

ABAC

ABAC Complaints Panel
Determination No: 32/09, 42/09 & 43/09

Confidential Complaint & Complaints by Mrs Marna Oskam & Ms Deb Phillips
Product: Hahn Beer
Advertiser: Lion Nathan Limited

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

11 May 2009

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a television advertisement for Hahn Beer by Lion Nathan Limited (“the Advertiser”) and arises from a confidential complaint received 17 April 2009 and further complaints by Mrs Marna Oskam received 21 April 2009 and Ms Deb Phillips received 29 April 2009.

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 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 complaints raise a concern under the ABAC Code and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

6. The complaints are in the form of a confidential email received on 17 April 2009, an email from Mrs Marna Oskam received on 21 April 2009 and an email from Ms Deb Phillips received on 29 April 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 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 this advertisement [BH59/09].

The Advertisement

9. The advertisement is a television commercial for Hahn Superdry.
10. The advertisement features what appears to be a special occasion family meal at home. The camera pans to a young man and woman as the man says "I just hope I can make Lizzy as happy as you guys obviously are". The happy mood is interrupted by a mobile phone ringtone with the lyrics "I'm a tits and ass man". The young man looks embarrassed and is fumbling for his mobile phone to switch it off as the song continues to play when a middle aged woman stands and points her 375ml bottle of Hahn Superdry toward the young man and shouts "In the spirit of good taste turn the damn thing off." He switches the phone off and everyone continues the meal in uncomfortable silence. The lyrics resume as the screen changes to a picture of two 375ml bottles of Hahn Superdry with the tagline "great taste low carb also in 3.5% alc/vol". The website address "spiritofgoodtaste.com.au" is also shown.

The Complaint

11. The first complainant argues that:
 - (a) The lyrics of the ringtone played over and over again are offensive;

- (b) The ad appears before many children would be in bed and there is no way of preventing them seeing it (notes the ad was viewed on 9 April 2009 at 8.15pm on Channel 9 (WIN)); and
 - (c) Kids will sing the song at school.
- 12. The second complainant argues that:
 - (a) The language is quite offensive;
 - (b) The ad is regularly played during the AFL matches which are viewed by families and children; and
 - (c) Although it is obviously not directed at children, the sound of the “cool tune” and offensive language ensure that my children find this ad appealing.
- 13. The third complainant argues that:
 - (a) The language is offensive and degrading toward women; and
 - (b) The ad is shown when children may be watching, including during and after the football (notes the ad was viewed at 8.10pm on Sunday 26 April 2009).

The Code

- 14. The complaints raise issues under the AANA Code of Ethics, the Commercial Television Industry Code of Practice (CTICP) and the ABAC Code. The Code of Ethics issue goes to matters of taste and sexism and will be determined by the ASB.
- 15. The CTICP provides at paragraphs 6.7 to 6.13 that a commercial which is a direct advertisement for alcoholic drinks may be broadcast only in M, MA, or AV classification periods (8.30pm-5.00am & 12.00noon-3.00pm weekdays & 8.30pm-5.00am weekends and school holidays) or as an accompaniment to the live broadcast of a sporting event on weekends and public holidays.
- 16. The ABAC provides at Sections (a)(ii) and (b) that advertisements for alcohol beverages must:
 - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - i) must not encourage under-age drinking;
 - b) not have a strong or evident appeal to children and adolescents...

Arguments in Favour of the Complaint

- 17. In favour of the complaint it is alleged that:

- (a) the advertisement was broadcast at 8.10pm and 8.15pm in breach of the CTICP and at a time before children are in bed;
- (b) the advertisement was broadcast during AFL matches when children and adolescents are watching; and
- (c) the advertisement uses a “cool tune” and offensive language on a mobile phone ringtone that might appeal to children and adolescents and may be sung as a chant in the school playground in breach of sections (a)(ii) & (b) of the ABAC.

The Advertiser’s Comments

18. The Advertiser responded to the complaint and questions posed by the Panel by way of emails dated 4 and 5 May 2009. The points made by the Advertiser in relation to the advertisement were:
- (a) In relation to the advertisement in general, we do not believe there are any elements in the advertisement that could be considered to have a ‘strong or evident’ appeal to under 18s. Dinner parties are adult occasions. There is conversation of an adult nature. Novelty ring-tones are ubiquitous
 - (b) No spots have run incorrectly on any FTA network, metro or regional, since an error was discovered as a result of Complaint 27/09, except in live sport.
19. In Determination 27/09 which related to the same ad, Seven Affiliates (regional Seven network) uncovered an error where the spot was run seven times outside of the allowed time zones in March 2009 (refer Determination 27/09). They used the ad as free ‘filler’ and incorrectly coded it so the classification of the ad was not adhered to. They put in place processes to ensure that this error could not be repeated.

The Panel View

20. The complaints collectively raise three (3) separate issues under three (3) distinct codes of practice applying to alcohol beverage advertising broadcast on free-to-air television. These issues are:
- i. Is the ad offensive and tasteless in breach of section 2 of the AANA Code of Ethics?
 - ii. Was the ad broadcast at timeslots in breach of the Commercial Television Industry Code of Practice (CTICP)?
 - iii. Does the ad have strong and evident appeal to children and adolescents and/or encourage under-age drinking in breach of sections (a) (i) and (b) of the ABAC?
21. As explained in paragraphs 2-5 above, the regime applying to alcohol advertising is a little complex, involving multiple codes and two (2) separate adjudication bodies for complaints. In this case, the first issue under the AANA Code of Ethics will be dealt

with by the ASB, and not this Panel. The second and third issues, namely: “Was the ad broadcast in breach of the CTICP provisions?” and “Does the ad breach the ABAC?” will be dealt with in this decision.

