

ABAC

**ABAC Complaints Panel
Determination No: 63/11**

**Confidential Complaint
Product: Schweppes Soda/Johnnie Walker
Advertiser: Schweppes Australia Pty Ltd**

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

8 September 2011

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns an advertisement produced by Schweppes Australia Pty Ltd (“Advertiser”) which uses the Johnnie Walker name and product and arises from a confidential complaint received 1 August 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 was received on 1 August 2011.
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. The complaint been determined within the 30 day timeframe.

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed alcohol beverage advertisements against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this advertisement.

The Advertisement

9. The complaint refers to a television advertisement. The advertisement opens on a drinks party at a private home as Devon Headland from the TV show Masterchef mixes a drink while saying "I love mixing drinks at home. There's no rules. There's no-one yapping in your ear, Devon that's too sour, Devon that's too salty, Devon its making my eye go funny. At home I can just relax and get inventive. Take some orange, brown sugar and add some ice, Johnnie Walker and some Schweppes Soda." He takes a drink. "Out of ten, seven. As if. Ten, perfect again Devon."
10. A bottle of Johnnie Walker Whisky is shown briefly during the advertisement. Superimposed on the screen at the beginning of the ad is the statement "Devon Headland Eliminated Week Two" and during the ad "Schweppes is not a sponsor of any prime time cooking shows" and at the end "You don't have to be a Masterchef to mix at home". Then the screen changes to the Schweppes logo with the statement "Drink Responsibly".

The Complaint

11. The complainant is concerned about the inclusion of Johnnie Walker Scotch Whisky in what purports to be an ad for Schweppes Soda. He also states that he believes this to be a deliberate attempt to circumvent the ban on advertising alcohol.

The Code

12. The Preamble to the ABAC states that the Australasian Associated Brewers, the Distilled Spirits Industry Council of Australia Inc and the Winemakers Federation of Australia are committed to the goal of **all advertisements for alcohol beverages** produced for publication or broadcast in Australia other than point of sale material produced by alcohol beverage retailers, comply with the spirit and intent of this Code. 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 conformity of an advertisement with this code is to be assessed in terms of its probable impact upon a reasonable person within the class of persons to whom the advertisement is directed and other persons to whom the advertisement may be communicated, and taking its content as a whole.
13. The Definitions state “alcohol beverage includes any particular brand of alcohol beverage”.
14. The ABAC Part 1 provides that advertisements for alcohol beverages must-
 - (a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly:

The Advertiser’s Comments

15. Diageo responded to the substantive issues raised in the complaint and questions posed by the Panel by way of letter dated 22 August 2011. The principal points made by Diageo are as follows:
 - (a) The TVC is a Schweppes Australia Limited (“**Schweppes**”) produced and controlled advertisement in which a reality television personality describes a cocktail recipe and demonstrates the preparation of the cocktail. We understand that the purpose of the TVC was to promote Schweppes soda as a premium cocktail mixer. The alcohol ingredient in the cocktail is Scotch Whisky and Schweppes has used Johnnie Walker Red Label as the alcohol beverage cocktail ingredient in its TVC.
 - (b) Diageo’s involvement in the advertisement was limited to review of the TVC to ensure it complied with Diageo’s requirement that its brand is portrayed in a manner supportive of responsible consumption in line with Diageo’s global marketing Code and in compliance with the

ABAC. Diageo provided its consent to the use of the Johnnie Walker brand subject to Schweppes making certain changes to the TVC namely:

