



Case Report

1	Case Number	0271/12
2	Advertiser	Fosters Australia, Asia & Pacific
3	Product	Alcohol
4	Type of Advertisement / media	Internet - social
5	Date of Determination	11/07/2012
6	DETERMINATION	Upheld - Modified or Discontinued

ISSUES RAISED

- 2.6 - Health and Safety - Depiction of smoking/drinking/gambling
- 2.5 - Language - inappropriate language
- 2.4 - Sex/sexuality/nudity - S/S/N - general
- 2.1 - Discrimination or Vilification - Gender
- 2.1 - Discrimination or Vilification - Race

DESCRIPTION OF THE ADVERTISEMENT

Facebook page for VB which features questions posted by the advertiser and comments from members of the community. The comments include coarse language and sexual references.

THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

This submission asks that the Alcohol Advertising Review Board examine content on the Australian Facebook pages of VB and Smirnoff. When applying the AANA and ABAC codes to material openly available on the Facebook pages of VB and Smirnoff it appears that some of it features:

- Sexism racism and other forms of discrimination or vilification
- Irresponsible drinking and excessive consumption
- Obscene language depiction of under-25 year olds consuming alcohol
- Material that connects alcohol consumption with sexual or social prowess

We have detailed examples of each of these practices in the attached appendix.

The Facebook pages are also openly accessible to Facebook users under the age of 18.

Users under the age of 18 are able to view the content 'Like' the pages so that any content posted is pushed to their news feeds and they are also able to comment and post content. Some of the examples we attach here concern content produced by these brands other examples relate to content created by 'fans' that is instigated facilitated or allowed by the brand. The Alcoholic Beverages Advertising Code (ABAC) presents itself as 'media neutral' and therefore also applies to brand activity on social media platforms.

This would imply that brands maintaining official Facebook pages are charged with the responsibility to moderate fan conversations on their Facebook pages and to remove content that is in breach of the Australian Association of National Advertiser's Code of Ethics and the Alcoholic Beverages Advertising Code (ABAC).

The view that brands are responsible for consumer created content on their social media pages has been supported by a recent decision of an Australian Federal Court (Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2) [2011] FCA 74)1 that a health company was responsible for Facebook and Twitter comments by fans on its account in defiance of a court order that the company not make misleading claims about its allergy treatments The Federal Court concluded that Allergy

Pathway was responsible for third-party comments where it knew of them and made a decision not to remove them from its Facebook page In this context one could come to the conclusion that some of the content posted on the official Facebook pages of VB and Smirnoff breaches the self-regulatory guidelines as outlined in the ABAC-scheme This involves content that is created and posted by these brands and their fans Following the interpretation of the court in the case outlined above it is plausible to ask that the board consider if and to what extent alcohol brands are responsible for the content on their Facebook pages including fan produced content they facilitate instigate or allow.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

Thank you for your correspondence in relation to the single complaint (271/12) about the VB Facebook page (VB page), which raises concerns primarily about a number of User Comments. The VB page has been live since July 2009 and is managed by one of our agencies in conjunction with members of the Carlton and United Breweries (CUB) marketing team.

Before we address the issues raised in the complaint we'd like to share our approach to the social media medium and how our brands participate. The nature of Facebook is that it is dynamic, informal, easy to use and a tool that allows people to subscribe to communities that are of interest to them. As a medium its content is diverse in terms of the language and views expressed – it is like any conversation that people would engage in. It is this combination that makes it a compelling space for its users but equally the companies who participate. It's worth noting that the opportunity to engage continuously and directly with a group of highly engaged 'fans' is very appealing to brands. That said, those unique benefits can at times also make it a challenging space.

A brand's Facebook pages reflect the personality of the brand but largely the community who participates in discussions on those pages. For instance, whilst a brand may post a question or comment (Brand Post), the bulk of the posts that follow will then be generated by users

(User Comments), who may also keep the conversation flowing by responding to each other. As a result of a single Brand Post there could be anywhere from 0 to 100s of User Comments. These User Comments will vary greatly depending on their age, interests, beliefs and education – just as you would expect if you were privy to a conversation say at a restaurant or pub in Glen Waverley or Subiaco or Wallsend or Kirribilli. If the Facebook ‘conversation’ is not to your liking you can either attempt to influence its direction through your own User Comments or not view the page. In reality if you stay and participate it’s likely you have something in common with the community and/or you enjoy the types of discussions that take place.

