

ABAC

ABAC Complaints Panel Determination No: 40&44-53/13

Complaints by Matthew Girdler, Michelle Thornton, Matthew Stackhouse, Ross Chadwick, Julie Steepe, Jenine Graham, Carolyn Schofield, Bill Tunbridge, Marnie Theodoulou, Melissa Krempin and Confidential
Product: J&B Scotch Whisky
Advertiser: Diageo Australia

Professor The Hon Michael Lavarch – Chief Adjudicator
Professor Richard Mattick – Member
Debra Richards – Member

2 May 2013

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns advertisements for J&B Scotch Whisky by Diageo Australia (“the Advertiser”) and arises from complaints received on 12, 21, 22 and 23 March 2013.

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 and Alcohol Guidelines which includes provisions about Billboard advertising.

3. The complaint 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 complaints raise concerns under the ABAC and accordingly are within the Panel's jurisdiction.

The Complaint Timeline

6. The complaints were received by ABAC on 12, 21, 22 and 23 March 2013.
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. The complaints were decided within the timeframe with the exception of the complaint received 12 March 2013 due to subsequent complaints received raising similar issues and being combined into a single determination.

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 these advertisements (12086).

The Advertisements

9. The complaints collectively refer to two advertisements that appeared in the Newcastle, New South Wales, region on public commuter buses and billboards. At least one of the advertisements appeared on a bus used to operate school bus services in the Hunter Valley.
10. The first advertisement (Junkyard) is of a dance party or gathering set in a junkyard at night where men and women are dancing and wearing nightclub attire of denim shorts and gold bikini tops. A mirror ball is suspended from the arm of a crane. A large dog wearing a studded collar is sitting on the ground. There are several open fires in drums. There are a number of wrecked cars. The scene is floodlit. A man at the front of the scene is holding a large ghetto blaster with red lights attached to the side. Several of the women are wearing

gold hard hats. Superimposed on the right side of the image is the tagline “Junkyard & Bling” and a bottle of J&B Scotch Whisky. Along the bottom of the scene is the text “Just Be Responsible” with the letters J & B highlighted in red and the text “Where unexpected parties start”.

- 11 The second advertisement (Jelly and Bass) is of a dance party or gathering set in an indoor location. A man and a woman appear at a DJ booth to the left of the scene. To the right, a man is sitting on a couch and has a woman sitting on his knee. There are four large speakers and dispersed throughout the scene are men and women dressed in nightclub attire and dancing. The speakers and furnishings in the scene are depicted as made out of colourful jelly. Superimposed on the right side of the image is the tagline “Jelly & Bass” and a bottle of J&B Scotch Whisky. Along the bottom of the scene is the text “Just Be Responsible” with the letters J & B highlighted in red and the text “Where unexpected parties start”.

The Complaints

12. The first complainant specifically refers to the Junkyard advertisement and is concerned that an advertisement for alcohol is located on a bus that is used to operate school bus services.
13. The second complainant specifically refers to the Jelly and Bass advertisement and is concerned that:
 - (a) Alcohol is being advertised to children in family environments including shopping centres and schools. The buses the advertisement is printed on are used to drop off and pick up school children aged from 4 years to 17 years;
 - (b) Encourages children to engage in binge drinking and alcohol related domestic violence and anti-social behaviour;
 - (c) Promotes a ‘party culture’ which is not a healthy and responsible way to address the issue of alcohol in our society;
 - (d) This type of advertising has no place in a school or community environment.
14. The third complainant is concerned that:
 - (a) J&B Scotch Whisky is being advertised on the side of school buses;
 - (b) Encourages children to engage in binge drinking and alcohol related domestic violence and anti-social behaviour;
 - (c) Promotes an irresponsible ‘party culture’ which leads to tragic consequences every year;
 - (d) This type of advertising has no place in our society let alone a school environment and children need to be protected.

