

ABAC

ABAC Complaints Panel Determination No: 27/11

Confidential Complaint Product: Maxx Blonde Advertiser: Coles Group

Professor The Hon Michael Lavarch – Chief Adjudicator
Debra Richards – Member
Professor Fran Baum – Member

27 May 2011

Introduction

- 1 This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns an internet Facebook fan page for Maxx Blonde beer by The Coles Group Limited (“the Advertiser”) and arises from a confidential complaint received on 1 April 2011.

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 complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

- 6 The complaint is in the form of an email received by the ABAC Panel on 1 April 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 not been determined within 30 business days, in part due to dialogue with the advertiser and in part due to availability of the Chief Adjudicator.

Pre-vetting Clearance

- 8 The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The Advertiser is not a member of the ABAC Scheme and pre-vetting approval was not obtained for this advertisement.

The Advertisement

- 9 The Facebook page is located at www.facebook.com/Maxxblondebeer.
- 10 On entering the site users are taken to a page headed Maxx Blonde and below the heading is the text "Food/Beverages Melbourne, Victoria, Australia. To the left of the heading is the Maxx Blonde beer logo above a list of menu items. Below the heading is an advertisement for a contest featuring the Maxx Blonde beer logo, a picture of someone surfing below a speech bubble "Living life to the Maxx" and a surfboard with the text "Loads of surfboards to be won". Below the advertisement is the following text:

"Living life to the MAXX competition

Prize Details: In total 50 Haydenshapes surfboards will be awarded throughout the promotional period to the best entries, as deemed by our judging panel.

Contest Instructions. For your chance to win a MAXX Blonde branded Haydenshapes surfboard, tell us in 25 words or less, and/or upload a photo showing, how you live life to the MAXX. You may submit a maximum of 1 competition entry throughout the promotional period. Entries must be received no later than 5:00pm AEST on 26/4/2011. All competition winners will be notified by email to the email address provided on the MAXX Blonde competition entry form on Facebook at time of entry. Each winner will then need to nominate a 1st Choice or Liquorland Store from where they will collect their prize.

Prize Eligibility: Only persons residing in Australia who are at least 18 years of age can enter.

Contest starts. January 26, 2011 @ 09:00 am (EST)

Contest ends. April 26, 2011 @ 5:00 pm (EST)

Need more details? Read the Official Rules

- 11 By selecting “View entries” users are taken to thumbnails of a large number of competition entries generated by users. The photos include pictures of children, adolescents and adults that appear to be under 25 years of age.

The Complaint

12 The complainant argues that:

- a) The Facebook page has no alcohol based age restriction applied to it.
- b) There are a number of photographs uploaded by competition entrants of people clearly under 25 years of age as the central focus of people “living life to the Maxx” and the display of photographs clearly forms part of the advertised competition for an alcoholic beverage.

The Code

13 The ABAC provides at Sections (a)(ii) and (b) that advertisements for alcohol beverages must:

- a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - ii) must not encourage under-age drinking;
- b) not have a strong or evident appeal to children and 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 (e.g. family barbeque, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverage.
 - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene.

The Advertiser’s Comments

14 The Advertiser responded to the complaint and questions posed by the Panel by way of letter dated 18 April 2011. The principal points made by the Advertiser were as follows:

- a) The product website that has a link to the competition Facebook page is subject to age verification.
- b) The Facebook page did not have an age gateway at the time the complaint was made but such a gateway has since been implemented. At all times competition entries were only accepted by Facebook users over the age of 18 years and the competition terms stated that only persons who are at least 18 years of age could enter.

- c) The promotion does not require purchase, consumption or knowledge of the attributes of the product and doesn't encourage or reward excessive consumption, abuse of alcohol or other offensive behaviour.
- d) The target audience of the product is male/female consumers over the age of 30 years interested in extreme sports. The product website refers to famous people over the age of 25 years that appeal to the same target audience. The entrant profile statistics show approximately 64% of entrants were over 25 years, 21% were over 21 years and the remaining 15% were between 18 and 20 years. Facebook requires users to provide accurate information and actively reviews users' content and enforces this requirement. Only 12% of Facebook users are under 18 years.
- e) Liquorland retained a third party "Wintervolume" to create, maintain and conduct the promotion using a third party software application approved by Facebook. Wintervolume inadvertently failed to maximize security controls to include an age gateway at the outset of the competition which has now been rectified. Liquorland submits that this oversight to include the age gateway does not, of itself, encourage excessive or underage consumption of alcohol.
- f) A surfboard was chosen as the competition prizes as it reflects the interests and aspirations associated with the product and its target audience of men and women leading active and outdoors life and was targeted at the 25+ age bracket. Ancillary interest by youths in the prize or characteristics associated with the product does not equate to strong or evident appeal to children or adolescents.
- g) Liquorland submits that the entries do not constitute part of the Advertisement. Entries are not directly product-related and do not themselves have the purpose or effect of promoting the purchase or consumption of the MAXX Blonde product. Liquorland acknowledges that some entries contain images of children or adolescents under 25 years but submits that they are depicted in natural situations where there is no implication they will consume or serve alcohol.

The Panel's View

- 13 This complaint raises a number of issues, both substantive and procedural, which will be dealt with in turn.

The Procedural Aspects

- 14 The ABAC is a quasi-regulatory system which has at its heart the commitment of advertisers to comply with the standards contained within the ABAC and abide by the pre-vetting and complaints processes which make up the ABAC Scheme. This commitment is embodied through the sponsorship of the ABAC Scheme by three (3) peak alcohol industry bodies, namely the:
- Brewers Association of Australia & New Zealand
 - Distilled Spirits Industry Council of Australia
 - Winemakers Federation of Australia
- 15 While the individual companies which are members of the sponsoring industry bodies cover the vast majority of alcohol beverage advertisers in Australia, there are alcohol producers and advertisers who are not member of the relevant industry bodies or are not signatories to the ABAC Scheme. The advertiser in this particular case is not an ABAC

signatory. This means that the advertising was not subject to pre-vetting prior to its publication and the advertiser is not contractually bound to follow a panel decision. That said the Panel has had access to the advertisement and the Advertiser has provided feedback to the Panel although they have not submitted to the Panel's jurisdiction.

