

ABAC

ABAC Complaints Panel Determination No: 37/10

Complaint by Professor Robert Donovan Product: Bundaberg Red Rum Advertiser: Diageo Australia Limited

Professor The Hon Michael Lavarch – Chief Adjudicator
Jeanne Strachan – Member
Professor Richard Mattick – Member

14 October 2010

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a Company website and Facebook advertisement for Bundaberg Rum by Diageo Australia Limited (“the Advertiser”) and arises from a complaint received by Professor Robert Donovan on 26 August 2010.

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 ABAC on 26 August 2010.
7. The panel endeavours 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 the 30 day timeframe due to the need to source and consider the content of the research papers referred to in the complaint.

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. Pre-vetting approval was obtained for the television advertisement [10229-30].

The Advertisement

9. The complaint refers to a television advertisement included on the Advertiser's website www.bundaberg.rum.com.au/bundy-bear.htm.
10. The ad depicts an American movie 'Western' style 'gunfight' featuring 3 characters in a manner somewhat similar to the movie 'The Good, The Bad and The Ugly'. The opening scene shows one man dressed in period clothing standing in an open field which is later shown to resemble a 'bullring' enclosed by a low stone wall. The scene moves to show a second man walking into the 'ring'. He is dressed as a gunfighter.
11. The two men move to face each other, and begin to draw their hands behind their backs as if they were positioning to draw a gun from a belt holster. At this point a music score begins which is in dramatic western/Mexican style. The scene moves to show a wide angle shot which reveals that there is a third character also in the ring. This character is the Bundy Bear. Each of the characters is facing each other in a 'Mexican standoff'.
12. The Bundy Bear is shown as a computer generated character. The bear is different in appearance from previous uses of the character by the advertiser in television ads. For instance, the facial features are sharper, the bear has a muscular physique, and its hands have claws. The shot moves to show each of the two men slowly revealing cans of drinks from behind their backs. A close up of the bear's face is shown and a close up of one of the men who appears nervous.

13. The shot moves to show a 4 piece musical band playing the background music. The band is standing under a gum tree, setting the ad in Australia. The band members are dressed in South American clothing. The shot returns to the combatants, with close ups of the cans of drinks the two men are holding. The cans are seen to be pre-mixed bourbon and cola varieties. Each man's face, as well as the bear's is shown in close up. The men are nervous and tense, while the bear is shown as calm and determined.
14. The shot moves to show Bundy Bear reaching behind his back, and then a quick close up shot of the eyes of the 3 characters. Both men then drop their cans unopened to the ground, while the bear 'draws' his can and opens it. The can is the Bundaberg Rum product, and it opens with a loud 'fizz' sound effect and spray from the opened can is shown in slightly slower motion than real time. The ad ends with a final shot of the band under the gum tree with the superimposed text 'make your smooth'.
15. The complaint also makes reference to Bundy Bear's Facebook site which can be accessed from the company website. At the time of the complaint the Facebook site included pictures of members that show a child's picture and sever user-generated photographs that include children.

The Complaint

16. The complainant cites a number of research papers examining the impact of alcohol advertising on the 'drinking intentions and behaviours among youth'. The conclusions which the complainant takes flowing from the various cited papers are:-
 - Alcohol advertising has the power to influence young people by promoting positive associations with alcohol, particularly when linking consumption with attractive symbols and outcomes.
 - Cowboy themes have a long established appeal to children and youth.
 - Survey data shows Bundy Bear per se has evident appeal to children and youth with results showing children 9 to 12 and 13 to 15 correctly related the Bundy Bear character with the alcohol product.
 - Survey data also showed children associated the Bundy Bear with positive attributes such as friendly, funny, good to have at a party, laid back, adventurous, really cool, good sense of humour.
 - Television alcohol advertising reinforces under-age drinking.
17. The complainant draws on these conclusions to argue that the ad has strong and evident appeal to children. It is argued that the change in the Bundy Bear's appearance to a computer generated character has appeal to children and adolescents who use computer games. The ad in particular is stated to have common features with the computer game 'Red Dead Redemption'. A previous Determination of the Panel (11/06) is also cited as to the appeal of the Bundy Bear character to children.

The Code

18. 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 –
 - ii) must not encourage under-age drinking;
- b) not have a strong or evident appeal to children or adolescents and, accordingly -
 - 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...

