), and 98% of commercial radio stations are members. The Commercial Radio Codes of Practice were registered with the ABA in July 2004, and 'deal with, among other things, taste and decency, accuracy and fairness in news and current affairs, advertising, Australian music content and complaints handling'.<sup>76</sup> In addition, the ABA imposed three program standards on commercial radio broadcasters, breach of which constitutes a breach of licence conditions, a more serious matter than breach of the Commercial Radio Codes of Practice. These standards relate to distinguishing advertising from regular programs, disclosing sponsors and developing a compliance program. The Commercial Radio Codes of Practice defines 'program' as being 'all matter broadcast', so this presumably includes advertisements (cl 1.2), and 'proscribed matter' includes programs which 'present as desirable . . . the misuse of alcoholic liquor' (cl 1.3(c)(i)).<sup>77</sup> There are no classification zones on commercial radio, and no requirement for advertisements to be classified through an organisation such as CAD.

### **The complaints procedure for the electronic media**

Normally the complaints procedure for matter broadcast on commercial television and commercial radio is that the complainant should write a letter or complete a complaints form within 30 days of the broadcast. The BSA clearly states that complaints relating to codes of practice, and thereby programs, should be directed in the first instance to the broadcaster.<sup>78</sup> If the complainant does not receive a reply from the broadcaster within 60 days, or

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<sup>74</sup> Children's Television Standards relevant to commercial placement 23(1).

<sup>75</sup> <http://www.ctva.com.au> (accessed 7 February 2005).

<sup>76</sup> <http://www.commercialradio.com.au> (accessed 7 February 2005).

<sup>77</sup> Commercial Radio Codes of Practice 1.2, 1.3(c)(i).

<sup>78</sup> Broadcasting Services Act 1992 (Cth) s 148.

is not satisfied with the response, the complaint can then be referred to ACMA. ACMA must investigate the complaint, unless it is frivolous, vexatious or was not made in good faith.<sup>79</sup> ACMA may impose conditions on the licence of commercial television or radio broadcasters, for example 'requiring the licensee to comply with a code of practice that is applicable; or . . . designed to ensure that a breach of a condition by the licensee does not occur'.<sup>80</sup> Part 10 of the BSA is headed 'Remedies for breaches of licensing provisions'. Penalties for offences include fines, which may be very substantial, through to a three month suspension of the licence or even cancellation of the licence.<sup>81</sup> Another option enables ACMA to issue a notice directing a commercial broadcaster to take action to ensure the licence requirements are complied with.<sup>82</sup> An appeal against the findings of ACMA may be made to the Administrative Appeals Tribunal.<sup>83</sup> If the broadcaster appeals the decision of ACMA the procedure may become lengthy and expensive.

However, while the above gives details of the complaints mechanism ordinarily provided for by the BSA, complications arise when it comes to lodging a complaint about advertising content. As noted earlier, s 6 of the BSA says 'program' includes 'advertising or sponsorship matter, whether or not of a commercial kind', but the following information is extracted from the ACMA website:

The ABA [ACMA] does NOT:

- handle complaints about the content of advertisements, *except* for incorrect classification of TV ads and advertisements directed to children on commercial services;
- deal with false and misleading advertising; . . .

**Type of complaint**

Some advertising on commercial Television, commercial radio, pay TV and in the print media is covered by the Advertising Standards Bureau's (ASB) code of practice. For example, if your complaint is about such things as discrimination, sex and nudity, language or health and safety, you can write to the ASB.

Complaints about false and misleading advertising is covered by trade practices law <sup>84</sup>

**Who can handle your complaint**

Advertising Standards Bureau

Australian Competition and Consumer Commission

<sup>79</sup> Ibid, s 149.

<sup>80</sup> Ibid, ss 43, 44.

<sup>81</sup> Ibid, ss 139–143. Editor's note: These powers have been undergoing review: see, eg, I Ramsay, *Reform of the Broadcasting Regulator's Enforcement Powers* (released November 2005); DCITA, *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Media and Communications Authority*, Issues Paper, November 2005.

<sup>82</sup> Ibid, s 141.