Probable impact of VB Facebook page upon typical audience members

It is clear from the wording of the AANA Code of Ethics (the Code) that in determining whether particular material breaches the code, it is highly important to consider the context and the relevant audience (see discussion below). Given our comments above about social media, in relation to the complainant – we question whether they are a consumer genuinely participating in the pages given they have very deliberately searched ‘archived’ User Comments (clicking through repeatedly to find old User Comments no longer immediately visible) it would seem, in search of perceived breaches to the various advertising codes. As such we’d argue the complainant does not represent the views of the true audience and the complaint is not an indication of the probable impact of the VB Facebook page upon a typical audience member. Further, for the reasons set out below, these pages are unlikely to be communicated to persons who do not actively seek them out as the complainant has presumably done.

The User Comments are not “Advertising or Marketing Communications”

The Code applies to “Advertising or Marketing Communications”, defined as follows:

Advertising or Marketing Communications means any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and

*- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct, but does not include Excluded Advertising or Marketing Communications.*

Drilling down into the definition of “Advertising or Marketing Communications”, it was our understanding that User Comments do not fall within that definition as they are not material “over which [CUB] has a reasonable degree of control”. While CUB has the ability to monitor and remove User Comments from the VB Page (our commitment to this process is detailed later in this letter), pre-moderation by CUB of User Comments on the VB Page is not commercially feasible therefore CUB has no practical control over the content of the User Comments.

We submit that the Code must be read with recognition of the commercial realities that apply in the marketplace. It would be unduly onerous on alcohol beverage producers and indeed any company participating in this medium to interpret the Code as including User Comments on Facebook pages as falling within the scope of “Advertising or Marketing Communications”, since CUB does not have a reasonable degree of control over them. The only way for a producer to be certain that no inappropriate User Comments appear on a Facebook page for its product would be either not to have that Facebook page at all (which

is commercially unsustainable given the importance of social media in marketing in 2012 and its likely increased importance in future), or to review every User Comment before allowing it to appear on the page. A requirement for pre-moderation of every User Comment would be contrary to the spirit of social media and would cause users to become disengaged from the page, i.e. they are unlikely to tolerate the inevitable delay between their submitting a post and it appearing on the site, which runs contrary to the sense of immediacy and spontaneity that users expect from a Facebook page. Further it would require an unreasonably high level of resourcing by the producer – effectively, moderation staff would need to be engaged 24/7, every day of the year, to review every User Comment as quickly as possible after it is submitted. This is commercially unrealistic.

Further to our belief that User Comments fall outside the definition of “Advertising or Marketing Communications” as they are not “calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct”. It is not clear whether “calculated” means “intended” or “likely”, but in either case many of the User Comments on the VB Page do not mention any product or service etc. so they cannot be “calculated” to promote or oppose any product or service etc. While many User Comments do mention VB beer very few, if any, could be understood as advertising or marketing VB, even on the broadest possible definition of “advertising or marketing” – at most they could be understood as a statement of personal preference by an individual, to the effect that they enjoy (or in some cases dislike) VB. It is not unusual for those who ‘like us’ to actually post User Comments that express a preference for competitor product. The User Comments on the VB Facebook fan page fall outside the scope of the Code as they are not part of (and would not be understood by the relevant audience as part of) any advertisement or marketing communication for an alcohol beverage. In context, the User Comments will be understood as spontaneous comments that do not necessarily have anything to do with VB beer or if they do, may or may not be favourable to VB.

The audience and context of the VB Facebook page

Some of the provisions of section 2 of the Code expressly refer to the need to consider “context”, “relevant audience and medium” and “Prevailing Community Standards”. Even for those provisions of section 2 of the Code that do not use such words, CUB submits that it is implicit that the context of the content (in this case the User Comments) is extremely important.

For the reasons outlined above, CUB submits that the Code does not apply to the User Comments on the VB Page. However, if it is determined that the Code does apply, the context of the User Comments should be considered.

Contrary to the assertions in the complaint, the VB Page can only be accessed by persons over 18 years of age. This age restriction has been set up through Facebook. In relation to CUB’s brand Facebook sites, there are filters in place that allows access only to those of drinking age in their relevant country to view alcohol brand pages. We can also confirm that content from the VB page does not appear on those pages for people who are registered as 17 and under via news feeds. A member of the Melbourne FACEBOOK office supplied the following information in support of this: “Yes I can confirm that if you have settings in place around alcohol that people under the legal drinking age cannot access the page and they will also not see organic stories from friends that interact with the page who are of legal age.” In addition, those who like us or even if they simply visit the pages, are actively seeking us out. Unlike traditional advertising they either request to be exposed to material or they are choosing to be in the clearly branded space. As such at any time they are able to opt out if it is not to their liking.