The Substantive Aspects

- 16 The complaint concerns a page for Maxx Blonde beer located on Facebook. The complaint raises several issues under the Code, namely:
 - a) Is the Facebook page an alcohol advertisement?
 - b) If it is an advertisement, is the ad consistent with section (a)(ii) and (b) of the Code related to encouraging underage consumption of alcohol and having a strong appeal to children by:
 - i Failing to include an age restriction on the site thereby enabling access by children and adolescents; and
 - ii Its depiction of competition entries which include pictures of children and adolescents.
- 17 The ABAC scheme and the Code itself were created well prior to the emergence of social media such as Facebook. Initially the scheme did not cover the internet as a medium for advertising; however, following a major review into alcohol advertising regulation by the Ministerial Council on Drug Strategy in 2003, the ABAC scheme was extended to internet advertising in 2004.
- 18 The extension of the scheme to the internet envisaged that it would in effect operate as another medium by which a "traditional" method of advertising might occur. For instance, a 30-second electronic advertisement might be broadcast on a television network or be placed and viewed on an advertiser website. The model assumed that the advertisement is the same, but the medium by which the advertisement is accessed varies *i.e.* either television or the internet.
- 19 The internet, however, is a far more dynamic medium than the older mediums of print – radio and television. A key difference is the capacity of the internet to facilitate interaction between an advertiser and the individual consumer. Equally, dynamism means the ability to alter rapidly the content on a website, as opposed to print, and even television, which has reasonably static content.
- 20 Social media such as Facebook is based upon interactive exchanges between participants on a more or less real-time basis. For an advertiser, social media opens the opportunity to create a direct dialogue with consumers, which is far more personalized than can occur with older broadcast media.
- 21 The Panel considered if a Facebook page was "an alcohol advertisement" for the purposes of the ABAC in Determination 38/09 dated 11 May 2009. After considering the overseas experience and the spirit and intent of the ABAC scheme, as well as the actual characteristics of the Facebook page, the Panel concluded that Facebook was captured by the ABAC scheme. This conclusion equally applies in the current case.
- 22 The second issue is whether the Facebook page is consistent with section (a) (ii) and (b) of the ABAC. The complainant argues the user generated content on the page consisting of entries into the competition and some of these featuring persons under the

age of 25 breaches the Code standard. It is argued that the failure of the page to have age access restrictions breaches the ABAC. In response, the advertiser argues that the target audience of the site is consumers over 30 years interested in extreme sports. The site refers to famous people over the age of 25 and the competition prize reflects interests of an adult demographic. It is accepted that the page did not have an age restriction, and this was changed after the receipt of the complaint.

- 23 The advertiser accepts that users of the site have added entries which on occasion have included images of children or adolescents; however, it is argued that these entries do not form part of the advertisement and, in any event, any children or adolescents in the images are depicted in natural situations where there is no implication that they will consume or serve alcohol.
- 24 The Panel has previously considered user-generated content on advertiser websites and Facebook fan pages. While the ABAC does not define the term “advertisement”, it is apparent from the ABAC as a whole that, if an advertiser creates and controls a website/Facebook page which invites user-generated content, then these additions to the site form part of the “advertisement”. This is reinforced by the Code preamble which provides the Panel is to assess if an ad is consistent with an ABAC standard by having regard to the probable impact of the ad on a reasonable person, **taking the content of the ad as a whole**. Clearly a viewer of the Facebook page is presented with all its content, including the user-generated content.
- 25 Accordingly, the images on the page of children and adolescents contained in the entries to the competition should be considered as part of the ad. The ABAC accepts that children and adolescents might be depicted in alcohol advertising, but only “in natural situations (e.g. family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages”.
- 26 In this case, the images were a mixture between user profile pictures, some pictures of children with a message supplied by a parent who was entering the competition and group shots. A Facebook profile picture may or may not be a picture of the actual user and it is not uncommon for Facebook users to use pictures of celebrities or other famous people as a profile photo.
- 27 The preamble to the ABAC provides that conformity of an ad with the ABAC standard is to be assessed in terms of its probable impact upon a person to whom the advertisement is directed and other persons to whom the advertisement may be communicated. In this case, this audience is Facebook users and it can be reasonably assumed that Facebook users will be familiar with the fact that profile pictures are not necessarily the photo of the actual user.
- 28 The ABAC does not specifically require that alcohol internet sites have some form of age restriction on accessing the site, although it is common practice for advertisers to have an age verification step. The Panel has previously determined that it cannot impose such a requirement and a change of this kind would need an amendment to the terms of the ABAC. Accordingly, a failure to have an age verification step to access the Maxx Blonde Facebook page is not of itself a breach of the ABAC.
- 29 The presence on the page of user-generated content featuring children in both pictures and description is more problematic. It is possible that, in a particular case, such content might be fairly regarded as a “natural situation” as per section b (ii) of the Code; while in another case the user-generated content may raise the inference that children or

adolescents are engaging with alcohol or being encouraged to use alcohol. Essentially, a case-by-case assessment of the probable impact of the ad as a whole is required.

30 On balance, the Panel believes the user-generated content with reference to children “living life to the Maxx”, combined with the photographs of children, tips the ad as a whole into a breach of section (b) of the Code.

31 Accordingly, the complaint is upheld.