<sup>83</sup> Ibid, Part 14.

<sup>84</sup> <http://www.aba.gov.au> (accessed 18 February 2005) (now on the ACMA website).

This is supported by the Free TV Australia website which advises that complaints about the timing of advertisements should be sent in writing in the first instance to the television station that broadcast the material, whereas complaints about the content of advertisements should be sent to the Advertising Standards Bureau (hereafter, ASB) (the ASB is discussed in detail below).<sup>85</sup> Complaints to the ASB must be made in writing.<sup>86</sup> The CTI Code of Practice has a clause relating to 'Complaints about the content of commercials'. This clause states that broadcasters will deal with complaints relating to placement, and refer complaints relating to content to the Advertising Standards Board, 'or, in the case of a complaint relating to a matter covered by the Children's Television Standards 17-23, to the Australian Broadcasting Authority [which is now ACMA]'.<sup>87</sup>

On the other hand, the website for Commercial Radio Australia says, 'a listener who feels that a commercial radio station has breached any of the Codes is entitled to complain (in the first instance) to that station'.<sup>88</sup> The website also provides a generic complaint form which can be downloaded and sent to a particular radio station. The form is headed as follows:

**COMMERCIAL RADIO CODES OF PRACTICE — LISTENER COMPLAINT FORM**

All program content on commercial radio stations (music, news, talk, advertisements, etc) is regulated by the Commercial Radio Codes of Practice (Codes). The Codes also provide a complaints process through which any listener can make an official written complaint to a station if he or she reasonably feels that a program on the station has breached the Codes.

The Commercial Radio Australia website is silent on the issue of where complaints about advertising content should be sent, and the above would seem to indicate that it goes to the radio station, in contradiction of what is said on the ACMA website. There is a lack of clarity about the proper procedure for the lodgement of complaints about the content of radio advertisements, with ACMA stating one thing and Commercial Radio Australia another. If Commercial Radio Australia is correct, it would appear that complaints about the content of radio advertisements are treated differently to TV advertisements.

The move to self-regulation by commercial broadcasters was one of the features of the BSA, the explanatory memorandum for the Bill in the House of Representatives saying:

It promotes the ABA's role as an oversighting body akin to the TPC rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities and legalism as has been the experience with the ABT.<sup>89</sup>

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<sup>85</sup> <http://www.ctva.com.au> (accessed 7 February 2005). Those complainants with a disability which precludes writing can complain by phone or on an audio cassette: CTI Code of Practice, cl 7.3.2.

<sup>86</sup> <http://www.advertisingstandardsbureau.com.au> (accessed 18 April 2005).

<sup>87</sup> CTI Code of Practice, Cl 7.8.

<sup>88</sup> <http://www.commercialradio.com.au> (accessed 7 February 2005).

<sup>89</sup> The Parliament of the Commonwealth of Australia, House of Representatives, *Broadcasting Services Bill 1992 Explanatory Memorandum*, 1992, p 13.

However, a report issued by the ABT in 1977 cast doubt on whether advertising should be included as a feature of self-regulation:

It became clear to us from the evidence that a self-regulatory system could not be applied to all areas of broadcasting because of the natural conflict between the needs of commercial organisations and the interests of the public. The community could not reasonably expect broadcasters to immediately regulate themselves in areas such as Australian content, children's programs or advertising, where their necessary and justifiable desire for profits could be in conflict with their acknowledged social responsibilities.<sup>90</sup>

Under the BSA scheme complaints about the content of broadcast media advertisements go to the ASB or ACCC, unless the advertisement is directed at children in which case it goes to ACMA. In the BSA the definition of 'program' includes advertisements, so logic suggests that such a matter does fall within the purview of the Act, and should remain there because a self-regulatory body such as the ASB has less force than ACMA if the complaint is upheld. On this point an editorial in *Communications Update* in 1992 comments with respect to the BSA, 'Crucially, however it fails to acknowledge the need for continued regulation of television advertising, despite the demonstrable public interest in such regulation'.<sup>91</sup> If complaints about the content of advertisements on TV were in fact processed by ACMA, and findings made against the broadcaster, the broadcaster would be forced to act as a gatekeeper. 'Children' are not defined in the BSA so either the CTS definition of 'people younger than 14 years of age' applies or the AANA Code for Advertising to Children definition of '14 years old or younger' applies.<sup>92</sup> This leaves the 14–17 year olds in an anomalous situation – not legally allowed alcohol, but exposed to adult alcohol advertising, and complaints relating to their exposure to alcohol beverages advertising being diverted from ACMA to the self-regulatory system or the ACCC.