22. Turning firstly to the times when the ad was broadcast, it is claimed that the ad was broadcast on Thursday 9 April 2009 at 8.15 pm on Channel 9 (WIN) during AFL matches, and during and after football, including 8.10 pm on Sunday 26 April 2009.
23. The CTICP provides that alcohol ads are not to be broadcast prior to 8.30 pm unless the broadcast is in conjunction with sport on weekends and public holidays. On the face of it, if the ad was broadcast at 8.15 pm on Thursday 9 April 2009 (which was not a Public Holiday), then the CTICP has been breached. In contrast, 26 April was a Sunday and the ad’s broadcast “during and after” the football would be consistent with the CTICP provision. Equally, broadcast of the ad with AFL matches most likely would be consistent with the CTICP provisions.
24. The Panel sought advice from the advertiser as to when the ad was broadcast. It should be noted that the nature of the ABAC scheme means that, in order to function, the Panel relies on information provided by advertisers in response to complaints *e.g.* the supply of copies of advertisements subject to complaints. This means that the Panel relies in good faith on the advertiser providing factual information, such as when an ad was broadcast.
25. The advertiser has advised that the ad was not broadcast on WIN at 8.15 pm on Thursday 9 April 2009 as claimed. Further, advice from the advertiser is that the ad has only been broadcast consistently with the CTICP requirements, since a mistake was identified regarding some executions of the ad being broadcast incorrectly in March 2009 (see Determination 27/09 which found the advertiser had breached the CTICP requirements).
26. The Panel is obliged to act on this advice that the ads have been broadcast in correct timeslots and must assume that the complainant is mistaken in the claim concerning 9 April 2009. Accordingly, the complaints as far as they go to the CTICP are dismissed.
27. The next issue concerns whether the ad has a strong or evident appeal to children. The complainants suggest this might arise from the broadcast of the ad with AFL games, or generally when children will see it, and also from the ringtone tune appealing to children and likely to be adopted by them in school ground play.
28. The Panel’s role here is to make decisions on the consistency of individual alcohol ads against the standards contained in the ABAC. The Panel is not empowered to make a free-standing judgment as to whether alcohol ads should be placed in a particular medium or not. The ABAC is a content code, which goes to what is contained within an ad, irrespective of where the ad is placed *e.g.* TV, print, radio, billboards, websites. Whether the ad, irrespective of its content, should or should not have been placed in the medium in the first place is not a decision the Panel is given responsibility to make.
29. There are restrictions on the placement of alcohol advertising in some of the codes which apply to particular mediums. For instance, the code applying to billboards restricts alcohol ads appearing on a billboard within a certain distance from a school. However the code applying to TV does not apply to Pay TV and does not prevent

alcohol advertising during a live sporting broadcast which is one of the concerns of the second and third complainants.

30. As explained, the ABAC applies across all forms of media and goes to the content of the ads and not to the placement of the ads. The issue of placement is indirectly raised by the ABAC's preamble in that the conformity of an ad with an ABAC standard is to be assessed with regard to "the class of persons to whom the advertisement is directed". This means that the ABAC does not prescribe the type of media within which an alcohol ad can be placed but, in assessing the standards as to the ad's content, the likely audience of a particular ad is relevant.
31. What all this means is that the Panel has to examine the content of each of the alcohol ads for which a complaint has been lodged and determine whether the ad contains elements which are inconsistent with the relevant standard set out in the ABAC. Given the nature of the complaints, the relevant ABAC provisions are found in sections (a) (ii) and (b). These provisions provide that the content of an alcohol ad must not encourage under-age drinking or have strong or evident appeal to children or adolescents.
32. The ad is set at a family dinner attended only by adults. It depicts a young man who has apparently recently proposed to the daughter of the parents hosting the dinner. While making a comment about how he hopes he can make his fiancée happy, his mobile phone rings with the "tits and arse" ringtone. It is the ringtone which has principally attracted the concern of the complainants. It is argued that the ringtone and its tune will be attractive to children.
33. The advertiser, in response, argues that the ad is set in an overtly adult scene and the conversation is adult. Novelty ringtones are stated to be "ubiquitous".
34. Section (b) provides an ad must not have "strong or evident" appeal to children. This standard accepts that an alcohol ad might have a residue or incidental appeal to children, but it cannot be targeted at children or, even if not directed at children, not have a strong appeal to young viewers. In assessing consistency of an ad with an ABAC standard, the Code's preamble provides that the ad is to be taken as a whole, and viewed from the position of a "reasonable person".
35. A majority of the Panel does not believe the ad breaches the ABAC. While the ringtone might have some appeal to children, the context of the ad makes it clear that it is directed at adults and endeavours to humorously show the discomfort of the man when the inappropriate ringtone cannot be stopped in the company of his future wife and in-laws. While the ad is clearly not to everyone's taste, it cannot fairly be said to have a strong or evident appeal to children.
36. Accordingly, the complaint is dismissed.