The tone of the VB Page is tongue in cheek and ironic. This is consistent with the overall tone of Facebook and much of the Internet generally. It is also the tone of VB marketing in recent years (see for example the VB website at <http://www.vb.com.au/>) and of mainstream beer marketing in Australia. It is a tone commonly used and understood by the demographic principally targeted by VB (i.e. males aged 35 plus) and reached by the VB Page (see Appendix A). Unlike more traditional forms of advertising, a consumer is required to take an active step (i.e. searching for the VB Page on Facebook) in order to be exposed to the VB Page. Therefore the VB Page will most likely only ever be seen by consumers who are already familiar with the VB product and who are likely to be familiar with the tongue in cheek, self deprecating and ironic tone by which it is marketed. In fact, to be inspired to search for the VB page it is likely that the consumer already relates to (and engages with) the marketing style of VB.

In this context, readers of the VB Page will view the User Comments (and to a lesser degree, the VB Brand Posts) as “throw-away lines” i.e. spontaneous contributions that are not well thought through (in many cases they are not even grammatical), that are expressed in the vernacular and that are not to be taken seriously. For example, a post on the VB Page such as “cricket is so uber gay! cant wait 4 tha footy season lol” should not be understood, in context, as discriminating against or vilifying any section of the community on account of sexual preference (section 2.1 of the Code). For the relevant audience, “gay” is not a word that necessarily refers to sexual preference – it can be used as a general term of lighthearted dismissal.

As another example, a User Comment on the VB Page such as “is a man’s job women should b chained 2 da kitchen! Lmfao” (in response to a Brand Post by VB about brewing being every man’s dream job) would not be understood by the relevant audience as discriminating against or vilifying any section of the community on the basis of gender. This is clearly an ironic User Comment, intended to be humorous because it is intentionally outrageous. In the case of this User Comment the final acronym, meaning “Laughing my f-ing arse off”, puts it beyond doubt that the User Comment is intended to be ironic. Indeed, the acronyms “LMFAO”, “LOL” (laugh out loud) and similar acronyms and humorous asides appear throughout many of the User Comments on the VB Page, clearly denoting the ironic mood of the page. There are other indicators of the lighthearted and non-literal mood i.e. use of excessive punctuation (or lack of punctuation), lack of good grammar, use of slang, use of abbreviations and excessive use of capital letters, throughout the User Comments.

As a further example, the demographic targeted and reached by the VB Page is very comfortable with swearing and is unlikely to regard swear words used on the VB Page as inappropriate, strong or obscene in this context (section 2.5 of the Code). For this audience, in this context, essentially no words are taboo.

To take still another example, a User Comment on the VB Page such as “extra VB as to much is never enough” (in response to a Brand Post by VB asking “Besides VB, what’s the next essential needed for a great Australia Day BBQ?”) should not be understood, in context, as contrary to “Prevailing Community Standards” on health and safety (section 2.6 of the Code) by encouraging excessive consumption of alcohol. This is clearly a light-hearted User Comment, not intended to be taken literally. The attached letter to the ABAC Adjudication Panel is relevant to a consideration of whether the VB Page breaches section 2.6 of the Code by encouraging excessive consumption of alcohol.

It’s worth remembering that the User Comments highlighted by the complainant are being viewed here in isolation but in reality represent a tiny number of the total number of User Comments generated by our fans/people who have liked us (currently 39,874 as at 19.12 Thursday 28 June 2012) over a number of years. We’d like to take the opportunity to

highlight that the comments/questions posted by VB as Brand Posts are, we believe, in line with both the AANA Code of Ethics and ABAC.

The management of our brand Facebook pages continues to evolve and improve and we invest time and money to do this. We have recently consolidated the number of agencies who manage our Facebook sites and new initiatives are being developed. We now have a range of strict mandates in place including the following: House Rules, twice daily monitoring of User Comments (including removal of inappropriate User Comments), language filters, age restrictions and a “Way of Working” document (that brings to life the company policy for Digital Communication) for each brand that outlines no go topics, watchouts and a response matrix.