15. The fourth complainant is concerned that the posters on the sides of buses advertising alcohol are promoting drinking to underage students from K – Year 12.
16. The fifth complainant is concerned that alcohol advertisements on school buses are encouraging underage drinking and have a strong appeal to children and notes that children are forced to catch these buses with alcohol being literally plastered all over them.
17. The sixth complainant is concerned that:
 - (a) It is inappropriate to advertise alcohol on school buses transporting children aged between 5 years old and 18 years old;
 - (b) Domestic violence, binge drinking, anti-social behavior and an unacceptable road toll are all impacted by excess alcohol and the advertisement does not depict the true effects of overindulgence in alcohol;
 - (c) The advertisement misleadingly influences children by depicting 'beautiful' people in a party atmosphere;
 - (d) The colourful and eye catching graphics of the advertisement suggest:
 - i. the models are enjoying life because they are consuming J&B; and
 - ii. that a "fantastic social life" will be achieved by drinking J&B;
 - (e) The placement of the advertisements breach part 1, sections (a), (b) and (c) of the ABAC.
18. The seventh complaint refers to the Jelly & Bass advertisement and is concerned that:
 - (a) The advertisement conflicts or detracts from the need for responsibility and moderation in alcohol advertising and consumption;
 - (b) The advertisement encourages consumption by underage persons.
19. The eighth complainant is concerned that the advertisements are on buses that are used to shuttle the complainants underage children to and from school and which also enter school ground in full view of young children.
20. The ninth complainant is concerned that:
 - (a) The advertisement promotes a 'party culture' which is not a healthy and responsible way to address the issue of alcohol in our society;
 - (b) Society is struggling with binge drinking, domestic violence and anti-social behavior related to alcohol over-consumption and the advertisement does not address the issue of alcohol in our society.

21. The tenth complainant is concerned that:

- (a) The advertisement is plastered across the whole side of Hunter Valley buses which are primarily used to transport school students to and from school;
- (b) Society struggles with alcohol fueled violence and alcoholism and the advertisement does not send the right message to young people.
- (c) The advertisement implies that unless you are drinking alcohol you cannot have fun.

22. The eleventh complainant is concerned that:

- (a) The advertisement suggests that alcohol is needed to have a good time;
- (b) and the advertisement is sending the wrong message to impressionable children.

The Code

23. The ABAC provides at Section (a) 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
 - ii) must not encourage underage drinking
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages
- b) not have strong or evident appeal to children or adolescents
- c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly -
 - i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

The Advertiser's Comments

24. The Advertiser responded to the complaints and questions posed by the Panel by letters dated 25 March 2013, 2 April 2013, 4 April 2013 and 23 April 2013. The points made by the Advertiser in relation to the advertisements were:

- a. The advertisements present a mature, balanced and responsible approach to the consumption of alcohol.

- i. There are no open containers of alcohol, nor any alcohol consumption depicted and the advertisements contain a responsible drinking message.
 - ii. The Advertiser believes that there is no basis for the claim that a 'party culture' or 'club environment' are places where excessive consumption occurs. Both terms are vague and there is considerable evidence to show that the majority of adults consume alcohol responsibly. Licensing regulations require clubs to enforce responsible service of alcohol. Therefore, it should not be assumed that any depiction of partying within a 'club environment' promotes or encourages excessive or irresponsible consumption.
 - iii. The claim that the 'look' of a music video clip results in the advertisement failing to present a mature, balanced and responsible approach to the consumption of alcohol or promotes or encourages excessive or irresponsible consumption of alcohol is broad and does not provide evidence for why music videos are linked to excessive or irresponsible consumption.
 - iv. It is reasonable to depict a positive view of the product and that failing to depict the "true effects of over indulgence in alcohol" does not equate to promoting or encouraging excessive or irresponsible consumption. There is considerable evidence to show that the majority of adults consume alcohol responsibly.
- b. The advertisements do not have strong or evident appeal to children or adolescents.
- i. The advertisements were not in any way created with the aim or intention of appealing to children and/or adolescents.
 - ii. The Advertiser took great care to ensure that all models featured in the advertisements were and looked over 25 years old and had their proof-of-age ID checked before they were recruited for the Advertisement.
 - iii. The Advertiser does not believe that the use of colourful, attractive and eye catching graphics results in the advertisements having strong or evident appeal to children. The advertiser claims that there is no factual basis to claim that colourful, attractive or eye catching graphics would have primary appeal to children or adolescents. Further, it is reasonable for the Advertiser to use attractive graphics to market its products and that using colour does not result in the advertisements having strong or evident appeal to children.

