

ABAC

ABAC Complaints Panel Determination No: 48/11

Complaint of Mr Jeffrey Day Product: 1st Choice Liquor Advertiser: Coles Group

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

13 July 2011

Introduction

- 1 This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns an radio advertisement for 1st Choice Liquor by The Coles Group Limited (“the Advertiser”) and arises from a complaint received on 17 June 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 17 June 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 30 business days.

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 ad is a radio broadcast which played on a Melbourne station on Thursday 16 June, 2011. The ad consists of a male voiceover speaking in an upbeat manner against the background of a music score. The text of the ad is as follows:

"It's Byron Cook and we've made it, it's thirst-day knock off. Are you thirsty? Course you are. Thanks to 1st Choice Liquor Superstore thirst-day is fast becoming everyone's favourite day of the week and they want to shout you and your friends thirst-day drinks. To win register on-line at fox.com.au and don't wait till Friday to stock up, make the most of your thirst-day. Get into 1st Choice Liquor Superstore today. They're not only beating everyone to the weekend, they're beating everyone's liquor prices. Conditions apply."

The Complaint

- 10 The complainant argues that the advertisement encourages alcohol consumption on a Thursday as its pay day and that this results in employees being hungover at work on a Friday.

The Code

- 11 The ABAC provides at Sections (a)(i) and (iii) 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 excessive consumption or abuse of alcohol;
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;

The Advertiser's Comments

12 The Advertiser responded to the complaint by way of email dated 1 July 2011. The principal points made by the Advertiser were as follows:

- a) The complainant has not made any allegation that the radio advertisement is in breach of the ABAC Code.
- b) Coles Liquor is committed to the responsible service, supply and promotion of liquor and has in place internal guidelines and policies regarding them. We confirm that we are not a signatory to the ABAC Code, particularly as we have our own policies in place, nor required to formally respond to complaints received by ABAC. All circumstances considered, we invite ABAC to decline to entertain the complaint.
- c) We note that the complaint was in respect of an advertisement on Nova FM in Melbourne. We confirm that 1st Choice did not advertise on that station that day. We note your request to provide details of that advertising. We believe that where a complaint is received the onus should be on the complainant to provide accurate details of the complaint, including the relevant aspect of the Code, rather than request additional information from an advertiser, particularly one who is not a signatory to the Code.
- d) Nevertheless, 1st Choice did advertise on another station in Melbourne and we attach a copy of that advertisement for your information. Thursday has historically been the key advertising date for press and media for liquor retailers. It also coincides with 1st Choice's catalogue promotions. You will note that the advertisements convey a mature approach to alcohol consumption by inviting customers to purchase on a Thursday night to take advantage of new promotional prices prior to the weekend (retailers have differing catalogue/ promotional dates), and to purchase products for consumption across a variety of days and occasions, including but not particularly Thursday after work. The advertisements reinforce responsible consumption by referring to specific occasions/ events – dinner parties, special dinners, barbeques, football or with friends. In addition, the reference to “working all week” and “knock[ing] off” are clearly directed at adults of working age. For completeness, the references to a competition (which have not been raised by the complainant) is a promotion conducted by Austereo Pty Ltd, operator of the radio stations, and 1st Choice is a prize provider.
- e) 1st Choice denies any allegation that the advertising encourages drinking on Thursday or is in breach of any aspect of the ABAC Code. 1st Choice respectfully believes that the issues raised in the complaint are of a nature that are more appropriately dealt with in an employment context.

The Panel's View

13 The advertiser has responded to the complaint at two levels. Firstly, it points out that it is not a signatory to the ABAC scheme and, as such, has no obligation to respond to complaints. The advertiser then goes on to suggest that the ABAC adjudication process might better adopt an alternate procedure in considering complaints. Secondly, the advertiser provides comments on the substantive “good practice” issue raised by the nature of the complaint. The Panel will deal with both the procedural and substantive issues.