Complaints to the broadcaster (and ultimately ACMA if necessary) must be made in writing. Complaints to the ASB must be in writing, or can be lodged electronically via email. The ACCC accepts phone, written and electronic complaints.<sup>93</sup> Finding the right place to lodge a complaint about the content of an alcohol advertisement, and then actually lodging the complaint, requires perseverance and some ability to express oneself articulately in writing or over the phone.

A search of the ABA (now ACMA) website found only two reports of complaints about alcohol. One related to a Triple M Sydney (radio) broadcast of 11 February 2003, and the complainant was a member of the public. The complaint was about a program, not about an advertisement. There were three arms to the complaint, one of which was that the program had included the

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90 ABT, *Self-Regulation for Broadcasters? Report on the public enquiry into the concept* (1977), p 7 (cited in *CU* Editorial, 'Farewell, ABT' (1992) *Communications Update* 3, p 3.

91 *CU* Editorial, above n 90.

92 'Children' are not defined in the Commercial Radio Codes of Practice, indeed there is no direct reference to children at all.

93 <http://www.ctva.com.au> (accessed 7 February 2005); <http://www.aba.gov.au> (accessed 18 February 2005); <http://www.advertisingstandardsbureau.com.au> (accessed 18 April 2005); <http://www.acc.gov.au> (accessed 8 February 2005).

misuse of alcoholic liquor as one of the 'standards of rock'. The ABA found that the licensee did not present the misuse of alcohol as desirable in the program, and stated further that it is 'important to note that presentation of the misuse of alcohol is not, per se, a breach of the Code'.<sup>94</sup> The second complaint was that Network Ten broadcast three alcohol related advertisements during its national coverage of the Melbourne Cup on 7 November 2000, a timing issue. There is no mention of a specific complainant, the report stating 'On 7 November 2000 the Australian Broadcasting Authority (hereafter, the ABA) became aware that' the content had been broadcast. The ABA sought further information from Network Ten, and was notified that two of the three advertisements were admitted as breaches. Network Ten advised that the Network Manager of Broadcast Policy had since written an explanatory note to be forwarded to the Manager in each station 'explaining the correct interpretation of the alcohol advertising provisions in the FACTS Code, to ensure the mistake is not repeated'. The ABA required that 'the licensees ensure that all Traffic Managers are apprised of the ABA's findings in this investigation', the findings being that the licensee of Ten-10 Sydney, Network 10 (Sydney) Pty Ltd, and licensee of ADS-10 Adelaide, Television Broadcasters Ltd, had breached cl 6.7 of the Code.<sup>95</sup>

### **Summary of the complaints procedure for the electronic media**

In summary, complaints about the content of an advertisement (unless they apply to the incorrect classification of TV advertisements or advertisements directed to children) are not handled by ACMA if shown on a commercial TV or commercial radio. Although below the legal drinking age, 15–17 year olds, are treated as adults in terms of viewing times on commercial TV and in terms of the complaints procedure. A party concerned about the content of an advertisement broadcast on the commercial media must either make a complaint to the ASB, a system of self-regulation for advertisers, or to the ACCC on the basis of the advertisement being misleading and deceptive, or alternatively initiate a court action in pursuit of one of the remedies available under the TPA. In any event none of these avenues has an immediate effect on the organisation that made money by facilitating the exposure of the advertisement to the public, ie the broadcaster. As noted above, finding the right channel of complaint and then making the complaint requires perseverance and the ability to express oneself clearly.

