

ABAC

ABAC Complaints Panel Final Determination No: 73/12A

Complaint by Ms JulieAnn Bennett
Product: The Three Bears
Advertiser: Australian Liquor Marketers Pty Ltd

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

26 November 2012

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns packaging of “the three bears” Shiraz and Semillon Sauvignon Blanc by Australian Liquor Marketers Pty Ltd (“ALM”) and arises from a complaint received on 10 October 2012. The complaint also addresses an advertisement for the wine. This aspect of the complaint is dealt with in a separate determination.

The Quasi-Regulatory System

2. Alcohol advertising and packaging 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 and packaging. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising and packaging as quasi-regulation. The most important provisions applying to alcohol advertising and packaging 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 by ABAC on 10 October 2012.
7. The Panel has a benchmark of finalising complaints within 30 days of receipt. This goal, however, is not possible in relation to complaints under Part 2 of the Code because of the timelines associated with the two stages of the process (provisional determination and final determination). As a result, this complaint has not been determined within the 30 day benchmark timeframe.

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements and some packaging 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 the product material.

Product material

9. The label for "the three bears" Shiraz includes a stylized image of a wave using shades of purple and grey with a surfboard balancing on the wave, a large bear balancing on one leg on the surfboard, a smaller bear with a purple skirt and beads balancing on one leg on the larger bears raised foot and a smaller bear balancing on one hand on that bear's outstretched arm. Below the logo is the text "the three bears... 2011 Shiraz Margaret River Australia". The text "the three" and "Shiraz is in purple and the text "bears..." is in stylized bold text.
10. The back of the Shiraz label includes the name of the product in the same stylized text as the front of the bottle, a Margaret River logo, standard drink logo, and details including alcohol per volume, production and bottling details. It also contains the following text about the product "Papa's, Mama's & Babies are the three waves of the Margaret River's loved surf location Three Bears. Hailing from the same region & named in its honour we present Three Bears wines. Lifted spice with a hint of oak, riding a peppery palate of soft cherries with a spicy snap."

11. The label for “the three bears” Semillon and Sauvignon Blanc includes a stylized picture of a wave using shades of green and grey with a surfboard balancing on the wave, a large bear balancing on two legs on the surfboard with arms outstretched, a smaller bear with a green skirt and beads balancing on two legs on the surfboard with arms outstretched and holding hands with the larger bear and a smaller bear that is balancing upside down holding hands with the other bears. The text at the bottom of the page is “the three bears... 2012 Semillon Sauvignon Blanc Margaret River Australia”. The text “the three” and “Shiraz is in green and the text “bears...” is in stylized bold text.
12. The back of the Semillon Sauvignon Blanc label includes the name of the product in the same stylized text as the front of the bottle, a Margaret River logo, standard drink logo, and details including alcohol per volume, production and bottling details. It also contains the following text about the product “Papa’s, Mama’s & Babies are the three waves of the Margaret River’s loved surf location Three Bears. Hailing from the same region & named in its honour we present Three Bears wines. Barrels of tropical fruit, guava, passionfruit & fresh cut grass, followed by tides of crisp acidity.”
13. The closure at the top of the bottles also features the name of the product “the three bears” and the Margaret River logo on each side.

The Complaint

14. The complainant argues that the wine, named ‘The Three Bears’ and the picture on the label and in the ad of a mother, father and little bear (as in the Goldilocks and the 3 bears story) would attract attention especially by children.

The Code

15. Part 2.1 of the ABAC provides that the naming and packaging of alcohol beverages (which is also referred to as “product material”) 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....
16. Part 2.2 of the ABAC provides that the ABAC standards (Part 2 (1) (a)-(g)), apply to the naming and packaging of all alcohol beverages supplied in Australia, with the exception of the name of any product or a trademark which the supplier can demonstrate, to the satisfaction of the Adjudication Panel, had been supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009

The Supplier’s Comments

17. The Advertiser responded to the complaint and questions posed by the Panel on 16 October 2012. The principal points made by the Advertiser are:

