



ABAC Adjudication Panel Determination No. 101/15

Product: Bavarian Beer Café
Company: Urban Purveyor Group
Media: Outdoor
Complainant: Confidential
Date of decision: 12 October 2015
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns an outdoor advertisement and arises from a complaint received 10 September 2015.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;
 - (b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
 4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
 5. The complaint is independently assessed by the Chief Adjudicator and the ASB and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the ASB under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
 6. The complaint raises concerns under the ABAC Code.

The Complaint Timeline

7. The complaint was received on 10 September 2015.
8. The Panel endeavour 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 complaint has been determined within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Interim pre-vetting approval was obtained for the tagline of the advertisement but pre-vetting approval was not obtained for the final advertisement.

The Marketing Communication

10. The advertisement is situated at the Wynyard train station.
11. The advertisement includes the lines “GET OKTOBERFESTED” and “IS STEVE REALLY SHY?” in the top half of the advertisement. The bottom half of the advertisement is a photograph of two women wearing traditional Bavarian costume, in the case of one of the women accentuating her chest, with a man in a checked shirt with his arm around one of the women and resting his head against her chest while smiling at the camera. The caption underneath the image is “BOOK A TABLE NOW AT BAVARIANBIERCAFE.COM”.

The Complaint

12. The complainant is concerned that the advertisement:
 - (a) Is degrading to women, positioning them as sexual objects, happy to be grabbed by drunk men;
 - (b) Sends the message to men that it is ok to drink to the point that you lose your inhibitions and stop being “shy”, encouraging them to grab women and suggesting this is appropriate behaviour; and
 - (c) The waitresses at the bier café are portrayed as overly sexualized and it encourages sexual harassment in the workplace.

The ABAC Code

13. Part 2(a) of the ABAC Code provides:

The Code APPLIES to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, except as set out in Section 2(b). This includes, but is not limited to:

- Retailer advertising

Part 5 provides:

Marketer means a producer, distributor or retailer of Alcohol Beverages.

Part 3 provides that a Marketing Communication must NOT:

- (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage;
- (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
- (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

The Company's Response

14. The Company responded to the complaint by letter dated 18 September 2015. The principal points made by the Company were:

- There are a series of 5 adverts that have different adaptations of people letting their hair down and enjoying themselves at Oktoberfest. The ad in question is a picture of a shy guy enjoying himself at Oktoberfest with two girls. The objective of the advert is to showcase the feeling and spirit of Oktoberfest which brings people together who normally would not interact, in this case Steve whom everyone perceives to be shy is actually a lot more confident than people think. There is purposefully no alcohol shown in this advertisement as the intention is not to convey that alcohol is the catalyst to Steve losing his inhibitions, rather it is the joyous and spirited atmosphere of Oktoberfest celebrations that draws people together. Oktoberfest is well known for being a place of fun, festivities and the celebration that happens there every year for 6 million people. This advert represents the celebration of where people choose to go during the Oktoberfest festival in Australia each year, in this particular case it is referring to the Bavarian Bier Café.
- All of the creative was put through a rigorous process and was adapted to ensure it fell in line with the codes of ABAC, OMA and the commercial regulations of JC Decaux and APN outdoor. They all deemed the material to be appropriate for advertising.
- We take all complaints very seriously and this concern is no different. We feel very strongly that the complainant has misinterpreted this advert and singled out one execution in a series of adverts. The complaint notes that: "This ad is not only degrading to women, positioning them as sexual objects happy to be grabbed by drunk men." This is not the case, the purpose of this series of adverts is to capture the fun, conviviality, costumes and the Bavarian fare that is synonymous with Oktoberfest, which is an event that 6 million people attend every year in Germany, many of whom choose to dress in traditional attire. Throughout Oktoberfest, and at our venues, patrons and staff often wear traditional Bavarian outfits – which for women is the dirndl - and can be seen in this image. We are a family-friendly business, with a large contingent of respected and highly

valued female team members and by no means would we ever discriminate against women or do anything that leads to inequality or harassment in the workplace or in Australia. This statement is non-factual and is a stretch to be garnered from this advertising.

- Furthermore the complaint notes that there is concern around “the message it is sending to men that is it okay to drink to the point where you lose your inhibitions and stop being shy encouraging them to grab women and that is appropriate behaviour”. When creating this advertisement, we made the deliberate decision to leave alcohol out of the imagery completely. The intention here was to ensure these adverts were not misconstrued by the public. To suggest that this is promoting irresponsible consumption of alcohol and condoning men ‘grabbing women’ is a particularly narrow interpretation of the material and not in line with the Bavarian Bier Café brand and ethos.
- The image of people in traditional Bavarian attire alongside the tagline ‘Get Oktoberfested’ should help to clarify that the meaning behind this advert is to showcase that the spirit, fun and festivities of Oktoberfest is what makes Steve less shy and brings people together who don’t normally interact. People who have been to Oktoberfest in Germany will know that there is so much more to this celebration than alcohol – it is a joyous Festival celebrating food, bier, culture, tradition and comradery. Many families attend this event as well, which is no different to our venue and various Oktoberfest activities, which appeals to people of all ages.
- Overall, when looking at the advertisements as an overall holistic campaign, you will see that it is clearly evident that both male and females are represented in the manner and in the attire that they can be seen in at Oktoberfest. It would be our pleasure to further show you the Bavarian Bier Café experience, including the traditional attire for both male and female, during Oktoberfest and experience the array of events and activities taking place across the next 6 weeks.

