

# ABAC

**ABAC Complaints Panel**  
**Determination No: 82/09**

**Confidential Complaint**  
**Product: Barclays Premier League/ Carlsberg**  
**Advertiser: Premier Media Group Pty Ltd**

Professor The Hon Michael Lavarch – Chief Adjudicator  
Jean Strachan – Member  
Professor Fran Baum – Member

21 October 2009

## **Introduction**

- 1 This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a television advertisement for coverage of the Barclays Premier League on Foxtel by Premier Media Group Pty Ltd (“the Advertiser”) and arises from a confidential complaint received on 28 September 2009. The advertisement features the brand “Carlsberg” which is an alcohol product distributed in Australia by The Fosters Group.

## **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 prima facie within the Panel's jurisdiction.

### **The Complaint Timeline**

- 6 The complaint is in the form of an email received by the ABAC Panel on 28 September 2009.
- 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 30 business days.

### **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. This advertiser is not a member of the ABAC Scheme and pre-vetting approval was not obtained for this advertisement.

### **The Advertisement**

- 9 The complaint refers to a television advertisement by Foxtel promoting its coverage of the Barclays Premier League ("BPL").
- 10 The advertisement comprises three young boys jumping up and down and cheering, with the boys wearing Liverpool F.C. jerseys which include Carlsberg branding. A short snippet of commentary from a football match is played as follows: "Torres! - Liverpool have sealed it now". The text "Barclays Premier League Live & Exclusive Fox Sports" is overlaid on the screen.

### **The Complaint**

- 11 The complainant argues that it is a breach of the ABAC for young children to be used in an ad that promotes 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**, other than point of sale material, produced for publication or broadcast in Australia complying with the spirit and intent of this Code.
- 13 The Definitions state "Alcohol beverage includes any particular brand of alcohol beverage".
- 14 Section (b) of the ABAC provides that advertisements for alcohol beverages must:

not have a strong or evident appeal to children or 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 barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages; and
- (iii) adults under the age of 25 years may only appear as part of a natural crowd or background scene.

### **Arguments in Favour of the Complaints**

15 In favour of the complaint it can be argued that featuring children in an advertisement that includes alcohol branding is a breach of section (b)(ii) of the ABAC.

### **The Advertiser's Comments**

16 Fosters advised the Panel by way of email dated 6 October 2009 that the advertisement was not created or placed by Fosters and further advised on 8 October 2009 that the complaint referred to a program promo by Fox Sport.

17 The Advertiser responded to the complaint and questions posed by the Panel by way of email dated 15 October 2009. The principal points made by the Advertiser were as follows:

- (a) Premier Media Group Pty Ltd (**PMG**) is the owner and operator of a number of subscription television channels, including the FOX SPORTS channels, which are transmitted to subscribers on the FOXTEL, Austar, FOXTEL from Telstra and Optus TV featuring FOXTEL subscription television platforms. PMG would never intend to breach any law or code to which it is required to comply, nor would it promote the drinking of alcohol to children or adolescents. PMG has a large number of subscribers to its channels and services and it would not be in our interests to do so.
- (b) PMG purchases the right to transmit various sports, programs and events on the FOX SPORTS channels, including the Barclays Premier League (**BPL**). PMG has purchased the live and exclusive right to transmit the BPL on various types of media in Australia, including television, and includes its coverage of the BPL on the FOX SPORTS channels. As with all content transmitted by PMG, PMG's internal on-air promotions department produces on-air program promotions to promote what rights PMG may have to a particular sport, program or event or the upcoming transmission times of such sports, programs and events. Prior to the commencement of the 2009/2010 BPL season, PMG produced a number of on-air promos to promote its transmissions of the BPL including the promo referred to in the complaint.
- (c) In our view, the promo is just that, a program promo (as alluded to by the complainant), and is not an advertisement and is not and was not intended to be an advertisement for an alcoholic beverage (directly or otherwise). PMG has not received any benefit (financial or otherwise) from the BPL, Fosters, Carlsberg or any other entity in producing and/or broadcasting the promo and has done so solely to promote the BPL being live and exclusive on FOX SPORTS, in particular to Liverpool FC fans. This is further emphasized by the fact that the only verbal reference during the promo is commentary from a previous BPL match and says 'Torres, Liverpool have sealed it now'. This voice over was not created for the purpose of this promo (it is taken directly from a BPL match) and there is no verbal reference to the Carlsberg

brand. The replica Liverpool FC jerseys that include Carlsberg branding and worn by the children in the promo can be purchased by anyone from a sports clothing store in children's sizes (as well as the shorts and socks) as was the case in this instance.