## **Self-regulation**

### **The print media and self-regulation**

The print media regulates itself and there is no overall external regulation (and no licensing system) as such, apart from provisions relating to cross-media ownership and control in the BSA and provisions such as the TPA. Other commonwealth legislation also makes reference to foreign acquisition and takeovers. There is also some state based legislation regarding identification of

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<sup>94</sup> ABA Investigation Report, File No: 2003/0607, Investigation No: 1272, <http://www.aba.gov.au> (accessed 18 February 2005).

<sup>95</sup> ABA Investigation Report, File No: 2000/0879, Complaint No: 12271, Investigation No: 935, <http://www.aba.gov.au> (accessed 18 February 2005).



proprietors and printers. The Australian Press Council (hereafter, APC) was established in 1976 largely as a way of showing that the print media is serious about self-regulation, and thus trying to avoid any sort of external regulation. The APC has no legislative authority, and depends entirely on 'institutionalised self discipline'. It sees itself as a 'defender of press freedom'. It is funded by the newspaper industry and membership is voluntary, the latter being a weakness because some of the most powerful and influential newspaper groups have not always been participants. John Fairfax Ltd did not join until 1982, and News Corporation Ltd withdrew its participation in 1980, but rejoined in 1987.<sup>96</sup>

Publications that are subject to APC jurisdiction are any newspaper or magazine printed in Australia. The APC consists of 21 members: the chair (who must have no previous association with the press), 10 publisher's nominees and seven public members, two journalist members and an editorial member. Anyone may lodge a complaint with the APC about the conduct of a newspaper or magazine, and lawyers are not involved in the complaints committee hearings. Statistics show that, for various reasons, only a small proportion of the complaints are upheld. Even when complaints are upheld, the lack of sanctions has led to the system being called a 'toothless tiger'. When complaints are upheld the APC relies on the newspaper involved to publish information regarding the APC adjudication; if the newspaper complies, the report is often buried deep in the paper. The adjudications are also published in the APC's Press Council News and annual reports. This published 'criticism' is the only punishment imposed. Most of the complaints fall under the heading of inaccuracy or misrepresentation; some of the other headings are: imbalance or inadequate coverage, unfair treatment, bias and censorship. Complaints are most commonly made by individuals and these are usually against metropolitan newspapers.<sup>97</sup> With respect to print media advertising, most newspapers attempt to absolve themselves from liability for the content of advertisements by the use of disclaimers. Indeed the APC 'Complaints Procedure' says 'If you have a complaint against a newspaper or periodical (not an advertisement), you should first take it up with the editor', but does not specify where complaints about advertisements should be directed.<sup>98</sup> The ASB (discussed below) adjudicates on complaints about advertisements in the mainstream media, but the TPA (discussed above) is the most effective recourse for those wishing to complain about print media advertisements. Interestingly, however, the 2003 Annual Report of the APC includes a breakdown of complaints statistics, and under the heading 'About' gives the following detail without any further elaboration:

	2002/3	%age 2002/3	2001/2	%age 2001/2	1988/2002	%age 1988/2002
Advertising	6	1.6	9	2.3	186	3.4 <sup>99</sup>

<sup>96</sup> <http://www.presscouncil.org.au> (accessed 17 February 2005).

<sup>97</sup> Australian Press Council, *Annual Report No 28*, Australian Government Printing Service, 2004.

<sup>98</sup> *Annual Report No 28*, above n 97 at p 105; Australian Press Club, *Annual Report No 27* Australian Government Printing Service, 2003, p 105.

## Advertising self-regulation

### Advertising standards bureau

Prior to 1996 the Media Council of Australia (hereafter, MCA), 'an unincorporated association of virtually all main stream commercial media, including newspapers, magazines, radio, television, cinema and outdoor display contractors' had two roles. One was to administer an accreditation system of advertising agencies, and the other was to formulate and promulgate five Codes of Advertising Practice. These were the Advertising Code of Ethics, the Alcoholic Beverages Advertising Code, the Slimming Advertising Code, the Therapeutic Goods Advertising Code, and the Cigarette Advertising Code.<sup>100</sup> Complaints about advertising were handled by the Advertising Standards Council, formed in 1974 by the MCA. In 1996 the ACCC found the activities of the MCA to be anti competitive, and it was disbanded.