iv. The Advertiser does not believe that depicting a highly colourful and fanciful club or party scene encourages underage or irresponsible consumption or has strong or evident appeal to children or adolescents. The Advertiser asserts that:

- the Jelly & Bass advertisement depicts a surreal and unrealistic party scene in which the furniture is made of wobbly jelly and that this was designed to convey an unexpected and unrealistic party environment;
- it is reasonable for them to use colourful and surreal graphics to market their products and that using colour doesn't result in the advertisement having strong or evident appeal to children;
- jelly does not, in the way it has been represented, have primary appeal to an underage demographic;
- jelly, in this instance, was used to reflect the surrealism and unexpectedness of wobbly furniture;
- the depiction of the models as dancing reflects the behaviour of young adults above legal purchase age when they attend parties in nightclubs;
- the clothing of the models was intended to reflect the popular fashion choices amongst young adults above legal purchase age when they attend parties at the time the advertisement would be in market (summer season) and fashions for attending themed parties inside nightclubs.

c. The advertisements do not suggest that the presence or consumption of J&B Scotch whisky will result in a significant change in mood or the achievement of personal/social success, a fantastic social life, a good time, or imply that alcohol is needed to have fun.

- i. There are no open containers of alcohol, nor any alcohol consumption depicted in the advertisements.
- ii. There is no transformative moment in the static advertising and therefore no suggestion that the consumption or presence of the product will significantly change your mood.
- iii. Its reasonable to depict a positive view of the product and it should not be assumed that any depiction of people smiling, having fun or in a group equates to suggesting that consuming the product helps you have a social success, a fantastic social life or a good time.

- iv. It should not be assumed that any depiction of partying promotes a culture where alcohol is required as an element of success or leads to social success, particularly as there is significant evidence to show that the majority of adults consume alcohol in a mature and responsible manner.
- d. The placement of an advertisement is not a requirement of the ABAC. Nevertheless the Advertiser:
- i. Requests its agents ensure that any bus advertising is not placed on dedicated school route buses. In this instance, the advertiser engaged a third party, Ikon Communications (Ikon), to purchase advertising space on its behalf and instructed Ikon to target 18-22 year olds on their way to and from university. In response, Ikon purchased advertising space from Moove Media and the advertisement was placed on a public commuter bus which was subsequently re-routed by the bus company to service a high school. The Advertiser was not approached for approval for the advertisements to be displayed on the bus in question, and approval would not have been given for this placement on a school bus servicing a high school.
 - ii. Did not place the advertisements inside a shopping centre.
 - iii. Takes caution to ensure that marketing material is only placed in an environment where 70% of the audience can reasonably be expected to be over the age of 18.

The Panel's View

25. This determination is considering multiple complaints about two executions in a campaign for J&B Scotch Whisky. The complaints collectively raise the following issues about each execution:
- (a) Are the advertisements presenting a balanced and responsible approach to alcohol consumption and are they encouraging excessive consumption.
 - (b) Are the advertisements encouraging underage drinking and do they have strong or evident appeal to children or adolescents.
 - (c) Are the advertisements suggesting that the presence or consumption of alcohol is a cause or contributor to the achievement of social or personal success.
26. It is apparent that a trigger for some, if not most of the complaints was that the executions were placed on the side of a bus which serviced a school bus run in the Newcastle region of New South Wales. The Advertiser points out (and this is confirmed by the placement agency) that it did not intend for the advertisements to be placed on a bus that was to operate a school run. Upon receiving the

complaints, the Advertiser took quick action to have the executions withdrawn from buses servicing the school. In addition, the placement agency has advised that they have institute new procedures to ensure that no alcohol advertising is placed on buses used for school runs in the future.