The Procedural Aspects

- 14 The Coles Group is a major retailer of alcohol products in Australia and is behind several retail outlets such as Liquorland and 1st Choice Liquor. It also appears to be the distributor of alcohol beverage brands such as Maxx Blonde Beer. As the advertiser points out, Coles has not been a party to the ABAC scheme since the scheme's inception in 1998 and the willingness of Coles to engage with the ABAC public complaints process has varied somewhat over the years.
- 15 As is implicit in the advertiser's response, the Panel has no power to require Coles to assist in the adjudication process and any decision reached by the Panel cannot be enforced against the advertiser. The primary influence the Panel has in these circumstances is the advertiser's stated commitment of good practice in alcohol advertising and the persuasive force of adjudication processes which the majority of the alcohol beverage industry has agreed to accept.
- 16 The advertiser then suggests that the ABAC adjudication process would operate more effectively if it had characteristics of:
 - Requiring the complainant to frame complaints against specific clauses in the ABAC; and
 - Placing the onus on the complainant to correctly and precisely identify the ad and the media outlet which advertising was broadcast.
- 17 It is recognised that the Panel needs to operate within a policy framework which places importance on objectives such as:
 - Consistency of decision-making
 - Procedural fairness and
 - Speed

Further, it is recognised that the vast majority of the public will not be familiar with the terms of the ABAC, even if hopefully many will know that there is a mechanism to raise concerns about advertising. For this reason, the Panel does not require complaints to be framed against precise ABAC sections.
- 18 Given that over 95% of complaints are not framed against actual ABAC sections, the Panel's process is to generally pose questions for advertisers, drawn from the nature and wording of the complaint; but directly placed against the specific ABAC sections. This enables the satisfaction of the twin goals of fairness (the advertiser understands what the Panel considers to be the key issues raised by the complainant) and speed and cost effectiveness (inserting a step of requiring a member of the public to rewrite their complaint in the exact terms of the ABAC would considerably delay adjudications).
- 19 Ultimately the Panel and the ABAC scheme operate within the rules and procedures set by its Management Committee. The advertiser would be in a position to contribute directly to the operation of the ABAC scheme if it became a signatory to the ABAC scheme.

The Substantive Aspects

- 20 The complaint concerns a radio ad for 1st Choice Liquor Stores. The ad makes a play on “Thursday” which is pronounced in the ad as “Thirst-day”. The ad states that, thanks to 1st Choice Liquor Superstores, “Thirst-day” is fast becoming everyone’s favourite day of the week and the retailer expresses its desire to shout the listener and their friends Thirst-day drinks. This is a reference to an online competition. The balance of the ad suggests that customers purchase alcohol supplies for the weekend on Thursday, rather than Friday.
- 21 The complainant believes the ad encourages alcohol use on Thursday and this results in “employees being hung-over at work” on Friday. For its part, the advertiser argues that Thursday has historically been a key day for media advertising by alcohol retailers. It is argued that the ad invites purchases for “consumption across a variety of days and occasions including, but not particularly, Thursday after work”.
- 22 The relevant section of the ABAC raised by the complaint is section (a). This section provides that advertisements must present a mature, balanced and responsible approach to the consumption of alcohol and not encourage excessive consumption or misuse or abuse of alcohol beverages. If the ad could be fairly taken to be encouraging people to consume levels of alcohol that results in a person becoming “hung over” it would be inconsistent with the presentation of a responsible approach to alcohol consumption. The issue for the Panel is whether the ad can be fairly said to be raising this suggestion of irresponsible alcohol use.
- 23 The Preamble to the ABAC provides that, in assessing the consistency of an ad to the ABAC standards, regard is to be had to the impact of the ad upon a reasonable person, taking the content of the ad as a whole.
- 24 The ad has the following features:
- It promotes the purchase of alcohol on a Thursday.
 - It raises the consumption of alcohol in an immediate sense by phrases such as “Are you thirsty? ‘Course you are” and “They want to shout you and your friends Thirst-Day drinks”.
 - It does not suggest a particular level of alcohol consumption and cannot be fairly said to be suggesting excessive consumption.
- 25 The Panel does not believe the ad can be said to breach section a (i) or (iii) by suggesting immoderate or excessive consumption. The Panel believes the ad could have been better framed and would have benefited from the discussion of the ad that comes from independent review prior to its use through the ABAC pre-vetting service. A majority of the Panel however has concluded the ad does not breach the overall standard of ‘presenting a mature, balanced and responsible approach to the consumption of alcohol’ contained in section (a). One Panel member concluded the ad did fail to present a mature and responsible approach to alcohol consumption.
- 26 While the complaint is dismissed, it would benefit the advertiser if its ads were subject to prior independent assessment as provided by the ABAC pre-vetting service. The internal processes referred to by the advertiser are of course essential, but there can be little doubt that industry best practice involves prior independent review of advertising. As one of the largest alcohol industry participants in Australia, Coles would be expected

to operate by high standards. Its decision to stand outside the ABAC scheme is difficult to reconcile with its stated commitment to good practice in alcohol advertising.