Arguments in Favour of the Complaint

19. In favour of the complaints it is alleged that the advertisements breach Section (a)(ii) and (b) of the Code by encouraging underage consumption of alcohol and having a strong appeal to children by a combination of:

- A cowboy gunfight scene;
- The inclusion of Bundy R Bear as a participant in the gunfight scene and generally in the advertisements;
- The use of an electronic gaming theme and computer enhanced imagery and animatronics;
- The depiction of Bundy R Bear with a video game appearance;
- A Western theme which has apparently recently made a successful comeback in popularity among youth through video games such as 'Red Dead Redemption' (rated MA 15+) and available on X-box and PS3 game consoles which has similar features to the television advertisement ; and
- The inclusion of photographs on the Bundy Bear Facebook site that show children and adolescents.

The Advertiser's Comments

20. The Advertiser responded to the complaints and questions posed by the Panel by letter dated 10 September 2010. The principle points made by the Advertiser are:

- (a) The TVC is a parody of a scene from a famous 1970's movie featuring a classic Mexican standoff. It features Bundy Bear, a Bundaberg Distilling Company icon since 1961, and was filmed on a farm 45 minutes from Canberra. The advertisement conveys the message in a humorous way that Bundaberg Red Rum is smoother tasting than its bourbon competitors. The following elements establish the ad is satirical of that film genre:

- Overdramatised facial expressions of the characters including Bundy Bear;
 - The setting in the Australian outback with American cowboys and a Polar Bear;
 - The Mexican band in the Australian outback under a Red Gum tree;
 - The fact Bundy Bear is taking part in a Mexican standoff;
 - The use of ready to drink cans instead of guns;
 - The line “Make your Smooth” is a parody of the line “Make your Move”.
- (b) The television advertisement is only broadcast after 9pm during programs which have an audience that is at least 70% 18 years and over. The website and Facebook sites have gateway pages.
- (c) The tone, comedy, style and production values appeal to a consumer over 25 years of age. The satirical character of the advertisement challenges any claim the ad is a cowboy gunfight with strong or evident appeal to children. Further the 1970’s Western film genre is not considered to have strong or evident appeal to children or adolescents. The complainant has not presented any compelling evidence to show Western films and genre have a strong or evident appeal to children or adolescents.
- (d) Computer enhanced imagery and animatronics has been used to allow Bundy Bear to perform as a human actor would perform. T allows him to convey dramatic facial expressions and perform the script (ie opening the can and moving swiftly). It has not been used to make him more “video game” like. In any event Roy Morgan research indicates that based on evidence gathered on video and computer game usage over the past 3 months, 80% of video game users and 87% of computer game users are over the age of 18, and over 55% of video game users and 68% if computer game users are over the age of 25 (Source: Roy Morgan Single Source, April 2009-March 2010). Although we have no specific information regarding the game, “Red Dead Redemption” it could be reasonably argued that this would have an older age profile by virtue of its MA 15+ rating. Therefore, even if the ad was found to appeal to users of video and electronic games (which is denied), this does not translate into a strong or evident appeal to children as in the main these games appeal to 18+ year olds.
- (e) The Bundy Bear character as represented in CGI is even less reminiscent of a bear which could appeal to children and adolescents as it looks less like a bear and more manlike, stands on 2 feet and is 6 foot and 8 inches tall, uses his hands like a human and also appears more serious and adult like than the previous Bundy Bear, has furrowed brow, sharp teeth, claws and a muscular build and does not behave in a childlike or adolescent manner. His character and personality are structured around

a 25+ year old male and he is clearly distinguishable from popular children's characters.