27. While the actions taken by the Advertiser and the placement agency are appropriate, that is not the end of the Panel's consideration of the issues. The ABAC is a code which is focused upon the content of alcohol advertising, rather than where the advertising is placed. This means that all alcohol advertising, irrespective if the advertisement is found on a billboard or in a newspaper or in an electronic media, such as television or the internet, must satisfy the ABAC standards. Where the advertisement is found is a factor to be taken into account when assessing the advertisement's consistency with the standards, but the placement itself will not generally result in a breach of the Code. It is the content of the advertisement which is critical for the ABAC Scheme.
28. Some of the complaints did not raise concerns about the content of the advertisements as such, but rather the concern was specifically that an alcohol advertisement of any kind should be placed on a bus servicing a school route. Most of the complaints, however, contained concerns which went beyond the placement of the advertisement on the side of a bus and went to further points about the advertisements' content. It is these concerns which the balance of the determination will address.
29. In assessing an advertisement against the ABAC standards, the Panel is to have regard to the probable impact of the advertisement upon a reasonable person within the class of persons to whom the advertisement is directed or may be communicated, taking its content as a whole.

Do the advertisements present a responsible approach to alcohol consumption and do they encourage excessive consumption?

30. A number of the complaints raise concerns that the advertisements were irresponsible in their approach to alcohol consumption and their perceived encouragement of excessive consumption. This arose, it was argued, because the advertisements promoted a "party culture" and binge drinking. It was also argued by one complainant that the advertisements were unbalanced in that they did not depict the consequences of overindulgence in alcohol.
31. The Advertiser contended that the advertisements were consistent with ABAC standards in that:
 - (a) The advertisements did not depict alcohol consumption and there were no empty containers or any other evidence indicating that excessive consumption had occurred.
 - (b) Mere depiction of a club scene does not promote irresponsible or excessive consumption of alcohol. It was pointed out that the majority of alcohol consumed within clubs occurs in a responsible manner and alcohol is served in such venues consistent with responsible service of alcohol guidelines which licensed premises are obliged to follow.

- (c) It was argued that it was reasonable for the advertisement to present a positive view of the product and a failure to depict the effects of “overindulgence” does not equate to the advertisement encouraging irresponsible or excessive consumption.
32. The Panel does not believe the advertisements breach section (a) of the Code which goes to a responsible approach to alcohol consumption. In reaching this conclusion, the Panel noted:
- (a) The advertisements did not show alcohol consumption, nor do any of the characters depicted in the advertisements appear intoxicated.
 - (b) Placing characters in a club like environment of itself does not encourage excessive consumption or imply an irresponsible approach to alcohol use.
 - (c) The advertisements create fanciful, rather than literal, scenarios which a reasonable person would take into account when viewing the advertisements.

Do the advertisements encourage underage drinking or have a strong or evident appeal to children or adolescents?

33. All of the complaints expressed concern that the advertisements inappropriately encouraged underage drinking or were targeted at children. A common concern was the placement of the advertisement on the bus serving the school run. This point was accepted by the advertiser as being inappropriate and a mistake.
34. The question for the Panel is whether the advertisements themselves, beyond the school bus placement, are in their content in breach of the ABAC. In considering section (a)(ii) and (b) of the Code in previous determinations the Panel has noted:
- (a) each advertisement has to be assessed on its merits;
 - (b) the intention of the advertiser as to its target audience is not material, rather it is the ‘probable impact’ of the advertisement which is important;
 - (c) an advertisement might have some residual or incidental appeal to children or adolescents, but it is a “strong or evident” appeal which is prohibited;
 - (d) overall context of the advertisement is critical and in this respect the use of imagery, colour and use of the characters, amongst other elements, need to be assessed.

35. The Advertiser contended that the advertisements were consistent with ABAC standards in that:
- (a) The advertisements were not in any way created with the aim or intention of appealing to children and/or adolescents.