The Panel’s View

15. On 12 October 1810 Crown Prince Ludwig of Bavaria married the Princess Theresa of Saxony. The citizens of Munich were invited to celebrate the wedding through attendance at a festival held in the fields in front of the city gates and from this origin the annual Oktoberfest was born. Since the 1960’s the Munich based festival has spread worldwide with many events and activities laying claim to some resemblance to the German original.
16. While Oktoberfest activities involve cultural events and a combination of food and dining experiences there is little doubt that in popular perception within Australia if not elsewhere that the event is very strongly associated with beer. In fact, the official Munich website for the 2015 event “Oktoberfest.de” contains a prominent entry which is entitled “it’s all about the beer”. This entry then begins with the words “Among the many attractions the “liquid gold” is probably the most important thing at the Oktoberfest”.

17. The Urban Purveyor Group is the owner of the Bavarian Bier Café. The Company's website states that the group runs 20 restaurants across New South Wales, Victoria and Queensland. The Company's Bavarian Bier Café in Sydney as well as other venues in other States run numerous events and promotions linked to the Oktoberfest theme. This determination relates to the Company's outdoor advertising for its Sydney based Oktoberfest activities and specifically one billboard which has the tagline "Is Steve really shy?"
18. The billboard depicts a scene in presumably the Bavarian Bier Café which shows the male character "Steve" with two women. One of the women is dressed in a Bavarian style dress which is very low cut and she has large breasts. Steve is positioned very closely to the woman's chest and this image is accompanied with the text "Get Oktoberfested" and the question "Is Steve really shy"
19. The complainant is concerned about the messaging in the advertisement. It is argued that the advertisement is degrading to women and suggests that the woman is portrayed in a way which suggests that she is happy to be "grabbed by drunk men". It also argued that the ad is suggesting that sexual harassment within the workplace is being encouraged. Further it is contended that the advertisement sends a message that it is okay to drink to the point that you lose your inhibitions and stop being shy.
20. In making the complaint, the complainant incorrectly described the ad as showing Steve holding a beer. In fact, this is not the case and no alcohol product is shown in the advertisement at all. This absence of the depiction of alcohol raises a threshold issue for the Panel as to whether the advertisement is within the ambit of the ABAC Scheme and hence within the Panel's power to make a decision. The ABAC Scheme provides a set of good marketing standards for alcohol products and alcohol product retailers in Australia. This means that the reach of the scheme has limits of which the most fundamental is that it applies only to alcohol beverage marketing.
21. The current ad is clearly promoting the Bavarian Bier Café. The Bier Café is an "alcohol retailer" within the meaning of the ABAC as it is a licensed premise which sells alcohol products to the public. It does not follow however that every ad from a licensed restaurant or café will necessarily be alcohol beverage advertising. This will be particularly the case if an ad makes no reference to alcohol and say, is solely promoting the attractions of the restaurant based on features such as its food and convenient location.
22. The issue of the reach of the ABAC Scheme when dealing with advertising from an alcohol retailer was considered by the Panel in its Determination 14/15 concerning a television commercial for the Adelaide Casino. In that example the television advertisement was promoting the Adelaide Casino as an entertainment venue but in doing so alcohol products were extensively depicted as being present and consumed by casino patrons. The Panel held that the advertisement could fairly be regarded as an alcohol beverage advertisement for ABAC purposes given the prominent depiction of alcohol products and their use.

23. The Panel believes that for an advertisement from an alcohol retailer to be considered an alcohol beverage advertisement, then either directly or by necessary implication the advertisement must relate to alcohol as a product. This relationship need not be the primary purpose for the advertising ie the ad could be promoting the attractions of a restaurant or café, but in doing so there must be a discernible link to alcohol as a product for the advertising to fall within both the letter and the spirit of the ABAC Code and Scheme.
24. In the current advertisement, the discernible link to alcohol as a product does not arise through the actual depiction of alcohol products. If the link is to be established, then it must be by necessary implication through a combination of images and text which would lead a 'reasonable person' to conclude that the advertising concerned alcohol beverages. In this advertisement the images and text are:
- A scene within the Company's restaurant.
 - The text 'Get Oktoberfested'.
 - The venue's name and website address.
 - The Text "Is Steve really shy?"
25. On balance, the Panel believes the advertisement can be considered alcohol beverage advertising from an alcohol retailer. In reaching this conclusion the Panel has noted:
- The advertisement is set within the Company's venue, which is self-described as a 'bier café'.
 - The expression "Get Oktoberfested" draws attention to the Oktoberfest festival which is popularly and closely associated with alcohol consumption particularly beer.
 - A reasonable person would take the combination of images and text to be promoting the availability of alcohol beverages at the venue as part and parcel of the appeal of the venue.
26. The complaint raises a concern that the ad is degrading to women. This issue falls within the AANA Code of Ethics rather than the ABAC and will not be dealt with in this determination. The two ABAC issues raised are:
- Does the advertisement encourage irresponsible or offensive behaviour related to alcohol use and;
 - Does the advertisement imply that alcohol is a cause of or contributor to the achievement of personal or social success.
27. In assessing if an advertisement is consistent with a Code standard the Panel is to have regard to the probable understanding of the ad by a reasonable person. The 'reasonable person' benchmark is drawn from Australia's Common Law system and means that the views, values and opinions common in a majority of the community is the guiding criteria.
28. The Panel does not believe that the ad is encouraging offensive behaviour. While the male character is positioned closely to the woman in the Bavarian style dress, the interaction appears to be consensual and there is no