- (f) Bundaberg Rum has an ageing consumer profile, meaning the age of its consumers has increased over time and is predominantly consumed by males over 30 years of age.
- (g) Entry to the Facebook site is subject to a gateway page such that only registered users over 18 years can see the page. All registered Facebook users need to register their birth date. Content on the page is moderated by our digital agency who periodically screen it for inappropriate content which is not compliant with ABAC or our internal marketing code. Two photos posted by consumers showed themselves with their children and these photos have now been removed and the inclusion of these photos for a limited period until removed is not rendering the site as having strong or evident appeal to children.
- (h) All persons in the advertisement are and appear to be over 25 years of age.
- (i) The advertisement does not depict any consumption of alcohol and there is neither suggestion of nor encouragement of excessive consumption, abuse of alcohol, underage drinking or other offensive behaviour.
- (j) In relation to the survey data referred to by the complainant, it should have very little weight as there is inadequate information as to methodology used, the nature and substance of the research conducted, whether it's been published and if so where it can be found, the small sample size and which Bundy Bear was shown to the children. If the previous Bundy Bear was shown to the children the findings are irrelevant to this ad.
- (k) In relation to the complainant's assertion that in ABAC Determination 11/06 the Panel found that the cowboy hat enhanced the appeal to children of the ad, this is incorrect as the Panel upheld the complaint on the basis that the setting was a party in a private home and the scene had balloons, bright colours, music and dancing which is very different to the setting of the current advertisement.
- (l) In relation to the research referred to in the complaint, the evidence does not suggest that advertising causes or contributes to irresponsible, underage or binge drinking or that restricting advertising will help decrease the occurrence of these problems (Responsible Marketing, Advertising and Sponsorship: Policy Review for Oireachtas Members (Alcohol Beverage Federation of Ireland – ABFI)). Independent academic research based on statistical evidence and taking into account prices, incomes, sales and advertising spend shows that at most advertising has a statistically insignificant effect on consumption. Advertising is to strengthen brand identity, off-set brand switching and maintain market share.

The Panel's View

Introduction

21. The complaint raises the consistency with ABAC standards of the advertiser's website and associated 'Facebook' page in relation to the Bundy Bear execution 'Mexican standoff' parody. The execution is also utilised as a television advertisement.
22. It is argued that the execution has strong or evident appeal to children and adolescents and encourages underage drinking in breach of sections (a) (ii) and (b) based on cited research papers and survey data and the particular features of the ad. This is the first occasion that the Panel has had referred to it within a complaint specific research papers about the influence of alcohol advertising and as a result, the Panel's approach to the use of research papers needs to be considered.

The research papers

23. The ABAC scheme is a quasi regulatory approach to alcohol advertising in Australia. It developed from the initiative of initially 4, (now 3) Alcohol Industry Peak Associations in the late 1990's and replaced an earlier self-regulatory scheme. The scheme and alcohol advertising more generally has been the subject of several Government and Parliamentary Inquiries and Reviews in the last decade. The Ministerial Council on Drug Strategy conducted a major review in 2003 which lead to significant changes in the scheme, both in provisions of the ABAC itself and the governance arrangements of the scheme. Further important changes have been introduced in subsequent years which have been outlined in successive Annual Reports on the scheme posted on the ABAC website, most recently being the scheme's extension to labelling and packaging.
24. While the scheme has changed, two important features have remained constant, namely:-
 - The framework of the scheme, its objectives, its governance and the actual terms of the ABAC provisions are the responsibility of the ABAC Management Committee and not the ABAC Adjudication Panel and
 - The decision making on individual complaints and the settling of Panel Determinations are entirely matters for the Panel and not the Management Committee

This is important, as issues raised in complaints sometimes canvass matters which are the responsibility of the management committee and more broadly Australian Governments. These are issues which really go to whether alcohol advertising should be permitted at all, or if it is, should it be regulated directly by government via a statutory scheme of some kind.

25. These are perfectly valid and proper questions for public health advocates, industry representatives, policy makers and legislators and the community as a whole. The Panel however does not have a role in these debates in making its decisions. Rather the Panel is to use its best endeavours to apply the ABAC standards to the advertisements which have been complained about, taking into account the nature of the complaint and the response of the advertiser to the complaint.