- (i) the addition of a responsible drinking message in the TVC;
 - (ii) reference to a limited and reasonable measure of alcohol as the cocktail ingredient rather than simply using a free pour. Diageo also considered whether a standard drinks symbol should be included however it was decided in consultation with Schweppes that as the Scotch Whisky ingredient added to the cocktail would not be referred to as a specific volume (e.g. 30mL) an accurate standard drinks indicator could not be included; and
 - (iii) screening of the TVC at times consistent with restrictions imposed by the Commercial Television Industry Code of Practice (“CTICP”).
- (c) ABAC does not expressly address the obligation of alcohol beverage companies in circumstances where an alcohol advertisement is controlled by a third party. However there are provisions relating to third party controlled events which we consider express principles which should apply equally to alcohol product placement in a third party controlled advertisement. Specifically on the issue of third party controlled events and associated material, ABAC states that alcohol beverage companies have the obligation to use every reasonable endeavour to ensure that where third parties control events/advertising that these third parties comply with ABAC, *“However, non-compliance by third parties will not place alcohol beverage companies in breach of this protocol”* (see page 4 of the ABAC Code, the second paragraph under the heading *Third Parties*). We consider that it is appropriate that this principle be extrapolated to also apply to third party controlled advertising which may include product placement of an alcohol product. The steps taken by Diageo to use every reasonable endeavour to ensure that the Schweppes TVC, being a third party controlled alcohol advertisement, complied with the ABAC Code were consistent with this principle.
- (d) Relevantly, the ABAC Code does not define the concept of alcohol advertisement. As such it is instructive to look to past ABAC Panel Determinations for guidance. We have reviewed past Panel Determinations and in light of those determinations we consider that it is likely that the TVC would be held by the ABAC Panel to be an alcohol advertisement drawing the jurisdiction of the ABAC. Specifically we refer to Determinations 7/09, 49/07 and 26/08, each of which held that the fact that an alcohol company exercises a measure of control over the advertisement brings the advertisement into the ABAC scheme coverage. Additionally from a common sense approach, the fact that the TVC describes the making of a cocktail is conducive to its characterisation as an alcohol advertisement, even

though the intention of the TVC is to promote Schweppes soda as a mixer of alcoholic drinks.

- (e) While the characterisation of the TVC as an alcohol advertisement may bring it within the scope of review by the ABAC Panel, it does not give the Panel authority to find Diageo in breach of the Code as a result of a third party controlled advertisement. The value of the Panel reviewing such TVCs, despite the fact that the responsible advertiser may not be an alcohol company, lies in the fact that Panel Determinations develop the applicable policy and provide useful guidance as to how such advertisements should be managed by the industry in future. We have reviewed the ABAC in light of the complaint you have received and the TVC in question and strongly believe that this Advertisement does not breach section (a) of the ABAC. We cannot identify any elements in the TVC which offend the requirement to present a mature, balanced and responsible approach to the consumption of alcohol beverages.
- (f) For the sake of completeness we note that we strongly believe that the TVC does not offend paragraph (a) of the ABAC for the following reasons:
- The TVC in no way encourages excessive consumption or abuse of alcohol.
 - The TVC in no way encourages under-age drinking.
 - The TVC in no way promotes offensive behaviour, excessive consumption, misuse or abuse of alcohol beverages.
 - The TVC does not depict the excessive or irresponsible consumption of alcohol and rather the theme of the TVC is to provide a recipe and method for making premium cocktails when entertaining friends at home.
- (g) The apparent concern of the complainant arises from his/her misconception that alcohol advertising is banned and that Diageo has attempted to circumvent this ban by indirectly advertising within a Schweppes soda advertisement. There is no ban on alcohol advertising in Australia. Diageo has not engaged in any form of "surrogate advertising" through its consent to Schweppes to use the Johnnie Walker product in the TVC. Our position is strongly supported by the fact that our consent to Schweppes to use our product was subject to Schweppes' compliance with applicable alcohol advertising requirements. Further and importantly, Diageo has used its input into the advertisement to achieve compliance with the ABAC and CTICP in circumstances where otherwise Schweppes would not be bound by ABAC and may not be aware of certain alcohol advertising requirements. We consider that the case of Diageo's involvement in this TVC is an example of the positive and

broad influence of the ABAC Scheme and the principles of the responsible advertising of alcohol.