The Australian Association of National Advertisers (hereafter, AANA), at the behest of the federal government, put in place an alternative method of advertising self-regulation. As a result the current system of national voluntary advertising self-regulation, which came into operation in 1998, is managed by the Advertising Standards Bureau (hereafter, ASB), and administered by the ASB through the Advertising Standards Board and the Advertising Claims Board. The Australian Advertising Standards Council funds the system by means of a voluntary levy on the industry.<sup>101</sup>

The Advertising Standards Board, comprising a panel of members of the public, hears complaints from anyone about advertisements appearing in the mainstream media (print and broadcast) and provides determinations free of charge. These determinations are based on consideration of Section 2 of the AANA Advertiser Code of Ethics (the 'taste and decency' provisions). Section 2 of this Code includes such matters as:

- discrimination (race, nationality, sex, age, sexual preference, religion, disability, political belief)
- violence
- language
- portrayal of sex, sexuality or nudity
- health and safety
- alarm or distress to children

The Board's role does not extend to issues about the legality or the truth and accuracy of advertising. It cannot deal with issues about public advocacy, nor with label directions.<sup>102</sup>

Where the complaint relates to truth and accuracy in an advertisement, complainants are directed to contact the ACCC or the state or territory equivalent. Complainants are also advised that if the complaint is about the timing of a TV advertisement contact should be made with Free TV Australia, and complaints about alcohol advertising will be copied to the Alcohol Beverages Advertising Code Management Committee (discussed below).

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<sup>99</sup> *Annual Report No 27*, above n 98 at p 79.

<sup>100</sup> The Media Council of Australia information brochure (undated).

<sup>101</sup> <http://www.advertisingstandardsbureau.com.au> (accessed 18 April 2005).

<sup>102</sup> *Ibid.* As earlier noted the AANA Advertiser Code of Ethics also appears as Appendix 1 of Section 1 of the CTI Code of Practice.

Advertisers are asked to remove or amend advertisements against which an adverse finding is made, and the ASB reports a 'near perfect record of industry compliance' in five years of operation. With respect to complaints statistics, under the heading of 'Product Category Attracting Complaint', alcohol rates at 11.62% in 2003, 6.00% in 2002, 2.42% in 2001 and 4.83% in 2000. Between August 2004 and April 2005 (the only period displayed), none of the fifteen 'Complaints Upheld' were in respect of alcohol. Between October 2003 and March 2005 six of the thirty three 'Advertisements Withdrawn or Modified' were in respect of alcohol. Of these there was one print advertisement, complaint related to 'portrayal of people (disability)', two TV advertisements, both complaints related to 'violence', two on radio, one complaint was about 'health and safety' the other about 'discrimination (religion)/vilification', and one 'outdoor' advertisement where the complaint related to 'discrimination (sex)/vilification'. Of the fifty seven 'Complaints Recently Dismissed', four complaints were in respect of alcohol, three of these were TV advertisements and one was outdoor/print. These complaints related respectively to 'portrayal of people (sex)/portrayal of sex/sexuality/nudity'; 'health and safety'; 'alarm or distress to children/health & safety, sex/sexuality/nudity, other'; and 'discrimination (sex)/vilification'.<sup>103</sup>

Although none of these complaints related to the effect of the impugned advertisement on young drinkers, there is obvious potential for such a complaint to be made — but only if the message is an overt one that falls within the matters covered by the AANA Advertiser Code of Ethics. There would be fewer issues relating to the party who would make such a complaint, discussed earlier in the context of legal regulatory mechanisms, because anyone can complain to the ASB and the process is free of charge. As noted above, the Advertising Standards Board does not hear complaints relating to truth and accuracy in an advertisement, so the more subtle messages fall out of the Advertising Standards Board purview.