26. The ABAC sets out in its Preamble that 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. The Panel in previous decisions has noted that it is mindful of the public policy considerations which underpin the ABAC. These include that alcohol advertising is permitted in Australia however that like all advertising, it is constrained by an amalgam of laws and codes. Secondly, it is recognised that Australian adults make personal choices about alcohol use, however the misuse of alcohol can result in serious personal, economic, social and health harm to individuals, families and the community as a whole.
27. While these considerations provide background and context; the Panel has to apply the Code which it has been given. It adopts a common sense and non-legalistic approach to interpreting the Code, but it cannot go beyond the 'spirit and intent' of the Code. Panel members cannot substitute their own personal views on what the Code should say or cover for the actual provisions and reach of the Code.
28. This is the context for the consideration of the research papers cited by the complainant. The papers were:
- Aitken, P., Leather, D., & Scott, A. (1988). *Ten to sixteen year olds' perceptions of advertisements for alcoholic drinks*. Alcohol and Alcoholism, 23, 491-500.
 - Anderson, P., de Bruijn, A., Angus, K., Gordon, R., & Hastings, G. (2009). *Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies*. Alcohol Alcohol., agn115. <http://alcalc.oxfordjournals.org/cgi/content/abstract/agn115v1>.
 - Chen, N., Grube, J., Bersamin, M., Waiters, E., & Keefe, D. (2005). *Alcohol Advertising: What makes it attractive to youth?* Journal of Health Communication 10, 553-565.
 - Smith, L., & Foxcroft, D. (2009). *The effect of alcohol advertising, marketing and portrayal on drinking behaviour in young people: systematic review of prospective cohort studies*. BMC Public Health 9 (1), 51. <http://www.biomedcentral.com/1471-2458/9/51>.
 - Snyder, L.G., Milici, F., Sun, H., & Strizhakova, Y. (2006). *Effects of alcohol advertising exposure on drinking among youth*. Archives of Pediatrics & Adolescent Medicine, 160, 18-24.
29. The papers generally reference a number of cohort studies which endeavour to evaluate the relationship between alcohol advertising or marketing and alcohol use in young people. The papers describe the studies, their findings, the limitations of the studies and contain discussion and conclusions of the authors. The overall conclusion to be drawn from the papers is that there is evidence for an association between prior alcohol advertising and marketing exposure and subsequent alcohol drinking behaviour in young people.
30. The papers also generally note that the cohort studies have some limitations and qualifications, and that further research should be undertaken. Some characteristics of

advertising and the appeal of these characteristics to young people is also discussed, particularly in the paper of Chen, Grube, Bersamin, Waiters and Keefe.

31. The complaint also refers to survey data of a 'product-character matching task' for the Bundy Bear character and young people which reported high recognition of Bundy Bear amongst children and that a range of desirable characteristics were associated with the character. The details of this data such as sample size, methodology etc. was not provided.
32. The advertiser was given a copy of the complaint. In relation to the cited research, the advertiser responded "In relation to the research referred to in the complaint, the evidence does not suggest that advertising causes or contributes to irresponsible, underage or binge drinking or that restricting advertising will help decrease the occurrence of these problems (Responsible Marketing, Advertising and Sponsorship: Policy Review for Oireachtas Members (Alcohol Beverage Federation of Ireland – ABFI)). Independent academic research based on statistical evidence and taking into account prices, incomes, sales and advertising spend shows that at most advertising has a statistically insignificant effect on consumption. Advertising is to strengthen brand identity, off-set brand switching and maintain market share." The sources for these conclusions were not cited.
33. The Panel is obviously not a research assessment body, and while some members of the Panel have backgrounds in public health and associated research, the Panel operates as an adjudicative body and not as the maker of public policy. The papers cited by the complaint essentially go to the argument that alcohol advertising per se influences young people to either take up drinking and/or impacts on their levels of consumption. This raises a public policy issue as to whether alcohol advertising should be further regulated and this is not a question the Panel has any role in deciding.
34. The Panel notes the papers, but they are not directly relevant in the decision to be made on the individual ad being considered here. The Panel does not take as its proper function to be undertaking literature reviews of a general nature and only papers which went specifically to an advertisement before the Panel could be directly relevant in its decision making process.

The Bundaberg Rum Television Commercial

35. The relevant provisions of the ABAC provide that alcohol advertisements should present a mature, balanced and responsible approach to alcohol consumption and must not encourage underage drinking. Further, advertisements must not have a strong or evident appeal to children or adolescents. The Code defines a child as 'a person under 14 years of age' and an adolescent as 'a person aged 14-17 years inclusive. 'Adult', accordingly, is defined as a 'person who is at least 18 years of age.'
36. These provisions have been considered by the Panel in previous decisions. From these decisions it can be noted that,
 - The advertisers intention as to its target audience is not material, rather it is the 'probable impact' of the ad which is important;