- (a) “The Three Bears” is a brand and trademark owned and marketed by Australian Liquor Marketers Pty Ltd (**ALM**). ALM is a division of Metcash Trading Limited, a leading wholesale and marketing company operating in the fast moving consumer goods industry. Metcash and ALM are not at this time signatories to the Alcohol Beverages Advertising (and Packaging) Code (the **Code**). Accordingly, ALM is not bound by any decision of ABAC in relation to this matter. However, Metcash and ALM both work alongside organisations who are signatories to the Code. Likewise, Metcash and ALM both take their legal and social responsibilities very seriously and are therefore willing to address the complaint that has been made in this instance. In particular, it should be noted that ALM is committed to the responsible marketing and sale of alcohol and is a participant in a number of programmes designed to minimise the harm associated with the potential misuse of alcohol. For example, ALM supports and endorses the industry ID25 scheme which is aimed at eliminating sales of alcohol products to persons who are below the legal age of consumption.
- (b) The Advertisement features a picture of a logo and a product marketed and supplied by ALM under “The Three Bears” brand. For the purposes of any full assessment of the Advertisement, it is therefore relevant to consider the branding of the product itself, as is featured in the Advertisement. Given that a complaint has been raised, and in demonstration of the seriousness with which such complaints are taken by ALM, an explanation of the rationale behind the brand design has been set out below. The product being advertised are two wine varietals sold under the brand “The Three Bears”. The Three Bears brand is used in relation to three wine varietals marketed by ALM – a Shiraz, a Chardonnay and a Semillon Sauvignon Blanc. In particular, it should be noted that the branding has been used on products that are not generally marketed to the 18-25 age category (in the same way as some suppliers might market RTD categories). ALM’s experience is that wine products marketed under The Three Bears brand tend to be more popular with an older demographic. In particular, the brand is linked strongly to the quality wine-making heritage of the Margaret River region. This heritage is reflected in the desire that the majority of ALM’s customers have in relation to these products, which is to enjoy the flavour of the products (rather than focus on their intoxicating effects) and to enjoy their consumption in moderation.
- (c) “Three Bears” is the name of a premier surf location at Dunsborough, in Margaret River, well known, particularly among members of the surfing community and people who have also visited the region. Margaret River is also a scenic region of Australia which is heavily associated in the mind of the consumer with the quality of the local wine-making industry. The intention of the branding is therefore to create a geographical nexus between the branding of the product and a region of Australia, renowned for its quality wine-making. The actual history of how this surf location came to be known as “Three Bears” is not known. It is acknowledged that it is likely that the location was named after the story now more commonly known as “Goldilocks and the Three Bears”. We note that

whilst this story is now commonly reflected in popular culture and is more widely known as a children's story, further research indicates that the original oral literary tradition of the story, prior to publication of "*The Story of the Three Bears*" in 1837 by Robert Southey, was not a children's story. In fact, prior to that date, the story was a gruesome and macabre adult story involving an old lady being attacked by wild animals. Nevertheless, ALM acknowledges that it is likely that the name of the children's story has influenced the name of the surf location and that it has therefore indirectly influenced the name behind this particular brand. However, ALM submits that, on balance, it can be demonstrated that it was not intended that the name have a strong or evident appeal to children or adolescents through a direct allusion to a children's story. It was intended that the name be linked to a location in the Margaret River region of Western Australia.

- (d) The images used in the branding of the products are based on a caricature line drawing of three bears (being the bears from the location after which the brand is named). The bears are depicted engaging in surfing, again creating a link to the "brand story" and are portrayed in a humorous or whimsical manner (through the unexpected juxtaposition of animals participating in an acrobatic posture and in an activity which is not associated with animals), so as to have longer lasting appeal in the mind of the consumer. The choice of a caricature line drawing and use of bright and bold colours are directly relevant to the brand's portrayal of the attributes of the product being sold – "light", "clean", "fresh", "crisp", "vibrant" and "modern". These are all characteristics that one associates with a line drawing (versus other forms of graphic representation). The attributes can be found in the tasting notes provided with the products, which are set out following.

Tasting Notes

Semillon Sauvignon Blanc

Aromas: Tropical fruits, feijoa, guava and passionfruit. Freshly cut grass with a mineral complexity.

Palate: Light bodied and clean, with fresh, crisp acidity.

Chardonnay

Aromas: Ripe peach and nectarines with toasty vanillin oak.

Palate: Rich and creamy with intense flavour and length.

Shiraz

Aromas: Spicy shiraz lift with a lovely oak background.

Palate: Typical Margaret River style with a spicy, peppery edge to soft cherry fruit.

Fresh, vibrant and modern with a lovely spicy lift.