The Advertising Claims Board is the body that determines competitive complaints relating to breaches of Section 1 of the AANA Advertiser Code of Ethics (the 'truth, accuracy and questions of law' provisions). The Board is intended as an alternative dispute resolution scheme, and complaints are heard by a minimum three person panel consisting of practicing lawyers with relevant experience and expertise. The system operates on a user pays system. Before the complaint is heard the complainant, who may be a 'person/organisation/company', is charged a filing fee of \$250.00, and must also deposit an amount estimated to cover the panel members' fees and the Board's legal costs. This amount may increase, and the process is suspended until all fees are paid.<sup>104</sup>

In the context of this paper, the most relevant parts of Section 1 are as follows:

- 1.1 Advertisements shall comply with Commonwealth law and the law of the relevant State or Territory

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<sup>103</sup> <http://www.advertisingstandardsbureau.com.au> (accessed 5 May 2005).

<sup>104</sup> 'Advertising Claims Board — Procedural Guidelines for Participants', <http://www.advertisingstandardsbureau.com.au> (accessed 5 May 2005) at 1.1–1.4.

1.2 Advertisements shall not be misleading or deceptive or be likely to mislead or deceive.

The outcome of determinations, which cannot be enforced, may be either 'Advertising substantiated', 'Advertising Modified or Discontinued', 'Advertising Referred to Government Agency', or 'No Substantiation Received'. If the advertiser does not modify or discontinue the advertisement, or does not supply an 'Advertiser Statement', the matter is 'referred to the appropriate government agency'. There is no avenue of appeal. There is no clarification as to which government agency (or agencies) may be appropriate, and it is unclear whether the 'Advertiser Statement' is the required initial response to the complaint ('a substantial written response'), or the required response to the complainant's reply to the advertiser's initial response, or both. Determinations are published in the 'Advertising Claims Board Case Report', but these reports are not available on the general ASB website. Settlement is possible at any time, and the complainant may withdraw at any time, but in both instances the complainant forfeits fees paid. Either party may commence litigation, which brings the action to a close; if the complainant commences litigation, the complainant forfeits fees paid, but if the advertiser commences litigation the costs not yet incurred are refunded to the complainant. However, interestingly, included in 'Matters not considered by the Claims Board' is a reference to 'Complaints about advertisements for services or products where a specific industry Code apply [sic] (eg slimming, alcohol, therapeutic goods)'.<sup>105</sup> An enquiry made to the ASB resulted in a confirmation of this as the response said that a search of the office records showed no Advertising Claims Board adjudications relating to alcohol products.<sup>106</sup> It would seem, therefore, that, where there is a specific industry code, competitors must direct their complaints to the ACCC or take legal action under the TPA.<sup>107</sup>

### **Alcohol beverages advertising code and complaints management scheme**

The Alcohol Beverages Advertising Code (hereafter, ABAC) was introduced in 1998, and updated in 2004. The scheme is managed by a committee with representatives from the Australian Associated Brewers Inc, Distilled Spirits Industry Council of Australia Inc, Liquor Merchants Association of Australia Ltd, Winemakers Federation of Australia Inc, Advertising Federation of Australia (hereafter, AFA) and a government representative. Advertisements for alcohol are required to comply with both the AANA Advertiser Code of Ethics and the ABAC.<sup>108</sup>

The ABAC Code defines an 'adult' as being a person of at least 18 years, an 'adolescent' as being a person aged 14–17 inclusive, and a child as being under 14 years. This is the same as the CTS definition of children but inconsistent with the AANA Code for Advertising to Children which defines

<sup>105</sup> Ibid, 1.6, 2.4, 2.7, 3.2, 3.3, 4.3–4.5. Some careful editing would vastly improve the document.

<sup>106</sup> Email from the ASB to the author, 27 May 2005.

<sup>107</sup> The ABAC complaints panel generally does not adjudicate on competitor complaints.

<sup>108</sup> *The ABAC Scheme*, an (undated) information brochure prepared by the Principals of ABAC 2, <http://www.dsica.com.au> (accessed 4 April 2005).

children as 14 years or younger.<sup>109</sup> The ABAC Code says, inter alia:

**Preamble**

The Code is designed to ensure that alcohol advertising will be conducted in a manner which neither conflicts with nor detracts from the need for responsibility and moderation in liquor merchandising and consumption, and which does not encourage consumption by underage persons . . .