- (d) PMG's internal on-air promotions department shot the footage for the promo at a football park in Sydney. The children in the promo are children of an employee of PMG that are Liverpool FC fans. The jerseys they are wearing are the children's own Liverpool FC replica jerseys, shorts and socks and were not provided to them by PMG. The reasoning behind using the replica Liverpool FC jerseys was to promote Liverpool FC as part of PMG's BPL coverage. The children are wearing the complete Liverpool FC kit (shirts, shorts and socks) and have not been solely dressed in 'Carlsberg promotion shirts' as suggested by the complainants.
- (e) Neither Carlsberg nor any other entity has any direct control over how PMG promote the Barclays Premier League. Under PMG's agreement with The Football Association Premier League Limited (the organizer and owner of the BPL), there are restrictions on the length of match footage that can be included within a promo and we must refer to the approved competition title (Barclays Premier League) in our promos. However, the FAPL does not have any right to approve any promos for the BPL. Neither BPL nor Carlsberg were made aware of or consulted about the promo.
- (f) Any requirements with regard to PMG's broadcast of matches are not relevant to this complaint. I can confirm that there is no contractual requirement for PMG to broadcast Carlsberg signage when promoting BPL broadcasts.
- (g) So that you are aware, the alcohol sponsor of the BPL is Anheuser-Busch, Inc (Budweiser). PMG also has an arrangement with a competitor of Fosters for exclusive broadcast sponsorship and advertising in connection with the BPL. So if PMG were to enter into any arrangement with Fosters to broadcast paid advertisements for Carlsberg in connection with the BPL, then it would be in breach of this arrangement.
- (h) We have reviewed the ABAC determination 7/09. If it is determined that the promo requires further consideration of the ABAC Adjudication Panel, we submit that the promo must only fall within category 5. However it is distinguishable from the Domino's pizza complaint as this promo:
  - is a promo, and not a paid advertisement;
  - PMG has not received any benefit (financial or otherwise) from Fosters or Carlsberg or any other entity for the broadcast of the promo;
  - Neither Fosters nor Carlsberg was aware of the promo and neither had any control over the promo nor were either of them given an opportunity to approve the use of the Carlsberg branding;
  - Unlike Jim Beam, Carlsberg is a premium imported beer from Denmark that has a small market share in Australia having only been distributed in Australia by Fosters since July 2007. It is therefore not a well known alcohol brand within Australia and is unlikely to be readily identifiable to Australians (particularly children) as an alcohol brand.
- (i) If it is found that the promo is an alcohol advertisement that falls within the ambit of the ABAC Scheme, PMG submits that the promo does not breach section (b) of the ABAC. While the promo may have some incidental appeal to children, we do not

believe it has a strong or evident appeal to children or adolescents. Rather it has a strong or evident appeal to supporters of the BPL, especially Liverpool FC fans. Further, the children in the promo appear in a natural situation and there is no implication in the promo that they will serve or consume alcohol. Points (i) and (iii) under section (b) are not relevant as the persons in the promo are not adults or adults under 25 years of age.

## **The Panel's View**

### **Introduction**

18 The threshold issue raised by the complaint is whether the advertisement falls within the domain of the ABAC scheme. To answer this question, the Panel will canvass the following matters in this determination:

- The nature of the ABAC scheme and the quasi-regulatory framework
- Application of the ABAC to non-ABAC scheme entities
- Will reference to alcohol within an advertisement always bring the ad within the ABAC scheme?
- Is this particular ad within the scope of the ABAC?

### **The nature of the ABAC scheme and the quasi-regulatory framework**

19 The ABAC Complaints Management Scheme can be described as a co-regulatory system. Australian governments are involved in the system to the extent that the terms of the ABAC and the Rules and Procedures which govern the Panel's operation have been considered and approved by governments at the State, Territory and Commonwealth levels. Further, a government official sits on the Management Committee of the Scheme.

20 In terms of coverage of the ABAC, however, the Scheme can be characterised as self-regulatory in nature. This means that the ABAC does not apply to all advertising which promotes or features an alcohol beverage, but only to advertising broadcast or published on behalf of a company which has agreed to be bound by the terms of the ABAC and the complaints determination process. The companies to which the ABAC applies are those who are members of one of three peak alcohol industry bodies, namely:

- Brewers Association of Australia and New Zealand Inc
- Distilled Spirits Industry Council of Australia Inc
- Winemakers Federation of Australia Ltd.

21 The vast majority of participants in the alcohol industry are members of one of the three peak industry bodies. This means most advertising for alcohol products is covered by the ABAC scheme, but some alcohol companies are not members of their industry association and some advertising which features alcohol beverages may come from an organisation which is not in the alcohol beverage industry.

22 It is beyond the scope of this determination to canvass the inherent merits and limitations of self regulation. Suffice to say that while the Panel has no power to compel co-

operation from any party to enable the Panel to undertake its task, the companies involved in the advertisement have answered questions and supplied materials when requested. This has enabled the Panel to complete its determination.

