

# ABAC

## ABAC Complaints Panel Determination No: 12/08

### IN THE COMPLAINT OF Mrs Aurora MacKrill Product: Black Douglas Whisky Advertiser: Foster's Group Limited

Professor The Hon Michael Lavarch – Chief Adjudicator  
Professor Fran Baum – Member  
Professor Elizabeth Dangar – Member

25 March 2008

#### Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a billboard advertisement for Black Douglas Whisky by the Foster’s Group Limited (“the Advertiser”) and arises from a complaint received from Mrs Aurora MacKrill (“the Complainant”).

#### 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 Advertising Code of Ethics which includes provisions about the content of Billboard advertising in specific locations e.g. near schools.
3. The ASB and the Panel both assess complaints separately under their own rules. However, for the ease of public access to the complaints system, the ASB receives all complaints about alcohol beverage advertisements and forwards a copy of all complaints to the Chief Adjudicator of the ABAC.

4. The Chief Adjudicator of the ABAC then determines if the complaint raises issues which are solely within the province of the AANA Code of Ethics. If not, then the complaint will be forwarded to the ABAC Adjudication Panel for consideration. If only AANA Code issues are raised, then the matter is determined by the ASB.
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 11 February 2008.
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. Pre-vetting approval was obtained for a different version of this advertisement for print use which included a text block on the bottom right of the image giving historical context for the defiance of the Scots, purportedly "captured" in every bottle of the product (UL46.07). No version of this advertisement has been approved for outdoor use.

### **The Advertisement**

9. The complaint refers to a billboard advertisement which features:
  - (a) a black and white picture of a statue of three males on top of a plinth who have lifted their clothing and bared their backsides;
  - (b) there are three swords on the plinth behind the men and the plinth features the following carved words which are difficult to read "And These Three Men Made A Solemn Vow The English Rule is Dead";
  - (c) the picture is set at night with lighting focused on the statue, highlighting the semi-naked men;
  - (d) inset into the lower right-hand corner of the picture is a bottle of the product and to the left of the product is a picture of the Scottish flag superimposed with the words "Stand You Ground" above the words "The Black Douglas Genuine Scotch Whisky". In the top right hand corner, a small "Enjoy Responsibly" message is displayed.

## **The Complaint**

10. The complainant argues that the advertisement is irresponsible in that it is suggesting to the already troubled youth that it is cool to “get pissed and flash a brown eye”.

## **The Code**

11. The ABAC provides at Sections (a) and (a)(iii) that advertisements for alcohol beverages must:
  - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
  - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;

## **Arguments in Favour of the Complaint**

12. In favour of the complaint it can be argued that the advertisement breaches sections (a) and (a)(iii) of the ABAC as follows:
  - (a) Section (a) is breached by failing to present a responsible approach to the consumption of alcohol through the association of the product with offensive behaviour;
  - (b) Section (a) (iii) is breached through the depiction of a statue of men baring their backsides and the association of offensive behaviour of this kind, which is commonly linked to immoderate alcohol consumption.

## **The Advertiser’s Comments**

13. The Advertiser responded to the complaint and questions posed by the Panel by way of letter dated 28 February 2008. The principal points made by the advertiser are as follows:
  - (a) The Black Douglas is a scotch whisky whose heritage is inspired by the story of the Scottish Warrior James “The Black” Douglas, a man renowned for standing his ground for his people and his country. The advertising campaign takes acts of defiance which, over the centuries, have become legends in their own right and depicted in many films such as Brave Heart, Rob Roy and Highlander, then humorously depicts them in the form of heroic statues with a twist, to appeal to those scotch drinkers with a sense of humour and who want to choose an alternative brand to the market leader.
  - (b) The campaign aims to bring The Black Douglas, his character and attitude, to life in an irreverent way across a number of executions. A previous example showed a statue of a kilt-wearing, Black Douglas warrior astride a rearing horse and raising two fingers to an unseen foe.

- (c) The image in this advertisement has a significant historical connection in that it was inspired by the actions of the Scottish army at the legendary battle of Stirling Bridge where they audaciously turned their backs on the English and raised their kilts as a symbol of their rebelliousness. The image is of a statue and not of three real men and is a black and white photograph of a specially commissioned sculpture. The statue was created in such a way that it is anatomically incomplete and there is nothing more to see than the carved stone bare cheeks.
- (d) While appreciating the campaign may not be to everyone's taste it is more mischievous than offensive and is not in breach of the ABAC. The behaviour has nothing to do with alcohol consumption but is an acknowledgment of a historical moment and the strap line "Stand Your Ground" and is pertinent to the role of The Black Douglas which is seen as the challenger brand in a highly competitive and well established scotch category.