**Advertisements for alcohol beverages must:**

- (a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly:
  - (i) must not encourage excessive consumption or abuse of alcohol;
  - (ii) must not encourage under-age drinking;
  - (iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
  - (iv) must only depict the responsible and moderate consumption of alcohol beverages;
- (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;
- (c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly:
  - (i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;
  - (ii) if alcohol beverages are depicted as part of a celebration, must not imply or suggest that the beverage was a cause of or contributed to success or achievement; and
  - (iii) must not suggest that the consumption of alcohol beverages offers any therapeutic benefit or is a necessary aid to relaxation . . .<sup>110</sup>

All complaints go in the first instance to the ASB, and ones relating to alcohol are copied by the ASB to ABAC. The ABAC brochure says 'If complainant raises issues which are "solely within" the AANA Code it will be dealt with only by the ASB. All other complaints are adjudicated by the ABAC complaints panel'.<sup>111</sup> The focus of ABAC, as outlined in the above paragraph from the preamble, is the responsible use of alcohol. In 'A submission to the NSW alcohol summit', dated August 2003, the AFA says:

<sup>109</sup> See text accompanying n 68 above.

<sup>110</sup> *The ABAC Scheme*, above n 108, p 3. This paragraph from the Preamble was inserted into the Code in 2004: *Alcohol Beverages Advertising Adjudication Panel — 2004 Annual Report 4*, <http://www.dsica.com.au> (accessed 4 April 2005).

<sup>111</sup> *The ABAC Scheme*, above n 108, p 5.

The ABAC was developed to reflect the public policy considerations which underpin the National Health policy on alcohol. It aims to ensure that alcohol advertising does not undermine the health message that an alcohol product should be consumed responsibly and in moderation.

The overriding theme of the Code is that alcohol advertising is to present a mature, balanced and responsible approach to the consumption of alcohol beverages.<sup>112</sup>

The ABAC brochure states that sometimes the complaint will be heard by both the ASB and ABAC when the complaint relates to issues covered by both the AANA Code and the ABAC Code. If a complaint is upheld by the ABAC complaints panel, the advertiser is asked to withdraw or modify the advertisement.<sup>113</sup> Two hundred and twelve complaints relating to 23 advertisements were referred by the ASB to ABAC during 2004. One advertisement, a TV advertisement for beer, was responsible for 180 of these complaints. Eight of the 212 complaints were found to fall within the ABAC, and three of these were upheld, two of which appeared on the internet and one in the print media.<sup>114</sup>

There is no mention of the composition of the ABAC Complaints Adjudication Panel in the ABAC brochure, but a separate 'Rules and Procedures' document states it consists of three regular and two reserve members. One of the regular members is a health sector representative, and no panel members may be current employees of the alcohol beverages industry, or employed in the industry in the five years prior to appointment.<sup>115</sup> The panel members 'represent broad, mainstream values. They are independent of the alcohol industry and not represent any particular interest group'.<sup>116</sup> The Chief Adjudicator at present is Michael Lavarch.<sup>117</sup>

ABAC also provides an alcohol advertising pre-vetting scheme through which advertisers may have their electronic, print and trade media alcohol advertisements evaluated by independent adjudicators. The advertisement is measured against the ABAC Code at an early stage of development.<sup>118</sup> The Distilled Spirits Industry Council of Australia Inc, one of the ABAC principals, reports that the pre-vetting scheme has been 'extraordinarily successful'. In 1990 there were 35 complaints under the former code, there were no complaints in 1993, and complaints 'have remained at negligible levels ever since'.<sup>119</sup> The AFA comments that:

It is also worth noting that over the past three years 18% of beer advertisements submitted for pre-vetting have been either rejected or modified as a result of the

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112 The Advertising Federation of Australia, *Submission to the NSW Alcohol Summit: Responsible Marketing*, August 2003, p 6, <http://www.afa.org.au> (accessed 11 May 2005).

113 *The ABAC Scheme*, above n 108, p 5.

114 *Alcohol Beverages Advertising Adjudication Panel — 2004 Annual Report* 8.

115 *Alcohol Beverages Advertising Code (The ABAC Scheme): Rules and Procedures* (undated) Clause 2: <http://www.afa.org.au> (accessed 28 May 2005).

