

ABAC

**ABAC Complaints Panel
Determination No: 77/09**

**COMPLAINT of Mr Phil Willis
Product: Liquorland
Advertiser: Wesfarmers Limited**

Professor The Hon Michael Lavarch – Chief Adjudicator
Elizabeth Dangar – Member
Professor Richard Mattick – Member

22 October 2009

Introduction

- 1 This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns promotional material for Liquorland by Wesfarmers Limited (“the Advertiser”) and arises from a complaint by Mr Phil Willis received on 11 September 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 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 is in the form of an email received by the ABAC Panel on 11 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 promotional tags that were seen on the shelves of a Coles Liquorland bottleshop.
- 10 The complainant states that promotional tags were attached to the Liquorland shelves included the titles "Hammered" and "Everyday".
- 11 The advertiser has supplied photographs of the store that show tags on the shelves with the words "\$ Everyday", "\$ Our Cheapest Price" and some specials tags. They have also supplied a copy of a poster that they say would have been placed above a stack of beer cartons near a counter and separate from the shelves which contains the text "Beer prices hammered" a picture of a Miller beer carton with the words "Red Hot Value" and the text "\$42.99 ea Miller Genuine Draft Bottles 24 x 355ml".

The Complaint

- 12 The complainant argues that the advertisements carry the implication that consumers should get hammered and drink every day or when placed together should get "hammered everyday" thereby encouraging excessive consumption or promoting the misuse or abuse of alcoholic beverages.

The Code

- 13 The Preamble to the ABAC states that the Australian Associated Brewers Inc, 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.
- 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:
 - (i) must not encourage excessive consumption or abuse of alcohol;
 - (iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages.

Arguments in Favour of the Complaints

15 In favour of the complaint it can be argued that by using the word “hammered” and “everyday” or just the word “hammered” in an alcohol advertisement the advertisement breaches section (a)(i) & (iii) of the ABAC Code by encouraging excessive drinking or misuse or abuse of alcohol beverages;

The Advertiser’s Comments

16 The Advertiser responded to the complaint and questions posed by the Panel by way of letter dated 8 October 2009. The principal points made by the advertiser were as follows:

- (a) Liquorland complies with relevant legislative obligations and industry codes, has a long standing commitment to the responsible service and promotion of alcohol, maintains compliance measures and internal expectations of its liquor advertising materials and considers its materials accord with the spirit of ABAC.
- (b) Liquorland considers its advertising was not sufficient to warrant review by the ABAC Panel and is unlikely to accept any decision of the Panel in this matter.
- (c) A reasonable class of consumers would consider these advertising materials to represent two discrete value propositions in relation to the shelf-edge prices of a number of its offerings.
- (d) Advertising references to “\$ Everyday” were only displayed on shelf edges. No reference to everyday appeared without a prefacing \$ symbol, being the denotation of an ongoing competitive price. This is used extensively across Coles brands in its supermarkets and service stations and Coles and Liquorland are unaware that any customer has interpreted the material to advocate daily purchase or daily consumption of products.
- (e) The term “hammered” was used in relation to temporary price reductions of beer prices. It appeared as part of a poster as well as in the fridge and on the shop floor adjacent to displays of the relevant beer products. The term clearly related to the price of the product which accords with its dictionary definition of “beating down” and is a common retail marketing reference to a price reduction. There was nothing in the store that would direct a consumer to the colloquial meaning of “hammered”, that is, to become intoxicated.
- (f) There was no juxtaposition of these two references anywhere in the store as they were communicated in respect of different products constructed of different materials, in different font and background, making no reference to each other, erected at different points in time and not physically proximate.
- (g) No customers have expressed confusion about these references.

- (h) All of the relevant advertising materials were only displayed and affixed inside the store. These materials were not displayed externally on the store nor were there “flyers”.

The Panel’s View

- 17 There are two threshold issues raised by the nature of the advertising and the status of the advertiser which need to be considered before turning to the substantive matters posed by the complaint. The first threshold issue is that Liquorland is not a member of an alcohol industry body sponsor of the ABAC, nor is it a signatory to the ABAC scheme. Accordingly, the ABAC’s adjudication process has no binding effect on the company. In addition, Liquorland have indicated disappointment that the Panel is considering this complaint have stated they are “unlikely” to comply with a Panel decision. Despite this, Liquorland have stated their commitment to good practice in alcohol product advertising and have provided a detailed response to the complaint and fully cooperated in the adjudication process. Accordingly, the Panel has proceeded to make this determination. It is important for Liquorland to note that once an alcohol complaint raises an issue under the ABAC the rules and procedures applying to the Panel mean it must adjudicate that complaint regardless of its merit.
- 18 The second threshold issue is whether the advertising which has attracted the complaint is “point of sale material” and hence is “carved out” from the operative provisions of the ABAC. The scope of “point of sale” material was considered by the Panel in its Determination No: 18/08 (WKD). The Panel decided that it takes the “point of sale” carve out to incorporate advertising material which:
- Is displayed adjacent to the point at which the alcohol beverage is purchased,
 - Is a fixture or akin to a fixture *i.e.* not intended to be taken away from the premises by a customer, and
 - Has limited exposure to a wider audience beyond the clientele of the premises from which the alcohol beverage is purchased.
- 19 The advice received from the advertiser is that:
- The advertisements were only displayed and affixed inside the store, were not displayed externally on the store, nor were there “flyers”.
- 20 The Panel concludes that as the advertisement was fixed inside the store only and therefore not visible to a wider audience than the clientele of Liquorland the complaint relates to “point of sale material” and as such is not required to comply with the ABAC.
- 21 That said, the Panel is also of the view that the advertising, even if not within the point of sale carve-out, would not be inconsistent with the ABAC standard in section (a). The material’s reference to “hammered” appears quite separately to the other material which refers to everyday prices. A reasonable consumer would take the terms to be advertising “puffery” relating to prices and not an encouragement to get drunk every day, as the complainant has suggested.
- 22 Accordingly the complaint is dismissed.