Whilst we do not consider the User Comments on the VB Page to be advertising or marketing communications (see our views above) we have nevertheless adopted a procedure for moderating the pages as per our House Rules. Whilst some of the User Comments may not be to the taste of some members of the broader public, it is clearly to the taste of our fans. Whilst we choose to enforce House Rules, high levels of censorship are contentious particularly when people are seeking us out and choosing to be part of a community with its unique traits and style. That said, we acknowledge some of the User Comments identified in the complaint arguably fall foul of our house rules (without necessarily breaching the Code) in which case the agency that was retained to monitor this space should have removed a number of them. Out of an abundance of caution and willingness to support the process all the User Comments highlighted in the complaint have been removed from the VB Page (although this not an admission by CUB that they breach the Code).

Need for guidance from ASB/ABAC As noted in the attached letter to the ABAC Adjudication Panel, we believe that a guidance note should be developed and issued by the ABAC management committee to provide signatories with up to date and detailed guidance in relation to social media and in particular Facebook, taking into account our comments above. Other ABAC signatories face very similar issues to those faced by CUB in relation to this complaint. It would also be very helpful if the ASB could provide guidance to advertisers in relation to social media and in particular Facebook, taking into account our comments above.

THE DETERMINATION

The Advertising Standards Board (“Board”) considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”).

The Board noted the complainant’s concerns that the advertisement contains material that is sexist and racist and contains other forms of discrimination, promotes irresponsible drinking, includes obscene language and contains references to sexualized themes.

The Board reviewed the material provided by the complainant which included examples of questions posed by the advertiser and comments posted by users. The Board also noted the advertiser’s response to the material provided.

The Board noted that the complaint about this advertisement would also be considered by the Alcohol Beverages Advertising Adjudication Panel against the Alcohol Beverages Advertising Code (ABAC) that contains alcohol specific advertising standards.

The Board first considered the definition of advertising or marketing communications. Under the Code, advertising and/or marketing communication means “any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.”

The Board considered that the Facebook site of an advertiser is a marketing communication tool over which the advertiser has a reasonable degree of control and that the site could be considered to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product. The Board determined that the provisions of the Code apply to an advertiser’s Facebook page. As a Facebook page can be used to engage with customers, the Board further considered that the Code applies to the content generated by the page creator as well as material or comments posted by users or friends. The Board noted that on this Facebook page, the user comments identified in the complaint were posted in reply to questions posed by the advertiser.

The Board also noted the advertiser response identifying the tone of the page, the demographic principally targeted by the VB brand and advertisers view of the comments posted by users. The Board further noted that the age access restrictions within Facebook itself, is designed to limit access by children to pages promoting alcohol products and other adult material.

The Board first considered whether the advertisement was in breach of Section 2.1 of the Code.

Section 2.1 of the Code states that Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.”

The Board noted the material provided by the complainant that identified questions posed by the advertiser and the comments posted by members of the community in response. The Board noted that comments included on the Facebook page referenced “sluts”, “pussy”, “tits”, “big titted women” and statements such as “women should be chained to da kitchen”. The Board considered that the comments posted on the site, in response to questions raised by the advertiser to engage with the community, were discriminatory toward women.

The Board noted the user posted comments included references to “bloody poofs”, “gay as fuckin aids”, and “poofter”. The Board considered that these comments were derogatory and used in an insulting manner and were degrading to homosexual people in the community.

The Board determined that the advertisement did depict material that discriminated against or vilified persons or sections of society and did breach Section 2.1 of the Code.

The Board considered whether the advertisement complied with Section 2.2 of the Code which states, “Advertising or Marketing Communications should not employ sexual appeal in a manner which is exploitative and degrading of any individual or group of people.”

The Board noted that the advertisement did not use sexual appeal or images to promote the product. The Board determined that the advertisement did not breach Section 2.2 of the Code.

The Board considered whether the advertisement was in breach of Section 2.4 of the Code. Section 2.4 of the Code states: “Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience”.

The Board noted that Facebook has some inbuilt controls over access by minors to certain pages that are promoting alcohol and other adult products or services and that a Facebook user makes a decision to access a specific page. The Board also noted that the activity and updates of Facebook friends can result in the receipt of unsolicited or unwanted material.

The Board noted that posts included references to oral sex “get a dic* in your mouth” and anal sex “loves it in the ass himself” and “when the missus says I can put it in her arse”. The Board noted these comments contained inappropriate references to sexual activity and considered that the user posted content on the Facebook page did not treat sex, sexuality and nudity with sensitivity to the relevant audience.