Source: The Three Bears – Margaret River Product Tasting Notes

- (e) In particular, it should be noted that the bears are not themselves portrayed in consuming the product, or encouraging the consumption of

the product by anybody, let alone by persons under the age of legal consumption. The bears are not depicted in any scene taken from the children's story, nor are they presented as participating in that story. In fact, the depiction of the bears engaging in the activity of surfing, which is an activity which does not feature in the story, might also be suggestive of the fact that the bears are not actually participating in the well-known children's story. ALM acknowledges that caricatures or line drawings may frequently be used in children story books, but notes that a wide range of other styles of artistic expression are also often used in other children story books. Many of these styles of artistic expression are also used on other popularly accepted alcohol products. The coincidental use of a particular form of artistic expression in a type of literature, and in the advertising of a type of product, need not therefore logically imply that there ought to be a link made between the product and its consumption by persons to whom that form of literature is addressed. Furthermore, the style of graphic design used for this product is consistent with that used for a number of other products which are currently available in the Australian market.

- (f) On balance, therefore, ALM submits that that the use of The Three Bears brand on these products is not intended to, and does not in fact encourage under age drinking or have a strong or evident appeal to children or adolescents.
- (g) Nevertheless, given that this complaint has been raised, ALM is still committed to addressing the concern of members of the community. With this in mind, at this time, ALM does not intend to advertise further the logo associated with this brand, other than by depicting the logo as part of a picture of the product itself.

The Panel's View

Some Procedural Aspects

- 18. The complaint has placed before the Panel two separate but entirely related matters for determination, namely:
 - (a) Is the branding of the product, specifically the labels used on the shiraz and semillon sauvignon blanc bottles of the product in breach of Part 2.1, sections (a)(II) and (b) of The Code; and
 - (b) Is the advertisement for the product contained within a brochure advertising various alcohol products in breach of Part 1 of The Code.
- 19. This determination deals with the labels for the product. A separate determination deals with the advertisement within the brochure. The Panel has dealt with the complaint in two determinations because of the process differences between the Part 1 and Part 2 of the ABAC. In particular, the Part 2 process has potentially a two-stage decision making process of a provisional determination followed by a final determination. This is not the case with determinations concerning only advertising.

20. It should also be noted that ALM is not a signatory to the ABAC Scheme. This means that it is not contractually bound to follow a Panel's decision, in contrast to signatories to the Scheme or members of the peak alcohol industry bodies who are the sponsors of the Scheme. The Panel does, however, consider all relevant complaints regardless of whether the advertiser or supplier is a signatory to the Scheme and, in this case, ALM has stated its strong commitment to good practice in alcohol marketing. ALM has fully cooperated with Panel in its decision making process.

Part 2 of the ABAC

21. The ABAC Scheme came into operation in 1998 and initially applied standards to alcohol beverage advertising alone. Actual alcohol product branding, such as product names and labels, was not covered by the Scheme and the Code standards at this time.
22. The Code was extended to labels and packaging in late 2009, but this extension of the Scheme contained a 'grandfathering' provision. This means that branding material in the market at the time of the Scheme's extension (ie, 31 October 2009) does not have to comply with the ABAC standards.
23. ALM has advised that "The Three Bears" label came onto the Australian market after the commencement of Part 2 of The Code. Accordingly, the 'grandfathering' provision is not relevant in this case and the Panel is able to make a substantive decision as to the consistency of the labelling with the Part 2 standards.

The Substantive Issues

24. The complainant is concerned that the product name in combination with the illustrations on the label will attract the attention of children. This is because of the association of the branding with the children's story of "Goldilocks and The Three Bears". The ABAC provides that product material (labels and packaging) must present a mature, balanced and responsible approach to the consumption of alcohol and not encourage underage drinking. Further, the product material must not have a strong or evident appeal to children or adolescents.
25. The basis of the complainant's concern is that the product name "The Three Bears" is shown on the label with a depiction of stylized caricatures of three bears in an acrobatic pose on a surfboard. It is argued, in essence, that this combination of the name and the illustration of the bears in this way results in the label having a strong or evident appeal to children.
26. ALM has provided a detailed response to the complaint. It explains that "The Three Bears" name is drawn from the wine growing region of the Margaret River district of Western Australia, from where the product originates. It is argued:
- (a) The product is of a type more popular with an older demographic, as opposed to younger people;
 - (b) The branding aims to draw a geographic nexus between the product and the region from which the grapes are grown, i.e. in the area adjacent to the beaches known as "The Three Bears";