### **Application of the ABAC to non-ABAC scheme entities**

- 23 This case involves an example of advertising by a non-alcohol industry body, namely Premier Media Group Pty Ltd (“PMG”). PMG is not a member of one of the three industry associations who collectively sponsor the ABAC scheme. Accordingly, *prima facie* the ABAC standard for alcohol beverage advertising does not apply to PMG. Equally, the Panel has no authority as such to make a determination which has any force with PMG.
- 24 While this is the starting point, the situation is somewhat more complex. The advertisement features branding for Carlsberg Beer and therefore the Panel must establish whether the advertisement in question can be described as ‘surrogate advertising’ by an alcohol industry participant. Surrogate advertising is the indirect promotion of one product via the marketing of a second associated product.
- 25 Fosters Group is the distributor of Carlsberg Beer in Australia and they have advised that they did not create or place the advertisement that is the subject of the complaint. The Panel then sought advice direct from the Advertiser as to the level of control or influence the owners of the Carlsberg brand exercised over the use of its brand in the advertisement. The advice from the Advertiser is that neither Carlsberg nor any other entity exercised any control over how the Carlsberg brand was used in the advertisement.

### **Will reference to alcohol within an advertisement always bring the ad within the ABAC scheme?**

- 26 The core threshold question which the Panel is obliged to answer is whether the reference in the advertisement to Carlsberg brings the advertisement within the ambit of the ABAC scheme. This is not a straight forward question and the factors to be considered were discussed by the Panel extensively in Determination 7-09 which concerned an advertisement for Dominos Pizzas. In that determination the Panel reviewed the decisions of the Panel since the ABAC scheme commenced operation in 1998 and placed the advertisements considered by the Panel into 5 broad categories namely:
- Brand specific advertisements by the producer or distributor of the particular alcohol beverage (Category 1)
  - Advertisements from a liquor retailer which promote a particular brand of alcohol beverage (Category 2)
  - Advertisements from a liquor retailer which promote the sale of alcohol from the outlet rather than the sale of a particular brand of alcohol beverage (Category 3)
  - Advertisements which are from non-alcohol entities but which promote alcohol products or alcohol use in some way (Category 4)
  - Material which might contain some reference to alcohol but can’t fairly be said to be ‘alcohol beverage advertising’ (Category 5)

- 27 The advertisement that is the subject of this complaint could prima facie fall within either category 4 or 5.
- 28 Category 4 involves third party entities which are not prima-facie alcohol product companies. Examples of previous Panel decisions that fall within this category were described in Determination 7/09. The advertisements in the previous cases made reference to an alcohol beverage because of some relationship between the third party and an alcohol product company. This category includes examples of sponsorships by alcohol companies. Each case turned on its own facts but the critical issue considered by the Panel was whether the alcohol beverage company had a measure of control and approval over the advertisement and the portrayal of the alcohol brand in question.
- 29 Category 5 involves material or content with a reference to alcohol but which cannot be regarded as either 'advertising' or an advertisement promoting alcohol beverages. Complaints received which have fallen into this category have included:
- 149/08 – Complaint about the sale of Bundaberg soft drink being a product unrelated to Bundaberg Rum Distilling Co.
  - 40/08 – Complaint about a Gold Lotto ad in which people were celebrating a win with an unbranded glass of champagne.
  - 17/05 – Road Safety Task Force of Tasmania ad in which people were discussing how they go out and drink to excess.
  - 10/05 – Carnarvon Community newspaper editorial that the complainant felt promoted alcohol to teenagers.
  - 4/98 – Complaint about a fashion spread which appeared in a fashion magazine where in the corner of each page there is a slightly crumpled can of VB and in a separate shot three models are shown sitting around a table which has 6 cans of VB on display. Both the magazine and the alcohol company asserted that there was no prior knowledge or approval given for the use of the VB cans in the fashion advertisement.

**Is this particular advertisement within the scope of the ABAC?**

- 30 The advice of both the advertiser and the Fosters Group is that the advertisement was not produced, nor broadcast, with the knowledge of or with the prior approval of Fosters, or apparently the brand owners of Carlsberg. This is in contrast to earlier determinations made by the Panel, notably 07/09 concerning Dominos Pizza and Jim Beam, where it was established that the alcohol company had a measure of control and gave prior approval over the surrogate advertising used in that case.
- 31 As the information before the Panel is that an alcohol company did not have control or influence over the ad, the Panel must conclude that the ad is not "alcohol beverage advertising" within the scope of the ABAC scheme. In this case, the ad falls outside the ABAC provisions.
- 32 The Panel has concluded that it cannot make a decision on the consistency of the ad with the substantive ABAC provisions.