



ABAC Adjudication Panel Determination No. 118-119/15

Product: Munich Brauhaus and Bavarian Bier Cafe
Company: Urban Purveyor Group
Media: Outdoor
Complainant: Mr Knight & Mr Abraham
Date of decision: 3 December 2015
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns two outdoor advertisements by Urban Purveyor Group (“the Company”) and arises from two complaints received 23 October 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 complaints raise concerns under the ABAC Code.

The Complaint Timeline

7. The complaints were received on 23 October 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. Pre-vetting approval was obtained for each of these marketing communications.

The Marketing Communications

10. The two billboards that were seen in various train stations are described following.

First Advertisement – “Where three is never a crowd”

11. The advertisement includes a photographic image in the left third of the advertisement that features three smiling women in Bavarian costume with visible cleavage each holding a stein of beer with one additional stein of beer in front of the group. The woman in the middle is waving at someone to the left of the camera.
12. On the right two thirds of the advertisement against a dark blue background is the text “Oktoberfest 2015” in a light blue elaborate font at the top of the page. Below is white bolder font for the text “WHERE THREE IS NEVER A CROWD”. The bottom right section of the advertisement includes the dates “18 September – 31 October” in light blue font and below in white text “Book now munichbrauhaus.com”. On the bottom right of the page is the Munich Brauhaus logo in light blue and white.

Second Advertisement – “See Tim from Indoor Cricket in Action”

13. The advertisement includes a photographic image in the right half of the advertisement that features a man in Bavarian costume standing in the middle of a group of people also wearing Bavarian style clothing. His arms are outstretched and one fist is clenched in a triumphant pose and his mouth is open as if calling out or shouting. Some of the people around him are holding up steins of beer in various sizes.
14. On the left side of the advertisement against a blue background is the text “Get Oktoberfested” in a white elaborate font at the top of the page. Below is white font with the text “SEE TIM FROM INDOOR CRICKET IN ACTION”. Below in smaller white font is the text “18 September – 31 October. Book a table now at Bavarianbiercafe.com”. In the upper middle of the page is the Bavarian Bier Café logo in light blue and white.

The Complaint

15. The first complainant is concerned that the first advertisement:
 - (a) includes an exploitative and demeaning portrayal of women by including three women and focusing on their breasts;

- (b) suggests binge drinking by showing about 6 litres of beer in front of the three women; and
 - (c) suggests a lewd invitation of sex with multiple partners if you go to the venue by including a tagline that suggests a threesome.
16. The second complainant is concerned that the second advertisement:
- (a) includes the tagline “get Oktoberfested” which is reminiscent of “get maggoted” and similar phrases about excessive alcohol consumption, a connection which most reasonably aware persons would make; and
 - (b) the slogan “see Tim from indoor cricket in action” suggests that alcohol drinking associated with Oktoberfest provides some kind of benefit or mood elevation and his stance and aggressive expression reflects this.

The ABAC Code

Part 3 provides that a Marketing Communication must NOT:

- (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines;
- (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

17. The Company responded to the complaint by letter received 10 November 2015. The principal points made by the Company were:
- There are a series of 5 adverts that show Bavarian women enjoying the spirit, atmosphere and bier that Oktoberfest is famous for. There is one advertisement which shows a group of three women laughing and enjoy a stein of bier, which is shot in one of our Bavarian venues. This advertisement, accompanied by the tag line “Where three is never a crowd” is intended to convey the spirit of Oktoberfest whereby friends and strangers alike come to share in the joyous festivities. The tag line is a play on the common phrase ‘two’s company, three’s a crowd’, implying that at Oktoberfest there is no ideal combination of people; the more the merrier.

- 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. They all deemed the material to be appropriate for advertising.
- The complainants have misinterpreted the advertisements which are part of a multi-channel Oktoberfest campaign. The complaint notes that: “Three women with a focus on their breasts. About 6 litres of beer between them and a tagline suggestion of a threesome”. 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 these images.
- Secondly, each of these women is holding a stein of Bavarian bier, which is 1L per bier. To ensure we were not promoting the irresponsible consumption of bier, the steins are three quarters full which is in line with advice we have received from ABAC with previous advertising campaigns. It is not our intention to suggest or promote binge drinking. Our venue strictly adheres to Liquor Licencing protocol and we go to great lengths both in venue and with advertising to ensure that these licencing restrictions are upheld at all times.
- The complainant goes further to state that the advertisement is an “exploitative and demeaning portrayal of women, suggesting binge drinking and lewd invitation of sex with multiple partners if you go to the venue’. 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. To suggest that these advertisements aim to lewd sexual behaviour is a particularly narrow interpretation of the material and not in line with the Munich Brauhaus brand and ethos.
- The Oktoberfest festivities that take place at Munich Brauhaus are a celebration of Bavarian food, bier and music which are attended by thousands of Melburnians who seek an authentic and joyous Oktoberfest experience. We have a range of unique activities on offer ranging from family Sundays to Ladies Night and more.
- In the case of the Tim from indoor cricket execution, the ad features a picture of a sports player enjoying himself at Oktoberfest surrounded by his team mates and fellow customers. 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 Tim who is a character that his team mates would usually see on the pitch

at indoor cricket. The intention of this advertisement along with the catch phrase 'Get Oktoberfested' is to suggest that the energetic celebration of Oktoberfest is the catalyst to Tim's celebratory spirit. 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.