### **The Panel's View**

- 14. As explained in Paragraph 2, alcohol advertising is subject to a number of codes of practice and two distinct complaint systems operated by this Panel in the case of the ABAC, and the ASB in the case of the AANA Code of Ethics. This particular ad has attracted complaints which have raised issues under both Codes and both the ASB, and now the ABAC Adjudication Panel, have been called upon to make determinations about the ad.
- 15. The ASB decision on the advertisement was made on 13 February 2008 in response to earlier complaints and dealt with Section 2.3 of the Code of Ethics concerning the portrayal of sex, sexuality and nudity. The ASB dismissed the various complaints, basing its decision on its view that the advertisement was not sexually suggestive, but suggestive of defiance, which was consistent with the historical context of the image. The ASB noted that the nudity in the ad was not real, nor sexual in nature, and "while it might be suggestive of socially undesirable behaviour, it was not inappropriate for a wide audience".
- 16. In recent times it has become more common for the ASB and the ABAC Adjudication Panel to consider complaints about the same advertisement. For this reason, it is important to understand that each body is asked to apply quite different codes and to consider different issues. While both adjudication processes are conducted against the backdrop of an assessment of "community standards", it is quite possible that the different criteria to be applied in the two respective codes can lead to different conclusions as to whether an ad is in breach of one or other of the two applicable codes.
- 17. In this case, the ABAC Panel is not called upon to decide if the ad is in good taste or if its portrayal of nudity or sexuality is acceptable. Those matters were considered by the ASB. Rather, this Panel has to determine if the ad complies with the standards set down in Section (a) and (a)(iii) of the ABAC, namely – does the ad present a mature, balanced and responsible approach to the consumption of alcohol and accordingly does not promote offensive behaviour.
- 18. In assessing if an ad is consistent with the standards in the ABAC, the Preamble to the Code provides that the conformity of an advertisement is to be assessed in the terms of its probable impact upon a reasonable person within

the class of persons to whom the advertisement is directed, taking its content as a whole.

19. The essential issue raised by the complaint is whether the ad is promoting offensive behaviour by associating alcohol use with the baring of backsides. The advertiser's argument is that the scene depicted "has nothing to do with alcohol consumption...but is an acknowledgement of an historical moment and an act of defiance" and this relates to the branding of the product.
20. Section (a) contains both a "positive" standard of good practice in ads presenting a "responsible approach to alcohol consumption" and then goes on to outline "negative" standards which are not to be breached, such as not promoting offensive behaviour. The notion of "offensive behaviour" as used in Section (a) needs to be understood in the context of the section and clearly relates to behaviour related to alcohol misuse e.g. drunkenness.
21. The advice from the advertiser was that the ad was given AAPS (pre-vetting) approval. This is not quite accurate, as approval was given during the campaign development, and specific approval was given to a slightly different version of the execution which contained some text further establishing the historical context. Also, this approval was for print advertising, and not for outdoor use. This is important, as the decision the Panel is called to make turns largely on whether the historical context of the image relied upon by the advertiser would be understood by a reasonable viewer of the ad. If the ad is not understood in an historical context of a show of Scottish defiance to English rule, then it can reasonably be taken to be depicting behaviour which is offensive, particularly when associated with the use (misuse) of alcohol.
22. The advertiser argues that the historical context of the ad is established by:
  - The Billboard showing a photograph of a statue of the three men which is not anatomically complete
  - The words on the plinth
  - The use of the strapline "Stand Your Ground" and
  - Presumably a level of background knowledge of the Scottish/English conflict.
23. The Panel understands the advertiser's argument, however, in the Panel's view, it is highly questionable whether the historical context is adequately established. Firstly, it cannot be assumed that a reasonable person will have a knowledge of the Scottish/English conflict or will readily associate the image with films such as "Braveheart". Many viewers will make this connection, but equally, many others will not. The print version of the ad given APPS approval, contained accompanying text which set out the historic context of the image and this is not a feature of the outdoor execution.
24. Secondly, the image is shot at night and the lighting used gives emphasis to the bare backsides and makes it difficult to read the inscription on the plinth. This is particularly the case if a viewer sees the billboard from a moving vehicle, which will be a common occurrence. While the image is clearly a photograph of a statue, and not real people, a reasonable viewer will need to take from this that an historic event is being depicted and this may or may not be the case.

25. On balance the Panel believes the ad does not adequately establish its historical context and that a reasonable viewer could conclude that the ad is associating offensive behaviour with alcohol use. While the ad does not depict alcohol consumption, the section (a) standard is wider than actual consumption and goes to a responsible approach to alcohol consumption. The Panel does not believe the ad meets this standard and accordingly that the ad breaches the ABAC.
26. The complaint is upheld.