

# ABAC

## ABAC Complaints Panel Draft Determination No: 112/11C

### Complaint by the McCusker Centre for Action on Alcohol and Youth Advertiser: Liquor Home Delivery

Professor The Hon Michael Lavarch – Chief Adjudicator  
Jeanne Strachan – Member  
Professor Fran Baum – Member

12 January 2012

#### Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a print and internet catalogue by Liquor Home Delivery advertising various products (“The Advertiser”) This determination results from a complaint by the McCusker Centre for Action on Alcohol and Youth received 9 December 2011. A separate determination has been made in relation to those aspects of the complaint relating to the name and packaging of two of the products featured in the advertisement.

#### The Quasi-Regulatory System

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

a common entry point for alcohol advertising complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.

4. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
5. The complaints raise concerns under the ABAC and accordingly are within the Panel's jurisdiction.

### **The Complaint Timeline**

6. The complaint was received by ABAC on 9 December 2011.
7. The Panel endeavour to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. This complaint has been determined within the timeframe.

### **Pre-vetting Clearance**

8. The quasi-regulatory system for alcohol beverage advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The Advertisers are not Code signatories and did not obtain pre-vetting approval for the advertisement.

### **Advertisement**

9. The catalogue advertisement relevantly features a Bacchus Shot Bucket and Midori 500ml with Party Pourer that will be considered in separate determinations that consider the name and packaging of these products. The advertisement also features an image of a bottle of "Wild Turkey American Honey" with the price \$39.99 plus a caption stating "Buy 2 for \$75". Next to the image is an image of a yellow Wild Turkey American Honey surfboard with the text "Buy Wild Turkey American Honey and go into the draw to WIN Surfboard".
10. The Catalogue is available on the Liquor Home Delivery website. The website does not have any age verification measures to prevent those aged under 18 years from accessing the website or product catalogue or to sign up to become a member of Liquor Home Delivery.

### **The Complaint**

11. The complainant argues that the Wild Turkey American Honey promotion associates alcohol and the inherently risky aquatic activity of surfing; and notes that alcohol is a contributing factor in many injuries which occur around the water as well as in many

drowning deaths. It is argued that various groups, including the Royal Life Saving Society of Australia, work very hard to prevent injury and deaths related to alcohol and water-based activities and promotions such as this are in direct conflict with their harm prevention messages.

12. The complainant also argues that the Liquor Home Delivery website does not appear to have any age verification measures in place to prevent those aged under 18 years of age from accessing either the website and product catalogue or to sign up to become a member of Liquor Home Delivery.

### **The Code**

13. Part 1 of the ABAC provides that Advertisements for alcohol beverages must:
  - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
    - i) must not encourage under-age drinking
  - b) not have a strong or evident appeal to children or adolescents...
  - d) not depict any direct association between the consumption of alcohol beverages, other than low alcohol beverages, and the operation of a motor vehicle, boat or aircraft or the engagement in any sport (including swimming and water sports) or potentially hazardous activity and, accordingly –
    - i) any depiction of the consumption of alcohol beverages in connection with the above activities must not be represented as having taken place before or during engagement of the activity in question and must in all cases portray safe practices.

### **The Advertiser's Comments**

14. The Advertiser, responded to the complaint and questions posed by the Panel by email dated 18 December 2011 and referred the issues relating to particular products featured in the catalogue to the relevant suppliers.
15. In relation to the failure to include an age restricted gateway the advertiser advised:
  - (a) On every page on the website it states that it is illegal for a person under the age of 18 to purchase alcohol.
  - (b) Competitor retailers do not have age restricted gateways.
  - (c) The inclusion of a gateway does not prevent a person under the age of 18 from entering the site.
  - (d) Purchase of products via the website is by credit card and credit cards are restricted to 18+ individuals. The checkout terms and conditions also state that the person must be over 18 to purchase on the site.

16. Campari Australia Pty Ltd responded to the complaint and questions posed by the Panel by letter dated 22 December 2011. The principal points made by Campari were:
- (a) Campari Australia fully supports the Alcohol Beverages Advertising (and Packaging) Code and takes care when developing and executing advertising and promotions to ensure we abide by all aspects of the ABAC as well as other Australian advertising and liquor licensing laws, regulations, codes and guidelines.
  - (b) The promotion in question offers consumers a chance to win an American Honey branded surfboard when purchasing American Honey. Campari developed this promotion and associated promotional materials including A3 posters, plasma screen images and wobblers for display in liquor outlets. The national promotion is currently being offered in a number of independent liquor stores and on-premise outlets, including Liquor Home Delivery. The promotion is only available to consumers purchasing American Honey in person at participating liquor outlets. All promotional materials include the following qualifications "Drink Responsibly. Open to Aust. Residents aged 18+".
  - (c) Campari developed the promotion to enhance brand loyalty, encourage switching from a competitor product and to build the American Honey brand. The Promotion Materials were supplied to various liquor retailers and on-premise venues, including Liquor Home Delivery, by Campari to display in their venues and/or on their websites during the Promotion.
  - (d) We strongly believe that the Promotion does not breach any sections of the ABAC, including and in particular, section (d). We consider that the Promotion does not in any way promote or encourage consumption of alcohol either prior to or while engaging in water sports or any potentially hazardous activity.
  - (e) Campari Australia strongly believes that the Promotion does not "depict a direct association between the consumption of alcohol beverages and the engagement in water sports or a potentially hazardous activity" by advertising the chance to win a Wild Turkey American Honey Surfboard with the purchase of Wild Turkey American Honey. The Promotion was reviewed and received Interim Approval from the Alcohol Advertising Prevetting Service (AAPS).
  - (f) Liquor Home Delivery's catalogue, page 7, under the Heading "What's Your Christmas Spirit?" depicts 17 bottle images of various spirit brands with a small photo of the American Honey branded surfboard alongside the American Honey bottle and wording "Buy Wild Turkey American Honey and go into draw to WIN surfboard".
  - (g) The American Honey logo on a surfboard is consistent with a number of brand logos on items used for water sports and promotions offering water sport equipment as prizes. Some previous examples include Carlton Mid (beer) surfboards and 'tinnies' (small boats), Jim Beam (bourbon) surfboards and snowboards and Coopers (beer) surfboards. A current