- (h) Paragraph 5.1 of the ABAC Rules and Procedures provides that alcohol advertisements of spirits producers should be pre-vetted against the ABAC. Diageo is committed to the obligation to have its alcohol advertising pre-vetted in accordance with these Rules and Procedures. However, as the TVC was not owned, produced or controlled by Diageo or by an alcohol beverage company, it was not considered that prior clearance for the advertisement from the Alcohol Advertising Pre-Vetting System (**AAPS**) was necessary.
- (i) Diageo formed the view that as the TVC was a Schweppes asset and as Schweppes is not bound by the ABAC that the procedural requirements of the ABAC Scheme were not applicable to Schweppes. We considered that it was more important to ensure that the TVC be consistent with the requirements of the ABAC which we took reasonable steps to achieve as set out in this letter.
- (j) If the Panel considers that in fact Schweppes should have submitted the TVC to AAPS for pre-approval we note that in accordance with the terms of the ABAC Diageo cannot be found in breach of the Code as a result of a non-compliance by a third party. Nonetheless if the Panel finds that the TVC ought to have been submitted for pre-approval we will take this policy development into account in the refining of our internal processes should a product placement opportunity such as the TVC arise in future.

16. The Advertiser (Schweppes) responded to the questions posed by the Panel by way of letter dated 19 August 2011. The principal points made by the Advertiser are as follows:

- (a) Diageo provided input on the content of the advertisement before it was finalised and approved the final version. The advertisement was developed and paid for by the Advertiser.
- (b) The advertisement features Devon Headland mixing Schweppes Soda Water with Johnnie Walker Red Label Scotch Whisky in his home kitchen. There are small groups of people socialising in the background.
- (c) The advertisement does not in any way encourage the excessive consumption or abuse of alcohol in that:
 - (i) Devon is pictured mixing one alcoholic beverage using a standard 30ml nip to measure out the Johnnie Walker Red Label Scotch Whisky which is then mixed with the Schweppes Soda Water and other ingredients to make the alcoholic beverage;
 - (ii) Devon only drinks one small mouthful of the alcoholic beverage during the advertisement;

- (iii) The people in the background, whilst holding alcoholic beverages, are not seen to consume any of these beverages;
 - (iv) The advertisement does not depict any binge drinking or other forms of excessive consumption;
 - (v) Nothing Devon does or says portrays the message that people should excessively consume or abuse alcohol.
- (d) The advertisement does not encourage under-age drinking. There are no children depicted in the advertisement. All the people that appear in the advertisement are over the Australian legal drinking age of 18. The Advertiser has an internal policy that any people depicted in advertisements featuring alcohol of any kind must be adults aged 25 years or older. The advertisement complies with this policy.
- (e) The advertisement does not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcoholic beverages. The setting of the advertisement is a relaxed and controlled environment. The advertisement does not suggest in any way that alcohol will help with personal, business or social success or that it has therapeutic benefits which are necessary to unwind.
- (f) The advertisement contains a "Drink Responsibly" message which is displayed clearly across the screen.
- (g) The complainant is concerned about the use of an alcoholic product in an advertisement for a non-alcoholic product. The Advertiser is not aware of any ban against alcoholic beverages being featured in advertisements for non-alcoholic beverages. It is the Advertiser's understanding that as long as the Code and other relevant alcohol marketing guidelines are complied with, they are free to feature alcoholic products in our advertisements. It is quite common for soda products to be marketed alongside alcoholic products as soda is traditionally seen by consumers as a mixer rather than a stand-alone drink. Schweppes mixers have been advertised as a component of alcoholic mixed beverages since the 1850s (overseas) and as long as the products have been in Australia (late 1800s). Schweppes mixers have been available in bars and pubs since the 1920s. Schweppes mixers have been marketed as confident, adult and stylish and this is consistent with the image we have portrayed in the advertisement.
- (h) The Commercial Television Industry Code of Practice in relation to placement of alcohol advertisements has been complied with.
- (i) The advertisement is no longer being aired on television and was part of a limited ad campaign featuring Diageo's products. The advertisement was aired 6 times in each market over a 7 week period. The Advertiser has no intention at this stage of airing the advertisement again, however, subject to the Panel's decision, may wish to use the advertisement in the future.