The Board determined that the advertisement breached Section 2.4 of the Code.

The Board then considered whether the advertisement was in breach of Section 2.5 of the Code. Section 2.5 of the Code states: “Advertising or Marketing Communications shall only use language which is appropriate in the circumstances and strong or obscene language shall be avoided.”

The Board again considered the context and medium of the advertisement represented by the Facebook page and noted the age based access restrictions of Facebook in accessing pages of alcohol and other adult products. The Board noted the advertiser’s response indicated that the demographic targeted and reached by the Facebook page is very comfortable with swearing and almost no word is taboo. The Board noted that comments included the words “double fuck oath”, “vaginal backwash” and “bad c**t” and considered that the words used in the context of a social media discussion board, although posted by friends and contributors to the Facebook page and not the advertiser, were not appropriate in the circumstance and the language was both strong and obscene. The Board considered that the advertisement did use strong and obscene language and determined that the advertisement did breach Section 2.5 of the Code.

The Board considered whether the advertisement was in breach of Section 2.6 of the Code. Section 2.6 of the Code states: “Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety”.

The Board noted the advertisement includes references to excessive drinking including “vb, vb and more vb”, “drink a shitload”, “to much is never enough” and “beer o’clock is when the pub opens”. The Board noted that there is a level of community concern around the issues of excess alcohol consumption and alcohol brands must be conscious of this concern in the community.

A minority of Board members considered that the presence of ill-informed or insensitive comments about the excess consumption of alcohol could be interpreted by some members of the community as unacceptable.

A majority of members considered that although the some statements could be perceived to endorse drinking too much, overall these comments are not specific and use colloquial terms that do not specify actual amounts for consumption. Such general comments could not be taken as the advertiser endorsing excess consumption to the extent that the comments breach Section 2.6 of the Code regarding health and safety.

The Board considered that the advertisement did not breach Section 2.6 of the Code.

The Board noted that social media is an advertising platform that requires monitoring to ensure that offensive material is removed within a reasonable timeframe and that content within a Facebook page should, like all other advertisement and marketing communication, be assessed with the Code in mind. The Board noted that some comments referenced in the complaint were posted on the Facebook page in early 2011. The Board recognized the challenges in effectively monitoring social media to ensure that offensive material removed within a reasonable time.

The Board noted the advertiser’s response which indicated that the material identified by the complainant had been removed from the Facebook page and the advertiser had implemented a more rigorous monitoring arrangement for its social media presence.

Finding that the advertisement breached section 2.1, section 2.4 and section 2.5 of the Code, the Board upheld the complaint.

ADVERTISER RESPONSE TO DETERMINATION

We would like to acknowledge that a number of the comments posted by fans of the VB Facebook page were clearly inappropriate. And we are disappointed that they were not removed through the review process we had in place.

Through this ruling the Advertising Standards Bureau has, for the first time, determined that user comments are considered to be an ‘advertisement’ in relation to the AANA Code of Ethics. As per our initial response, we have never considered user comments to be advertising although we have always taken the view that it is our responsibility to exercise a level of moderation in social media forums. That said, we acknowledge the view you have taken and so too the feedback that many of the user comments were in line with the AANA Code of Ethics but that some were not. As previously flagged, as a precaution and to demonstrate our commitment to this process, upon receiving notification from the ASB of this complaint we removed all the user comments that were highlighted.

We wanted to take this opportunity to explain that whilst these user comments had remained on our VB FACEBOOK page (for varying lengths of time), this was due to the fact that some had been missed in the monitoring process. We have discussed this complaint with the agency (who previously managed the VB FACEBOOK page) in order to understand how this happened and found that despite ongoing monitoring some of the comments had “slipped through” and then unfortunately were not picked up later. As time passed these were no longer immediately visible and were accessible only by searching through user comments that had effectively been archived on VB’s FACEBOOK timeline.

As a result of this complaint we have revisited our guidelines and made a number of changes. We now have a range of strict mandatories in place including the following: House Rules, twice daily monitoring of User Comments including removal of inappropriate user comments, broader language filters, age restrictions and a “Way of Working” document (that brings to life the company policy for Digital Communication) for each brand that outlines no go topics, watchouts and a response matrix.

As an aside, work is also underway to develop a more tailored approach to social media in relation to the Alcohol Beverages Advertising Code (ABAC). This will ensure that the code is always current when it comes to new and developing ways of marketing to consumers and that we, as alcohol manufacturers, actively manage our commitments to responsible marketing.