- (b) all models featured in the advertisements were and looked over 25 years old.
- (c) the use of colourful, attractive and eye catching graphics does not result in the advertisements having strong or evident appeal to children.
- (d) depicting a highly colourful and fanciful club or party scene does not encourage underage consumption or have strong or evident appeal to children or adolescents.
- (e) the Jelly & Bass advertisement depicts a surreal and unrealistic party scene in which the furniture is made of wobbly jelly and that this was designed to convey an unexpected, surreal and unrealistic party environment
- (f) using colour and jelly does not, in the way it has been represented have strong or evident appeal to an underage demographic;
- (g) the depiction of the models as dancing and their fashion reflects the behaviour of young adults above legal purchase age when they attend parties in nightclubs;

36. The Panel has concluded that the “Junkyard & Bling” advertisement did not breach the section (a)(ii) or (b) standard. In reaching this view, the Panel noted:

- (a) The people featured in the ad are over 25 years of age and clearly depicted as adults;
- (b) The junkyard scene has an adult “look and feel” that a reasonable person would not believe to have strong or evident appeal to children or adolescents.

37. The “Jelly & Bass” execution has features beyond the first execution which could be argued to have strong and evident appeal to children or adolescents, namely the use of the term “jelly” and the depiction of furnishings within the scenario as being made of brightly coloured jelly.

38. The advertiser contends that the use of bright colours and jelly in the context of the advertisement does not have appeal to underage persons. Rather, it is argued that the advertisement was “designed to convey an unexpected, surreal and unrealistic party environment”.

39. The ABAC Scheme has counterparts overseas and it is sometimes useful to consider how complaints have been dealt with when broadly similar issues to those being assessed by the Panel are in play. In the United Kingdom the Portman Group operates a scheme applying to alcohol producers and retailers, which contains a code of practice regarding alcohol beverage packaging and a complaints adjudication system.

40. The Portman Group's independent complaints panel has made six decisions featuring products using 'jelly' references or depictions in packaging. In each case, the decision went to whether the packaging had "particular appeal to under 18 year olds", which is the equivalent provision to section (b) of the ABAC. From these decisions, it can be noted that the following considerations were relevant:
- (a) That as 'jelly' as a product was more associated with children than with adults, care was needed to ensure that products marketed through the use of 'jelly' did not cause confusion with products aimed towards under 18 year olds.
 - (b) Bright colours were a factor to be taken into account when assessing the appeal of the advertising material.
41. While the overseas experience is of interest, the Panel must apply the ABAC provisions to the context of the advertisement before it. In this case, the Panel on balance believes that the "Jelly & Bass" execution does not breach section (b) of the Code. The context of the advertisement establishes that the use of 'jelly' does not have a child like appeal and overall the theme of age is directed towards adults.

Are the advertisements suggesting that the presence or consumption of alcohol is a cause or contributor to the achievement of social or personal success?

42. Several of the complainants raise concerns that the advertisements, by their use of images of models enjoying life and having fun, are conveying the message that by consuming J&B a fantastic social life, fun and enjoyment of life will be achieved.
43. The Advertiser contended that the advertisements were consistent with ABAC standards in that:
- (a) There are no open containers of alcohol, nor any alcohol consumption depicted in the advertisements.
 - (b) There is no transformative moment in the static advertising and therefore no suggestion that the consumption or presence of the product will significantly change your mood.
 - (c) Its reasonable to depict a positive view of the product and it should not be assumed that any depiction of people smiling, having fun or in a group equates to suggesting that consuming the product helps you have a social success, a fantastic social life or a good time.
 - (d) It should not be assumed that any depiction of partying promotes a culture where alcohol is required as an element of success or leads to social success, particularly as there is significant evidence to show that the majority of adults consume alcohol in a mature and responsible manner.

44. The question for the Panel is whether the advertisements suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment or be a cause of or contributor to the achievement of personal, social or other success. The key element is that of causation i.e. would a reasonable person take the ad as suggesting that alcohol is a cause or contributor to a change in circumstances or the achievement of success.
45. The Panel does not believe the advertisements can be said to breach the section (c) standard. The advertisements depict a scene in which no alcohol consumption or change in mood or environment is depicted. Depicting attractive people in a nightclub like setting is not inconsistent with ABAC standards. What is inconsistent is the suggestion that alcohol is needed to have a good time, however the ad does not make this suggestion.
46. The complaints are dismissed.