- (j) The Advertiser takes the responsible promotion of alcohol very seriously. Whilst not strictly bound by the ABAC, the Advertiser is aware of the Code's requirements and does all it can to ensure that its advertisements and marketing campaigns are in compliance. The Advertiser also has internal "best practice" policies in place which incorporate the key requirements of the relevant codes and alcohol marketing guides. The Advertiser agrees to accept the Panel's decision in relation to the complaint.

The Panel's View

Procedural issues

17. The complaint raises fundamental threshold issues as to whether the ABAC scheme has any application to the particular advertisement and whether the advertisers drawn into the complaint, namely Schweppes Australia and Diageo, are bound by the Panel's processes. These issues were considered by the Panel in Determination 7/09. That matter related to an advertisement for Domino's Pizza with Jim Beam sauce. In that matter the Panel undertook a detailed examination of the interaction between advertisements for non-alcoholic products and the ABAC Scheme.
18. As in the Domino's matter, this case involves an example of advertising by a non-alcohol industry body, namely Schweppes. Schweppes is not a member of one of the three industry associations who collectively sponsor the ABAC scheme and is not a non-member signatory. Accordingly, *prima facie* the ABAC standard for alcohol beverage advertising does not apply to Schweppes. Equally, the Panel has no authority as such to make a determination which has any force with Schweppes.
19. While this is the starting point, the advertisement includes product placement of an alcohol beverage. The advice from Diageo and Schweppes is that Diageo consented to the product placement and exercised a measure of control over how its brand was used in the advertisement. The Panel's conclusion is that because of the control exercised by Diageo over the advertisement, it is appropriate for this determination under the ABAC scheme to be made, even though Schweppes is not an alcohol beverage company and is not bound by this determination.
20. In the Domino's matter the Panel considered 5 broad categories of advertisements that have been considered by the Panel. The relevant category in this case is Category 4 which covers advertisements which are from non-alcohol entities but which promote alcohol products or alcohol use in some way. The Panel found in the Domino's matter that where an alcohol company is both aware of the advertising and had some level of entitlement to approve the advertising at least in relation to the portrayal of the alcohol brand the exercise of that measure of control over the advertisement by the alcohol company brings the advertisement into the ABAC Scheme coverage.

Substantive issues

21. The complainant is concerned that placing an alcohol name and product in an advertisement for a non-alcoholic product, namely Schweppes Soda is a “veiled yet deliberate attempt to circumvent the ban on advertising alcohol”.
22. The Panel notes that there is no ban on advertising alcohol in Australia, only restrictions. The relevant restrictions in this matter are the ABAC Code and the Commercial Television Industry Code of Practice (CTICP). The Panel notes that the advertisement was aired after 8.30pm which is consistent with the CTICP restrictions but will consider whether the complainant’s concern that the placement of an alcohol product in a soda advertisement is a breach of the ABAC Code.
23. Section 1(a) of the ABAC provides that alcohol advertisements must present a mature, balanced and responsible approach to the consumption of alcohol beverages. The issue for the Panel is whether the placement of an alcohol product within an advertisement for a non-alcohol product namely Schweppes soda is irresponsible.
24. The Panel has considered the advertisement as a whole and does not believe that the advertisement is in breach of the relevant ABAC standard. The advertisement depicts mature and responsible behaviour and Schweppes soda is commonly used as a mixer with alcohol and other products.
25. Accordingly, the complaint is dismissed. The Panel would encourage Diageo when approving third party advertisements that include its products to require the advertisement to be pre-vetted and Schweppes to have its advertisements containing alcohol beverages pre-vetted.