

ABAC

ABAC Complaints Panel Determination No: 76/10

Confidential Complaint Product: Three Kings alcohol beverages Advertiser: Independent Distillers

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

17 December 2010

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a series of outdoor transit advertisements for Three Kings alcohol beverages by Independent Distillers (“the Advertiser”) and arises from a confidential complaint received on 24 November 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 was received by ABAC on 24 November 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 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 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 these advertisements.

The Advertisement

9. The complaint refers to a series of outdoor advertisements located on the side of and also inside public transport, in particular buses.
10. The first advertisement features a photograph of three young men, one on a skateboard and another with a skateboard over his shoulder facing away from the camera above or below the text "Three Kings" next to three bottles of the product, one of which is Cider, another Dry Lager and the third is vodka and ginger. There is also a reference to the product website threekings.com.au.
11. The second advertisement is the same as the first but with a different photograph of the same three young men, this time sharing a joke and holding bottles of the product.
12. The third advertisement is the same as the first two but with a different photograph of the same three young men, sitting on a bench with graffiti in the background talking and holding bottles of the product.

The Complaint

13. The complainant argues that the advertisement encourages underage drinking and has strong appeal to children by:

- (a) including models that look very young, under 18 years of age and carrying skateboards which appeal to young boys and early teens.
- (b) Style of ad, clothing and overall attitude appeals to very young men and boys.
- (c) It is not clearly marked that the beverage is an alcohol beverage.
- (d) There is no warning about responsible consumption of alcohol in the ads.
- (e) The series of ads is on bus sides and inside buses including the afternoon school bus in Bondi Junction which is inappropriate placement.

The Code

14. 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 and accordingly:
 - i) adults appearing in advertisements must be over 25 years of age and be clearly depicted as adults.
 - ii) children and adolescents may only appear in advertisements in natural situations (eg family barbeque, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverage
 - iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene

The Advertiser's Comments

15. The Advertiser responded to the complaints and questions posed by the Panel by email dated 8 December 2010. The principal points made by the Advertiser are:
- (a) In the advertisement that depicts a male skateboarding there is no product being drunk or product in their hands.
 - (b) Models are wearing on trend fashion apparel – there was no intention to deliberately dress the models in a more youthful way than how they would dress themselves.
 - (c) Skateboarding has a broad appeal which is promoted by riders such as Tony Hawke, the world's most famous skate board rider who is over 40. This is an ageless lifestyle choice particularly long boarding which is featured in the advertisement.

- (d) In regard to placement on buses, out of home advertising has become a proven channel of communication for the alcohol category. Many of the category leaders such as Corona have been using this medium for the past 3-5 years.
- (e) The models are of legal drinking age.

The Panel's View

- 16. This complaint raises a number of issues, both substantive and procedural, which will be dealt with in turn.

The Procedural Aspects

- 17. The ABAC is a quasi-regulatory system which has at its heart the commitment of advertisers to comply with the standards contained within the ABAC and abide by the pre-vetting and complaints processes which make up the ABAC Scheme. This commitment is embodied through the sponsorship of the ABAC Scheme by three (3) peak alcohol industry bodies, namely the:
 - Brewers Association of Australia & New Zealand
 - Distilled Spirits Industry Council of Australia
 - Winemakers Federation of Australia.
- 18. While the individual companies which are members of the sponsoring industry bodies cover the vast majority of alcohol beverage advertisers in Australia, there are alcohol producers and advertisers who are not member of the relevant industry bodies or are not signatories to the ABAC Scheme. The advertiser in this particular case is not an ABAC signatory. This means that the outdoor advertising was not subject to pre-vetting prior to its showing. Further, this decision by the Panel does not have any binding force on the advertiser. That said, the advertiser has cooperated with the Panel in enabling the determination to be made.

The Substantive Aspects

- 19. This complaint raises an issue of whether the advertisement breaches section (a)(ii) and (b) of the ABAC by encouraging underage drinking and having a strong and evident appeal to children. The complainant specifically raises the issue of the age of the models in the ads. Section (b)(i) of the ABAC provides that adults appearing in advertisements must be over 25 years of age and be clearly depicted as adults.
- 20. The complainant contends that the advertisement is in breach of the ABAC by reason of both its content and placement. The ABAC applies across all media *i.e.* print, television, radio, billboards and the internet and is a content based set of standards. This means that, regardless of where an alcohol ad is placed, its content is to meet the standards laid down in the ABAC. The issue of where the ad is placed is indirectly relevant in terms of assessing the content of the ad in that the audience of the ad is a relevant consideration.

21. The complainant is primarily concerned that the age, dress, style and in one execution the use of a skateboard will have strong or evident appeal to children or adolescents in breach of the ABAC.
22. The advertiser responds to this concern by pointing out that:
 - Models are of legal drinking age and wearing their usual style of clothing;
 - Skateboarding has broad appeal with the world's most famous skateboard rider, Tony Hawke, being over 40. It is an ageless lifestyle choice, particularly longboarding which is depicted in the ad.
23. The central issue is whether the ad has a strong or evident appeal to children. The Panel has considered this question in previous determinations and has noted that:
 - each ad has to be assessed on its merits
 - the intention of the advertiser as to its target audience is not material; rather, it is the "probable impact" of the ad which is important
 - the ABAC standard accepts that an ad might have some residual or incidental appeal to children but it is "a strong or evident" appeal which is prohibited
 - the overall context of the ad is critical.
24. This means an overall impression of the ad must be formed. The placement of the ad on and inside public transport does mean that the ad will be viewed by children and adolescents. This does not, however, of itself mean that the ad, irrespective of its content, automatically can be said to have "strong or evident" appeal to children or adolescents.
25. The Panel believes that the advertisements breach section (b)(i) and (iii) of the ABAC. Section (b)(i) requires that adults depicted in alcohol advertisements must as a matter of fact be 25 years or over and secondly, irrespective of the models actual age, adults need to be clearly depicted as adults. The advertiser's advice on the actual age of the models featured in the advertisement is that they 'are of legal drinking age'. This means the models are at least 18 years old but may well be under the age of 25.
26. Without specific advice from the advertiser on the models' age, the Panel can only make an estimate based on appearance. The three models appear to be young adults, and their dress and demeanour suggest they may be in either late teens or early 20's. In the Panel's view the models do not appear to be 25 years or over in age.
27. Equally, the Panel believes that it is quite ambiguous as to whether the models are 'clearly depicted as adults'. While it is accepted that people who use skateboards would cover a variety of ages, it would be fair to say that the activity and skateboard culture is predominantly youth and young adult focussed. The Panel concludes that the advertisements do not show the models 'clearly depicted as adults'. Further, it follows that as the models are the primary focus of the advertisements, that section (iii) is also breached.

28. The Panel further believes that in addition to the specific question around the age or apparent age of the models featured in the ad, the advertisements breach section (a)(ii) and (b) of the ABAC. In reaching this conclusion the Panel has had regard to:
- The apparent youth of the models
 - That several ads depict scenes which strongly suggest that the three featured characters have consumed the product (eg. opened bottles, empty or partially empty bottles in the hands of the characters)
 - The dress of the characters which is suggestive of a youth/young adult culture
 - The association of the characters and product with skateboard use which is popularly regarded as a predominantly youthful activity
29. In upholding the complaint, the Panel strongly encourages the advertiser to become a signatory to the ABAC Scheme and take advantage of pre-vetting process. Pre-vetting would have identified the inconsistency of the advertising approach with ABAC Standards and enabled the advertiser to consider alternative creative means to pursue its marketing objectives in a manner reflective of ABAC Standards of good alcohol advertising practice.