

A B A C

ABAC COMPLAINTS PANEL – DETERMINATION NO: 41/05

IN THE COMPLAINT OF “CONFIDENTIAL”

Product: Tooheys New Beer

Producer: Lion Nathan

Advertiser: New South Wales Rugby Union

Professor The Hon Michael Lavarch - Chief Adjudicator

Prof Fran Baum - Member

Ms Liz Dangar - Member

Ms Jeanne Strachan - Member

17 November 2005

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“the Panel”) concerns a television advertisement for the Tooheys New Cup, a Rugby Union competition conducted by the New South Wales Rugby Union (the “Advertiser”). The complaint was made by way of an email to the Advertising Standards Bureau (ASB) dated 6 September 2005. The complainant has requested that their personal details be kept confidential.

The External 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. Currently, alcohol advertising is subject to both:
 - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB); and
 - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and the complaints mechanism established under the ABAC Scheme.
3. The ASB and the ABAC 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.

The Complaint Timeline

5. The complaint is in the form of an email dated 6 September 2005 and received by the Panel on 6 September 2005.
6. The Panel endeavours to determine complaints within 30 days of receipt of the complaint but this timeline is dependent on a number of variable factors. In this case the complaint concerns an advertisement for the New South Wales Rugby Union for

the “Tooheys New Cup” which is the Sydney Club Rugby Competition. As the advertisement was not for a company which is a member of one of the four peak alcohol industry bodies, the issue of the Panel's jurisdiction to actually make a determination is a critical preliminary matter for this complaint. Gathering information on this point, as explained below, has delayed the making of this determination.

Pre-Vetting Clearance

7. The external-regulatory system also features independent examination of most proposed alcohol beverage advertisements against the ABAC prior to publication or broadcast. As the advertisement was not for an alcohol beverage as such, the pre-vetting scheme did not come into operation for this advertisement.

The Advertisement

8. The advertisement is a television commercial which depicts a segment of play in a rugby game. The segment features a team executing a series of off-loads along a backline leading to the scoring of a try in the left hand corner of the field. As the movement unfolds, the sound of the crowd watching the game is heard.
9. There is one prominent male voice which is heard in the crowd noise. The scene of the try being scored features a player diving over the try line and then raising his right arm from the ground to celebrate the try. As this occurs, the male voice becomes more distinct and more excited. The sound of a can being opened is heard and then a scene of a hand and arm is depicted entering the field in front of the player who has just scored the try. The hand holds a can of the product.
10. The male voice is heard saying as the can of beer is shown entering the scene “Here’s one for you, champion”. The football scene is then replaced by the slogan “It doesn’t get any closer” against a blue background. This scene is in turn replaced by a depiction of the logo for the “Toohey’s New Cup”.

The Complaint

11. The complainant considers the advertisement to be “disgraceful” which encourages excessive beer drinking and violence on the sporting field.

The Panel’s Jurisdiction and the coverage of the ABAC

12. 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 governmental official sits on the Management Committee of the Scheme.
13. 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 four peak alcohol industry bodies, namely:
 - Australian Associated Brewers Inc
 - Distilled Spirits Council of Australia Inc
 - Winemakers Federation of Australia Ltd.

- Liquor Merchants Association of Australia Ltd.

14. The vast majority of participants in the alcohol industry are members of one of the four 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.
15. This case involves an example of advertising from a non-alcohol industry body, namely the New South Wales Rugby Union (NSWRU). The NSWRU is not a member of one of the four industry associations who collectively sponsor the ABAC scheme. Accordingly, *prima facie* the ABAC standard for alcohol beverage advertising does not apply to the NSWRU. Equally, the Panel has no authority as such to make a determination which has any force with the NSWRU.
16. While this is the starting point, the situation is somewhat more complex. Lion Nathan, the producer of Toohey's New beer, is a sponsor of the NSWRU and apparently this sponsorship extends to the naming of the Sydney rugby competition as the "Toohey's New Cup". In essence, the question to be considered is whether the ABAC could still apply to the advertisement as an extension of the "advertising" program of a company bound by the ABAC.
17. By email dated 14 September 2005 the ABAC Executive Officer received advice from the producer regarding the advertisement. This advice was: "It's actually not one of our ads but was instead produced by the NSWRU for the Toohey's New Cup. We approved the use of our product only. We were advised by AAPS they had no need to see it because it isn't an alcohol ad". AAPS refers to the alcohol advertising – pre-vetting scheme.
18. The Executive Officer of the Panel sought information from Lion Nathan about the sponsorship of the NSWRU and the Tooheys New Cup. Specifically, the following questions were asked:

The advertisement in question is for the NSWRU which promotes the "Tooheys New Cup" and features a can of the product being offered to a player immediately after the scoring of a try. Please:

