

ABAC

ABAC Complaints Panel Final Determination No: 73/12B

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 a catalogue advertisement featuring “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 packaging of 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 endeavours to determine complaints within 30 business days of receipt. In this case, the Panel was unable to make a determination until the related determination concerning the packaging was finalised. As a result, the complaint has not been determined within the 30 days 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 advertisement.

Advertisement

9. The complaint refers to a catalogue advertisement by Cellarbrations which is owned by ALM. The catalogue promotes a range of alcohol products sold by Cellarbrations retail outlets.
10. The front page of the catalogue includes the Cellarbrations logo at the top of the page followed by the text "Make everyday a celebration". A red spot below and to the right of the logo states "Hurry! Specials available from 8/10/2012 until 21/10/2012". The top half of the page below the logo includes an image of two bottles, "the three bears" Semillon Sauvignon Blanc and "the three bears" Shiraz with a red spot with the text "2 for \$25 750ml". Below the bottles is the text "Three Bears Range". Next to the bottles the three bears logo as depicted on "the three bears" Shiraz label is featured.
11. The enlarged logo featured in the advertisement includes a stylized picture of a wave using shades of purple and blue 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". The text "the three" and "Shiraz is in purple and the text "bears..." is in stylized bold text.
12. The 4 page catalogue depicts a wide range of alcohol products including their price and any special offers. On the back of the catalogue at the bottom of the page are details of Cellarbrations outlets in South Australia. Below that list is the "ID25" logo

and the following text “Cellarbrations supports the responsible service and consumption of alcohol. “Specials valid from 8/10/2012 to 21/10/2012 or while stocks last. Retail quantities only. No trade supplied. Prices include GST where applicable. Tobacco & Alcohol not sold to under 18’s. Cost of local call, higher from mobiles or public phones. Prices may vary in country areas due to Freight. Specials available in SA only.”

The Complaint

13. 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

14. Part 1 of 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 and adolescents....

The Supplier’s Comments

15. The Advertiser responded to the complaint and questions posed by the Panel on 16 October 2012. The principal points made by the Advertiser are:
 - (b) Australian Liquor Marketers Pty Ltd (**ALM**) is the owner of the Cellarbrations brand and the publisher of the brochure which has led to this complaint. 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.

Nature of the advertisement

- (c) The Advertisement in question consists of a brochure advertising approximately 50 alcoholic products, across the spectrum of wines, beers and spirits. Featured prominently on the cover of the brochure are two products marketed under “The Three Bears” brand and the use of a logo

also associated with that brand. The Advertisement was not in a publication addressed to children, adolescents or persons under the legal age of consumption. It was contained in a brochure and featured alongside a number of other liquor products.

- (d) The following should be noted in relation to the brochure:
- The brochure itself does not contain any advertisements in relation to non-liquor products or products that might appeal to children or adolescents.
 - The brochure did not contain any material or editorial content that might usually be considered to be of any interest to children or adolescents.
 - The brochure was distributed by direct mail and was not included in a publication that might have had any interest or appeal for children or adolescents.
- (e) It is therefore clear that the Advertisement, by the nature of the brochure in which it was published, was addressed squarely at the adult market and to persons who are above the legal age of consumption.
- (f) ALM therefore submits that the Advertisement, given the context in which it is presented to the consumer, cannot, on balance, be seen to have any strong or evident appeal to children or adolescents.
- (g) It should be noted that the Advertisement did not feature any persons under the age of 25 as is proscribed by the Code. The brochure in which the Advertisement is contained also contains the messages that:
- Cellarbrations supports the responsible service and consumption of alcohol;
 - Tobacco and alcohol are not sold to under 18's; and
 - If the customer looks to be under 25, they will be asked for identification.
- (h) The Advertisement itself only shows the product and logo. It does not depict, or contain any message encouraging, the consumption of the product by anybody, let alone by persons who are under the age for legal consumption. ALM therefore submits that the advertisement cannot be regarded as being material that might be perceived to encourage under-age consumption
- (i) Nevertheless, given that this complaint has been raised, ALM has now determined that subsequent advertising of this product will feature only images of the product itself rather than reproducing the more prominent logo. Given that the "The Three Bears" logo, when it is only reproduced as part of a picture of the product, is actually very small and not very

prominent, ALM believes that this change will go a long way towards addressing the concerns raised by some members of the community

Products supplied under The Three Bears brand

- (j) 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.
- (k) “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.

- (l) 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

- (m) 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.

- (n) On balance, therefore, ALM submits 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.
- (o) 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

- 16. The complaint has placed before the Panel two separate but entirely related matters for determination, namely:
 - (p) 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
 - (q) Is the advertisement for the product contained within a brochure advertising various alcohol products in breach of Part 1 of The Code.
- 17. This determination deals with the advertisement for the product. Determination 73/12A is the final determination in relation to the branding of the product. There are separate determinations because complaints about branding under Part 2 of the ABAC have a different decision making process than complaints about advertisements under Part 1. Further, the underlying concern of the complainant was about the product label and, accordingly, it was sensible for the Panel to resolve that question first before turning to the complaint going to the advertisement.
- 18. 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.

The Substantive Issues

- 19. The Panel in Determination 73/12A found the label of the product to be in breach of sections (a)(ii) and (b) of Part 2 of the ABAC. Equivalent provisions are contained in Part 1, which deals with advertising. It does not follow automatically, however, that the advertisement must also be in breach of the ABAC standard. This is because the Panel is to assess the content of the advertisement as a whole, and it is quite conceivable that the advertisement placed as it is in a brochure advertising various products, may be in context not be seen to be strongly appealing to children.

20. The advertiser argues that while “The Three Bears” advertisement is prominent on the brochure, it should be noted that the brochure:
- (a) Was not in a publication addressed to children;
 - (b) Does not contain any advertisements in relation to non-alcohol products or products that might appeal to children or adolescents;
 - (c) Does not contain any editorial content that might be considered to be of interest to children or adolescents;
 - (d) Was distributed by direct mail and not included in a wider publication that might have interest or appeal to children.
21. The Panel acknowledges the points made by the advertiser and accepts, as it did in Determination 73/12A, the intention was to market the product solely to an adult audience. That said, the test which the panel must apply is the probable impact of the advertisement on both the intended audience and those to whom the advertisement may be communicated. It is almost inevitable that a brochure distributed widely to households will come to the attention of children and adolescents.
22. The advertisement does not prominently show the product’s label as such, however it features a large depiction of the three stylised bears engaging acrobatically on a surf-board. The bears are presented in a manner and with colours which the Panel believes would have evident appeal to children, as outlined in Determination 73/12A.
23. Accordingly, the Panel believes the complaint should be upheld.