116 <http://www.dsica.com.au> (accessed 11 May 2005).

117 I am grateful to Professor Lavarch for clarifying a number of issues in relation to the operation of ABAC.

118 *The ABAC Scheme*, above n 108, p 6.

119 <http://www.dsica.com.au> (accessed 11 May 2005).

pre-vetting process. This is seen as an indication that the pre-vetting process has been effective in maintaining the low level of complaints against alcohol advertisements.<sup>120</sup>

The above report includes the information that members of the Winemakers Federation of Australia are not required to participate in the pre-vetting process, although they have given a commitment to abide by the ABAC.<sup>121</sup> Members of the Distilled Spirits Industry Council of Australia are responsible for submitting their wine products.<sup>122</sup>

### Summary of advertising self-regulation

There are inconsistencies in the various codes as to the definition of 'child'. The ASB is the recipient for complaints about the content of advertisements that appear on television. The Advertising Standards Board hears complaints relating to 'taste and decency' and the ABAC hears complaints relating to 'responsible use'. Where the complaint is about 'truth and accuracy', the subject matter of this paper, complainants are directed to contact the ACCC or the state or territory equivalent. Competitor complaints about 'truth and accuracy and questions of law' may be heard by the Advertising Claims Board, a user pays, alternative dispute resolution scheme. The Board does not hear complaints about products where an industry Code applies, such as ABAC. Complaints relating to 'truth and accuracy and questions of law' in alcohol advertisements are in limbo as far as advertising self-regulation is concerned, and the inescapable conclusion seems to be that the ACCC or the state or territory equivalent is the only way of having such a complaint heard.

### Conclusion

While there are opposing opinions on whether alcohol advertising is definitely an influence in youth drinking, that possibility is a cause of concern. Those members of the community who are concerned may or, more likely, may not be young drinkers. Anyone wishing to make a complaint about 'truth and accuracy' in an alcohol advertisement in the print media or on the broadcast media may find only limited avenues available. Complaints relating to the content of advertisements on the broadcast media are not dealt with by ACMA in the way that other broadcast media complaints are (unless they apply to the incorrect classification of TV advertisements or advertisements directed to children); they are referred instead to the advertising self-regulation system. That system handles complaints about print and broadcast media advertisements, but leaves in limbo those complaints about truth and accuracy in advertising — in other words the subtle messages transmitted to young drinkers by alcohol advertising which is the subject matter of this paper. Complainants must therefore resort to the ACCC or bring an action under the TPA. A complaint to the ACCC only has effect if a sufficient number are received about the same issue. It would seem therefore that the TPA is the most effective (and probably the only) mechanism, legal or otherwise,

120 The Advertising Federation of Australia, above n 112, p 4.

121 Ibid, 4; see also Russ Knight Research survey for the Australian Associated Brewers, *Community Attitudes to Alcohol Advertising*, March 2003, p i.

122 <http://www.dsica.com.au> (accessed 11 May 2005).

regulating truth and accuracy in the advertising of alcohol in Australia. The TPA applies universally to all types of advertisement, and all modes of advertising. However, recourse to a TPA action requires time and expense in pursuing legal proceedings under the Act, and, in the context of alcohol advertisements and the potential influence on young drinkers, there may be difficult issues relating to who can bring an action. Other difficulties associated with such litigation include the most appropriate party against whom to bring an action, and evidentiary matters associated with TPA cases.

In short, making a complaint about an alcohol advertisement that is featured in the print or broadcast media is complex, although superficially it appears to be a simple matter. The correct recipient depends on whether the complaint relates to advertisements in the print media, or on the broadcast media. If the complaint is about an advertisement on the broadcast media, the correct recipient depends on whether the complaint is about the timing or about the content of the advertisement, or whether it applies to children. If the complaint is about the content of the advertisement, the correct recipient depends on whether it is about matters such as discrimination or violence, or about truth and accuracy. Undoubtedly a complainant who starts the process with the incorrect recipient will be redirected, but may require some persistence and patience to see the matter through to a satisfactory conclusion — this complainant will almost certainly not be a young drinker.