 - (a) confirm that your company is a sponsor for the Sydney Club Rugby Competition;
 - (b) advise if the sponsorship arrangement requires the NSWRU (or other rugby union entity) to promote your company or particular alcohol products in television advertising;
 - (c) advise what level of control your company is granted over NSWRU advertising which features an alcohol product produced by your company;
 - (d) advise if the advertisement which has been complained about was approved by your company;
 - (e) advise if your company considers it appropriate for advertising by the NSWRU, which features an alcohol product from your company, to comply with the provisions of the ABAC.
19. The Rules and Procedures applying to the Panel specify that advertisers / producers have 10 days to provide comments to the Panel on complaints. Unfortunately the producer, Lion Nathan, has not responded to this request for information. The Panel has allowed for a longer timeframe for a response than the rules required before proceeding to make its determination, given the particular circumstances of the case.

Without the information requested, the Panel cannot make judgment as to whether the advertisement is within the scope of the ABAC.

20. The Panel has received advice from its Management Committee that the NSWRU is willing to comply with the “spirit and intent” of the ABAC and will abide by this determination. Accordingly, the Panel has proceeded to make a decision, although it has not had the benefit of any comments from the producer, and there is no obligation on behalf of the NSWRU to comply with the Panel’s decision.

The ABAC

21. The ABAC provides in section (a) (i) that advertisements for alcohol beverages must present a mature, balanced and responsible approach to the consumption of alcohol beverages and accordingly must not encourage excessive consumption of alcohol;
22. Section (c) (i) provides in part that advertisements must not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and not depict the presence of alcohol beverages as a cause of or contributing to the achievement of sporting success.
23. Section (d) requires in part that there not be a depiction of any direct association between the consumption of alcohol beverages and the engagement in any sport and accordingly any depiction of the consumption of alcohol beverages in connection with the engagement in sport must not be represented as having taken place before or during the sporting activity.

Arguments in Favour of the Complainant

24. It might be argued that the advertisement breaches section (a) by irresponsibly placing a can of beer into a shot of actual play in a rugby game. Further, the presence of the product might be said to be contributing to the mood of the crowd or possibly to the success of the player.
25. Section (d) might be said to be breached by placing the product into the field of play and hence depicting a direct association between the product and a sporting activity.

The Panel’s View

26. The advertisement promotes the NSWRU Sydney competition and its sponsorship by Lion Nathan. It associates the game of Rugby with Tooheys New Beer. It does this in several ways, namely:
 - The visual device of inserting the can of beer into the scene of the player scoring the try;
 - The voice-over message associated with the can of beer shot of “Here’s one for you, champion”;
 - The use of the logo for the competition which features a product’s name.
27. The ABAC provisions on the association of alcohol with success and sporting pursuits impose standards which are expressed in the negative *i.e.* advertising is not to do certain things. These standards are:
 - Not suggesting the **consumption** or **presence** of alcohol may **creative** or **contribute** to a **significant** change in mood or environment by contributing to the achievement of sporting success;

- Not depicting any **direct** association between the **consumption** of alcohol and the **engagement** in any sport, with any depiction of consumption not being represented as having taken place **before** or **during** engagement in the activity.
28. The advertisement does not depict the actual drinking of alcohol as such. The players engaged in the football have no association with alcohol as a result of their actions. The product is shown in the field of play apparently at the instigation of a spectator of the game, and not a participant in the game
 29. Dealing specifically with the ABAC provisions, the Panel believes section (a) is not breached. Section (c) goes to the presence of the product being a cause of or contributor to sporting success. This provision is not breached, as no player in game has any voluntary association with the product. It is a member of the crowd, not the player, who has the beer and no scene depicts a player interacting or responding to the presence of the product. There is no change in mood on behalf of the players caused or contributed by alcohol. While the players celebrate the scoring of the try, the alcohol beverage enters after this occurs.
 30. Finally, section (d) deals with a direct association between consumption of the product and the engagement in any sport. The advertisement does not depict the drinking of beer, but the sound of a can being opened is clearly heard and presumably the opened can is the one shown in the field of play. The concept of “consumption” goes beyond actual drinking. The opening of a can of beer, its presentation to a person with the verbal invitation “Here’s one for you, champion” does amount to a depiction of “consumption”, in the Panel’s view.
 31. The second element of section (d) goes to the engagement in sporting activity. In this case the “consumption” occurs after the scoring of the try and the end of a passage of play. There is no suggestion, however, that the game itself has ended and accordingly the consumption is depicted during a sporting activity.
 32. The Panel concludes that section (d) has been breached and that it is inappropriate to advertise by showing the offering of a beer to a player during a rugby game or other sporting activity.
 33. The complaint is upheld.