example is the Wild Oats (wine) branded super yacht which competes in the very high profile Sydney to Hobart yacht race.

- (h) Section (d) of the ABAC also prohibits the direct association between the consumption of alcohol beverages with the operation of a motor vehicle. In this regard, we draw the Panel's attention to various spirit and beer brand logos which have appeared on V8 racing cars and over the years have included Jack Daniels, Jim Beam and Victoria Bitter.
- (i) At no time does American Honey, or any of the brands noted above, and their associated branding, portray, suggest, encourage or indeed support the consumption of alcohol either prior to or while undertaking "*the operation of a motor vehicle, boat, aircraft of the engagement in any sport (including swimming and water sports) or potentially hazardous activity*" and this would be inherently understood by a **reasonable** adult.
- (j) Campari Australia believes the Promotion is eminently suitable for its target audience, that is consumers 18 years and over, and that the Promotion and associated Promotion Materials have been prepared and executed in a responsible manner. In view of the facts set out above, Campari Australia strongly believes that the Promotion does not breach section (d) of the ABAC by offering consumers the chance to win a branded surfboard when purchasing American Honey. Campari Australia considers that the Promotion in no way depicts a direct association between the consumption of alcohol beverages either before or during the engagement in water sports or a potentially hazardous activity.
- (k) We note that only one complaint has been received in relation to the Promotion.
- (l) We are committed to the sale and marketing of our brands in a responsible manner in accordance with not only all Australian advertising and liquor licensing laws, regulations, codes and guidelines but also the 'spirit and intent' of these laws, regulations, codes and guidelines. We take our responsibility in this industry, and indeed the broader community, very seriously and strive to be seen as one of the leaders in terms of responsible marketing in this country. We believe this promotion meets our stringent standards and does not breach any sections of the ABAC including section (d).

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

17. The complaint raises several issues for consideration by the Panel:

- (a) Does the advertiser's failure to include an age restricted gateway on its website breach the ABAC by encouraging underage drinking;
- (b) Does the Wild Turkey American Honey "win a surfboard" promotion breach section (d) of the ABAC.

18. The failure by the advertiser to include an age restricted gateway on its website raises an issue of whether the internet advertisement breaches section (a) (ii) of the ABAC which provides that alcohol advertisements must not encourage underage drinking.
19. The complainant is concerned that the advertiser's website is accessible to those aged under 18 years of age. This is an issue relating to placement of advertising which is only indirectly relevant when assessing the class of persons to whom the advertisement is directed. The ABAC is primarily a content code and it is the Panel's role to assess whether the content of the advertisement is consistent with its provisions.
20. The ABAC does not have a provision which requires that internet sites have an age gateway restriction. While many alcohol sites adopt some form of age-related gateway and it is fair to say that such a requirement is good practice, the Panel cannot import into the code an express provision that a gateway is a mandatory requirement. The terms of the ABAC are set by the scheme Management Committee and it is for the Committee to consider an amendment to the code to create such a requirement. A failure to have an age gateway is not of itself a breach of the ABAC.
21. The complaint also raises a concern about the Wild Turkey American Honey promotion within the advertisement associating alcohol consumption and the engagement in a water sport or potentially hazardous activity. In this case, the ad comprises a still shot of a surfboard and a separate still shot of a bottle of the product. The advertisement also notes that the purchase of a bottle of the product allows the purchaser to go into the draw to win a surfboard.
22. The relevant ABAC provision states that an ad must not depict a direct association between alcohol consumption and the engagement in a water sport or potentially hazardous activity. To breach the standard, the ad needs therefore to depict:
  - (a) A direct association between alcohol and surfing;
  - (b) Alcohol consumption; and
  - (c) The engagement in water sports or a potentially hazardous activity.
23. The ABAC preamble provides guidance as to how the Code is to be applied. It refers to regard being taken to its "spirit and intent" and taking the content of the ad as a whole. For its part, the Panel endeavours to apply a common sense approach to interpretation and avoids legalistic or pedantic reading of provisions. It must however apply the provisions as they are written.
24. The advertisement directly associates the product with surfing, but to breach Section (d) this association needs to involve alcohol "consumption" and the engagement in a water sport or potentially hazardous activity. The Panel believes that the ad does not breach the terms of section (d). Firstly, showing an unopened bottle of the product cannot be said to be a representation of "consumption", even accepting that consumption captures more than physical swallowing of the liquid. Secondly, a static surfboard with no other depictions suggesting an engagement in the activity cannot be said to fall within the concept of "engagement in a water sport or potentially hazardous activity".

25. Accordingly the complaint insofar as it relates to the Advertiser's website and the Wild Turkey American Honey surfboard promotion is dismissed. That said, the Panel believes it is not desirable to promote alcohol products in a manner which associates alcohol with a potentially hazardous activity such as surfing.