

ABAC

ABAC Complaints Panel
Determination No: 81/07

CONFIDENTIAL COMPLAINT

Product: Vodka Cruiser Black
Advertiser: Independent Distillers (Aust) Pty Ltd

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

17 December 2007

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a complaint about labels and packaging for Vodka Cruiser Black by Independent Distillers (Aust.) Pty Ltd (“The Advertiser”) which were seen by the complainant in a BWS bottle shop in Nundah, Queensland.

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 Advertiser Code of Ethics (“the AANA Code”). 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. This 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 dated 20 November 2007 which was received by the ABAC Adjudication Panel on 21 November 2007.
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 not sought in respect of this advertising as the Advertiser is not a signatory to the Code, nor does the pre-vetting scheme currently apply to naming and packaging of alcohol products. While not a signatory to the ABAC, the Advertiser has been very co-operative in relation to the complaint process.

The Advertisement

9. This complaint refers to the label and packaging for Vodka Cruiser Black.
10. The label and packaging features a black background with white text and a red star displaying the name and a description of the beverage including the alcohol content and below that the text "Genuine 7% Vodka" against a red background. On the left side of the packaging the alcohol content is printed in large white font the same size as the name of the beverage.

The Complaint

11. The complaint raises concerns about the label and external cardboard packaging for Vodka Cruiser Black.
12. The complainant is concerned that:
 - a) the increased alcohol content of the "Black" range (7% compared to the original cruiser range content of 5%) appears prominently and frequently over the external cardboard packaging as well as the bottle in large colourful font;
 - b) compared to any other alcohol beverage packaging where the alcohol content is in small writing, the cruiser black packaging is making the higher alcohol content a selling point;
 - c) these drinks are targeted at the younger range of drinkers who seek out higher alcohol drinks in order to get more drunk, more quickly; and
 - d) it is the intent of the packaging to contain an inducement to prefer an alcohol beverage because of its higher alcohol content (in breach of section (e) of the ABAC Code).

The ABAC

13. The ABAC provides that advertisements for alcohol beverages must:
- e) not challenge or dare people to drink or sample a particular alcohol beverage, other than low alcohol beverages, and must not contain any inducement to prefer an alcohol beverage because of its higher alcohol content.

Argument in Favour of the Complaints

14. The advertising on the Vodka Cruiser Black label and packaging are in breach of section (e) of the ABAC (contain an inducement to prefer that product because of its higher alcohol content) by prominently and frequently displaying in large colourful font on both the bottle and external cardboard packaging the increased alcohol content of the “Black” range (7%) given that:
- a. the original cruiser range has an alcohol content of 5% and most other alcohol beverage packaging does not prominently display its alcohol content on its product and packaging;
 - b. the product targets a younger range of drinkers who seek out higher alcohol drinks in order to get more drunk, more quickly; and
 - c. the higher alcohol content is being used as a selling point.

The Advertiser’s Comments

15. The Advertiser responded to the complaint by way of letter dated 10 December 2007. The Advertiser has advised that:
- a. Their packaging differentiates between the regular Cruiser range and the Black range by using larger typeface for the 7%. The intent of this is to responsibly highlight to our consumers that the ABV is higher and encourage responsible drinking.
 - b. Their competitors (Jim Beam, Stolichnaya and Hi NRG) all display large typeface for their high ABV products. This is generally accepted as standard packaging and makes consumers aware they are drinking a higher ABV product. All these competitors have lower ABV products and use the typeface to distinguish between them.
 - c. While Independent Distillers like their competitors have a largely 18 to 30 target market, they do not market their products with the intent on getting people to drink higher alcohol volumes. Higher pricing plays a role in distinguishing between Cruiser and the higher ABV Cruiser Black. The higher ABV market accounts for around 10% of the 5% market volume.
 - d. Independent Distillers does not over promote these products; it does not as a rule run above the line marketing and its below the line marketing is largely confined to generic signage. Other than the 7% typeface informing of the ABV, none of our packaging or advertising communicates any message pertaining to the higher alcohol content. It certainly isn’t used as a selling point.