- (c) There was no intention to have branding which was appealing to children;
 - (d) The images on the label show a caricature of the bears engaging in surfing which draws an association between the product and the relevant wine growing region. It is noted by ALM that the Goldilocks story does not involve surfing;
 - (e) The bright and bold colours used on the label are described as being relevant to the brand's portrayal of the attributes of the wine, that is, "light", "clean", "fresh", "vibrant" and "modern";
 - (f) The Goldilocks story has changed in its nature over time and was not originally a children's story. It is accepted, however, that the story as widely understood now is generally regarded as a children's story;
 - (g) Other alcohol products on the market also utilise stylised characters, not dissimilar in broad style to that which is used on "The Three Bears" product. It is also argued that it does not logically follow that a link should be made between the use of the name and characters on the label and the children's story.
27. In assessing if product material is consistent with an ABAC standard, the Panel is to have regard to the material's probable impact upon a reasonable person within the class of persons to whom the material is directed and others to whom it may be communicated. In doing this, the Panel is to have regard to the content of the product material as a whole.
28. This means that the intention of an advertiser or a supplier is not a decisive issue, but rather the decisive issue is how 'a reasonable person' is probably impacted upon by the product material. Therefore, while the Panel can accept that ALM intends to market the alcohol products to adults and that "The Three Bears" name draws its origin from a geographic region, this does not settle the argument. The key question is how a reasonable member of the public who may well come across the product, either as part of a targeted audience or otherwise, would view the name and label.
29. The Panel has considered how it assesses "strong and evident" appeal to children or adolescents in previous determinations. From these previous decisions, it can be noted:
- (a) The intention of the supplier as to its target audience is not material: rather, it is the "probable impact" of the product material which is important.
 - (b) Product material might have consequential or residual appeal to children or adolescents and not breach the code.
 - (c) What is not permitted is product material which has "strong or evident" appeal to children and adolescents.

- (d) Assessment of consistency is a case-by-case exercise in which imagery, colour, use of characters and context is important in deciding the overall probable impact of the product material.
30. In this case, the Panel believes the product material is in breach of sections (a)(ii) and (b) of Part 2 of the ABAC. In reaching this conclusion the Panel has noted:
- (a) That while “The Three Bears” name was a reference to the wine making region from which the product originates, it nevertheless could be taken by a reasonable person to be a reference to the “Goldilocks and The Three Bears” children’s story.
- (b) That the use of the character of the bears as depicted on the labels would have strong and evident appeal to children given a combination of:
- the style of the drawing of the bears;
 - the bright colours used on the bears;
 - the activity the bears are portraying.
- (c) It is not necessary for the label to definitively create an impression of the ‘Goldilocks’ story to breach the ABAC standard. Rather, the overall impression created by the name, illustrations, colours and style of depiction of the bears collectively is considered strongly or evidently appealing to children.
- (d) The proposition that other products may be on the market with broadly similar approaches to labeling does not provide an answer to the current complaint as the Panel does not purport to regulate all alcohol product materials, but rather it only makes determinations on complaints which are brought before it.

Provisional Panel Determination

31. Consistent with section 4 (i) of the rules and procedures applying to the Panel processes, the Panel made a provisional determination on 1 November 2012 that the product material is in breach of Part 2, sections (a)(ii) and (b) of the ABAC.

Final Panel Determination

32. The Supplier was provided with a copy of the Panel’s provisional determination on 2 November 2012 and has advised that it does not intend to seek a review of the Panel’s provisional determination. However the Supplier has commented that the original complaint was about the advertisement itself and not about the packaging and noted that the image of the logo on the product featured in the advertisement was so small as to be hardly discernible and it was the Supplier’s use of an enlarged version of the logo which is referred to in the complaint.
33. While the Supplier has not requested a review of the provisional determination it is appropriate for the Panel to consider the issue raised by the Supplier subsequent to

the provisional determination, namely, the Panel's interpretation of the complaint as extending to both the advertisement and the product label.

34. The ABAC Scheme provides an avenue for members of the public to raise concerns about alcohol advertising and product labeling and packaging. It is recognised, however, that while hopefully many members of the community will appreciate that an avenue exists to raise concerns about advertising, few people will be aware of the precise provisions in codes of practice such as the ABAC. It is for that reason that the ABAC rules and procedures and the approach of the Panel adopt a 'liberal' spirit as to the intention of the complainant in raising a matter for consideration.
35. That said, the mere fact of a complaint does not trigger a complete examination of an ad or product material against each and every standard contained in the ABAC. Rather, the Panel reviews only those standards which are raised by a fair reading of the complaint.
36. In this case, the complaint reads, in part, as follows, "The wine is called "The Three Bears" and the picture on the label and in the ad..." The Panel believes this fairly clearly establishes that the complainant was concerned about both the label and the advertisement, and as a result determinations have been made about both matters.
37. Accordingly, in light of the Supplier's decision not to seek a rehearing, the provisional determination of 1 November 2012 is now made final and the complaint is upheld.