- Alcohol advertisements directed towards adults may have some consequential appeal to children and adolescents and not breach the Code;
 - What is not permitted is advertising which has ‘strong or evident’ appeal to children and adolescents
 - Whether an ad has ‘strong or evident’ appeal is a case by case assessment in which context, imagery, music, use of animation and characters are amongst the things important in deciding the overall impact of the ad.
37. For instance, in Determination 76/07, the Panel considered a cinema advertisement which featured an adult using toys and household items and concluded the overall context created a strong impression of children’s play. The ad was found in breach of the ABAC.
38. In Determination 7/09, the Panel dealt with a complicated set of issues involving surrogate marketing. The substantive Code argument went to whether the ad that was cross-selling an alcohol brand with a pizza product had a strong appeal to children and adolescents. In finding the television ad was not in breach of sections (a)(i) and (b), the Panel noted that the market of the pizza brand was broad based and included children and adolescents but was not predominantly younger people. More critically, the ad as a whole did not contain elements which could be said to be particularly appealing to children and adolescents.
39. The Panel has made several previous Determinations involving the Bundy Bear character, namely,
- 11/06 dated 25 April 2006;
 - 107/08 dated 6 November 2008; and
 - 58/09 dated 26 June 2009.

In Determination 11/06 the complaint was upheld and in the other two decisions the complaints were dismissed. Determination 107/08 did not deal with the issue of the appeal of the ad to children or adolescents.

40. The complaint specifically refers to Determination 11/06. In that case, the Bundy Bear character was placed in a private home which featured a party with balloons, decorations, and party goers wearing children’s versions of cowboy hats. The panel recognized that the polar bear character would have appeal to children and whether this appeal elevated the ad as a whole into ‘strong or evident’ appeal will depend on the context in which the character was used and depicted.
41. In the current case, the appearance of the Bundy Bear character has altered from that featured in the three previous Determinations. The Bundy Bear is now a computer-generated character that is more muscular and has sharper facial features. The character is shown to have claws. The complainant argues that the changes make the character more appealing to adolescents due to its resemblance to computer game characters. The Advertiser argues that the character is now less similar in appearance to children’s characters (such as Humphrey Bear) and will have less appeal to that demographic.

42. The Panel does not believe the television ad breaches the ABAC. In reaching this conclusion it was noted:

- The ad is a parody of a movie western. The Panel believes this movie genre 'has broad community appeal' but cannot be said to have a particular or strong appeal to children and adolescents;
- To the extent that the parody brings to mind westerns of the 1960's to 1980's such as 'the Good, The Bad and the Ugly', it is more likely to resonate with an adult audience;
- The Bundy Bear character's appearance has altered from that considered in previous Determinations. It is now less familiar in appearance to younger children's characters, but may bring to mind computer generated characters popular in current movies and computer games;
- Computer games have wide community appeal and are utilised by a significant proportion of the community. Like film and television productions, different games have different target audiences. A computer generated character is not automatically to be assumed to be particularly appealing to children or adolescents, although it may well be depending on the context in which the character is placed;
- The context of the ad is the critical consideration and the Panel does not believe the ad as a whole has strong or evident appeal to children or adolescents.

The Facebook Fan Site

43. The Complaint also refers to the Bundy R Bear Facebook Fan Site. The Panel has previously considered social media fan sites and concluded that Facebook Fan sites under the control of the Advertiser can fall under the concept of an alcohol advertisement for the purposes of the ABAC – see Determination 38/09 dated 11 May 2009.

44. The essential characteristic of the Fan Sites is that they contain 'user generated content'. This content is in the form of comments made by members of the public who are 'friends' of the product and who hold Facebook accounts. Such accounts can be opened by anyone with access to the internet.

45. The Advertiser advises:

- Entry to the site is via a 'gateway' page which requires an age verification step;
- Content on the site is 'moderated by our digital agency who periodically screen it for inappropriate content which is not compliant with ABAC or our internal marketing code';
- Some content featuring users with pictures of children (present at the time of the complaint) has been removed;

46. By its dynamic nature, it is very difficult to maintain a social media site in a manner that will be always consistent with the ABAC. For instance, as at 11 October, 2010, a review of the Facebook site revealed:

- User generated content with pictures of children;
- A comment suggesting rum was a good remedy for the flu;
- A statement that a person was 'gunna get real pissed on Bundaberg Rum!';

It is likely each of these statements or images is inconsistent with an ABAC provision.

47. The only apparent means to maintain the site in a manner consistent with ABAC Standards would be for its contents to be moderated continuously, not periodically. The Panel accepts that the Facebook site as at the time of the complaint breached the ABAC.

48. The ongoing relationship of social media, user generated advertiser sites with the ABAC Scheme is a matter for the Scheme's Management Committee.

49. Accordingly, the Panel dismisses the complaint in relation to the television ad. The complaint in terms of the Facebook site is upheld.