The Panel's View

16. As will be explained, this complaint has been dismissed, not on the substance of the complainant's concern, but because, as currently operating, the ABAC scheme does not extend to the naming and packaging of alcohol products. The reasons for this conclusion are set out in the following paragraphs.
17. The ABAC is a quasi-regulatory system which has at its heart the commitment of advertisers to comply with the standards contained within the ABAC and abide with the pre-vetting and complaints processes which make up the ABAC Scheme. This commitment is embodied through the sponsorship of the ABAC Scheme by three (3) peak alcohol industry bodies, namely the:
 - Australasian Associated Brewers
 - Distilled Spirits Industry Council of Australia
 - Winemakers Federation of Australia.
18. While the individual companies which are members of the sponsoring industry bodies cover the vast majority of alcohol beverage advertisers in Australia, there are alcohol producers and advertisers who are not members of the relevant industry bodies or are not signatories to the ABAC Scheme. The advertiser in this particular case is not an ABAC signatory.
19. This means that any decision by the Panel on this matter does not have any binding force on the advertiser. That said, the advertiser has fully cooperated with the Panel in enabling the determination to be made and has expressed its support for responsible alcohol advertising consistent with the ABAC standards. Given the willingness of the advertiser to engage in the ABAC processes, the Panel has proceeded to make a determination.
20. The complaint concerns the packaging and labeling of the product, and not a freestanding and separate "advertisement" for the product. This raises squarely the question of the ABAC's application to packaging and labeling.
21. The ABAC is a code of practice which applies to alcohol beverage advertising. The preamble to the ABAC commences by stating that the industry associations who sponsor the ABAC scheme "are committed to the goal of all advertising 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".
22. The ABAC uses the expressions "advertisement" and "advertising" within the body of the Code and the expression "promotion" in a protocol to the Code which deals with the "promotion of alcohol at events". None of these terms however are included in the "Definitions" component of the ABAC. This contrasts with the AANA Code of Ethics which defines "advertisement" as "matter which is published or broadcast in all of Australia or in a substantial section of Australia for payment or other valuable consideration and which draws the attention of the public, or a segment of it, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct".
23. An early decision of the Panel, No 16 of 2001, dealt with a complaint about the name of a product "Sex on the Beach". The Panel at this time determined that a product's name was not an "advertisement" for the purposes of the ABAC. It was concluded that the ABAC was "concerned with how brand names are promoted, with that promotion required to be conducted within the standards in the ABAC".

24. The Panel has not previously had to determine if the packaging of a product is within the ambit of the ABAC. It is however generally regarded that the intention of the ABAC scheme is to cover advertising which has the feature of specific material produced for publication or broadcast promoting a product and does not include the actual packaging of a product.
25. In June 2007 the industry sponsors of the ABAC made application to the Australian Competition and Consumer Commission (ACCC) for authorisation to establish a new scheme to cover the naming and packaging of alcohol beverages and specifically to introduce a Retailer Alert Scheme. The ACCC has given its authorisation to this new scheme, which means that complaints on naming and packaging of alcohol products will be able to be determined from the commencement date of the new scheme in 2008.
26. The ACCC authorisation decision notes at paragraph 1.10 "The (proposed) Alcohol Beverages Advertising (and Packaging) Code is designed to ensure that advertising, naming and packaging of alcohol beverages is conducted in a responsible manner. It is an extension of the existing ABAC which does not cover the naming and packaging of alcohol products".
27. Accordingly the Panel concludes that the intention of the current ABAC scheme does not cover the packaging of alcohol products and the Panel is unable to make a determination which goes to the merits of the complainant's arguments.
28. In dismissing the complaint, the Panel notes that a complaint of the nature made by the complainant will be capable of a decision on its merits upon the commencement of the ABAP Code Scheme in 2008.