appearance that either the male or the female characters are drunk. The image gives the impression that the 3 people were voluntarily posing for a photograph.

29. Section 3(c)(ii) of the Code provides that a marketing communication must not show (visibly, audibly or by direct implication) the presence of alcohol as a cause of or contributing to the achievement of personal or social success. The complainant argues that the ad is suggesting that it is okay to drink 'to the point that you lose your inhibitions and stop being shy'. If this is a fair interpretation of the ad, then it will be in breach of the Code standard.
30. The Company's response indicates that it was aware of this possible concern. The Company explains that it made a 'deliberate decision to leave alcohol out of the imagery completely; so that the ad would not be 'misconstrued by the public'. It is argued that 'the ad showcases the feeling and spirit of Oktoberfest which brings people together who normally would not interact, in this case Steve, whom everyone perceives to be shy is actually a lot more confident than people think'.
31. The key concept is the Section (c) standard is that of causation. It is permitted to show alcohol with confident and successful people, but it cannot be suggested that alcohol was a cause of the achievement of this confidence or success.
32. The Panel believes that the advertisement does breach the Section 3(c)(ii) standard. In reaching this conclusion, the Panel has noted:
 - While the Company stated that it created the advertisement mindful of the standard, the operative test is not the Company's intention but the probable understanding of the advertisement by a reasonable person.
 - The advertisement establishes that 'Steve' is not generally perceived to be confident but is thought of as shy.
 - Steve is shown as acting in an unreserved manner though his actions with the women in the Bavarian style dress.
 - The change in Steve's demeanour can reasonably be taken to him being 'Oktoberfested' by attending the Company's venue.
 - 'Oktoberfested' would be taken by a reasonable person as meaning participating in activities popularly associated with Oktoberfest events, which include the presence and consumption of alcohol.
 - Taken as a whole, a reasonable person would interpret the advertisement as suggesting alcohol is at least a cause of Steve achieving confidence and success.
33. Accordingly, the complaint is upheld.

Addendum by Chief Adjudicator – 27 October 2015

1. After this determination was made, the complainant advised the ABAC Scheme Executive Officer that the description of the advertisement contained in the determination was incorrect. This description had been based on a copy of an advertisement supplied by the Company as being the same as the one located at Sydney's Wynyard Railway Station and which had been seen by the complainant.
2. The complainant provided a photograph of the Ad. When contacted, the Company conceded that the complainant was correct and that the previous information given to the Panel related to a different execution. By way of explanation, the Company said that this had occurred 'due to an oversight caused by a lack of awareness that there were multiple executions of this Ad in the market'. It was further stated that the Company's Marketing Director was overseas at the time that the complaint was received and responded to.
3. The substantive difference between the Ad supplied to the Panel by the Company and the actual Ad viewed by the complainant is that 'Steve' is shown holding a large and full stein of beer. This difference between the two executions is important for two reasons, namely:
 - (a) The issue whether the Ad could fairly be regarded as alcohol beverage advertising and hence fall within the scope of the ABAC Scheme is a more straight forward question in the actual advertisement as opposed to the one supplied to the Company, and
 - (b) The Company's argument as to why it contended that the advertisement was not inconsistent with the ABAC provisions relied in large part on the assertion that the advertisement did not contain a depiction of an alcohol beverage. It was argued that this was a deliberate choice by the Company to make the advertisement consistent with ABAC standards.
4. The Panel's determination is that the execution supplied by the Company was in breach of the ABAC, specifically Section 3(c)(ii). The Panel further believes that the actual execution as seen by the complainant and located at Wynyard railway station is also in breach of Section 3(c)(ii). To that extent, the Company's failure to supply the correct advertisement does not alter the outcome.
5. The Panel is however, concerned by the Company's actions. The ABAC complaints process relies on the good faith and accuracy of information supplied by companies in both identifying then providing copies of advertisements which have been the subject of a public complaint. This occasion appears to be the first time since the Scheme's commencement in 1998 that the Panel has been supplied with an incorrect advertisement. While the Company's explanation that it did this by way of a mistake might be accepted on face value, the seriousness of the error needs to be clearly stated.
6. The Panel draws the particular circumstances of this event to the attention of the ABAC Scheme Management Committee for consideration.