- The complaint notes that: The phrase "get Oktoberfested" on the billboard is reminiscent of "get maggoted" and similar phrases about excessive alcohol consumption, a connection which most reasonably aware persons would make". 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. The idea behind 'Get Oktoberfested' is to ensure that people understand it is the joyous and spirited atmosphere of Oktoberfest celebrations that draws people together, not specifically the bier and certainly not the irresponsible consumption of alcohol. We do not believe this is a reasonable interpretation of the advertisement and we can ensure you that we take liquor licencing protocol very seriously at all of our venues.
- Furthermore the complaint notes that there is concern around "the slogan "see Tim from indoor cricket in action" suggests that the alcohol drinking associated with Oktoberfest provides some kind of benefit or mood elevation and his stance and aggressive expression reflects this". We believe this is a particularly narrow interpretation of this advertisement. The copy line 'Get Oktoberfested' helps to clarify that the spirit of the German celebration provides a joyous spirit rather than the alcohol itself. The stance of 'Tim' in this advertisement is similar to one of a sports player who has victoriously achieved a win for his team, which is why the advertisement clarifies that the character is an indoor cricket player. It was certainly not our intention to portray Tim's stance as aggressive, rather joyous and celebratory amid the festivities of Oktoberfest at his local Bavarian Bier Café. 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 the campaign paints a depiction of both male and females who are the stereotypes of locals we see at our venues every day. The yoga instructors, the sports players and the corporates who all come together to celebrate Oktoberfest at their local Bavarian Bier Café each year.

The Panel's View

Introduction

18. The Urban Purveyor Group is the owner of a number of restaurants in Australia which are styled on Bavarian Bier Halls. The annual Oktoberfest event features heavily in the Company's marketing and its 2015 campaign has attracted numerous complaints resulting in three separate Determinations by the Panel.
19. The rules and procedures applying to the Panel's processes provide that each complaint received about a marketing communication is assessed on its merits and the Panel's Determination deals only with the concerns raised by the complainant. This means it is possible for a single marketing communication to be the subject of several separate Determinations if individual complaints raise discrete and different concerns which have not been dealt with in a previous Determination about the marketing communication. In relation to the Oktoberfest theme marketing campaign by the Company the concerns raised in the previous two Determinations have related to:
 - That a specific outdoor advertisement was suggesting the alcohol products available at a Company venue was a cause of a change in mood and the achievement of social success (Determination 101/15) and;
 - The suggestion that a series of five outdoor advertisements were encouraging offensive behaviour namely sexual harassment and implying that alcohol may be a cause of the achievement of sexual success (Determination 113/15).
20. The two complaints dealt with in this Determination are about two specific outdoor advertisements promoting the Company's venues in Melbourne which either were not considered in the previous Determinations or new issues have been raised which were not dealt with in the earlier Determinations. The concerns raised by the current complaints are that:
 - The first advertisement is encouraging excessive consumption (binge drinking) and the achievement of sexual success and
 - The second advertisement encourages excessive consumption through the phrase "Get Oktoberfested" and that the advertisement as a whole is suggesting that alcohol causes or contributes to a significant change in mood.
21. For completeness it should be noted that the first complaint also raises a concern that the first advertisement demeans and objectifies women. This has been a frequently stated concern about the Company's entire Oktoberfest themed marketing campaign. While this is a legitimate point to be raised by a complainant, issues of sexism and objectification of women fall within the ambit of the AANA Code of Ethics rather than the ABAC and accordingly are considered by the Advertising Standards Board and not this Panel.

The first advertisement:

22. The complaint concerning the first advertisement firstly raises a concern regarding the use of the strapline “where three is never a crowd” by arguing that the advertisement suggests that alcohol might lead to the achievement of sexual success. The Company rejects this interpretation arguing that the purpose of the ad is to capture the “fun, conviviality, costumes and the Bavarian fare that is synonymous with Oktoberfest”.
23. The Panel does not consider that the ad is a breach of section c(ii) of the ABAC which states that a marketing communication must not suggest that the presence or consumption of an alcohol beverage is a cause or contributes to the achievement of social or sexual success. The advertisement features three women, apparently staff members at a venue smiling and interacting with unseen persons out of shot. It seems too great a stretch to interpret the advertisement is implying that sexual success will be achieved simply through the strapline and the image.
24. The second concern raised by the complaint is that the ad is encouraging binge drinking. The ad does depict the three women with five one litre steins of beer. The dress of the women would indicate that they are staff members in one of the Company’s venues and as such are likely serving the beer to customers rather than consuming the product themselves.
25. On balance the Panel does not believe the ad can be fairly interpreted as encouraging excessive alcohol consumption. In reaching this conclusion the Panel has noted:
 - That the scene would most likely be interpreted as staff members within the Company’s venue with beer that they are going to serve to patrons.
 - There is no depiction that the women themselves are consuming alcohol and their demeanour and appearance gives no indication that they have been affected by alcohol.
 - The number of steins when taken in the context of staff members serving alcohol to patrons cannot be fairly interpreted that any single person is engaging in excessive consumption.
 - The advertisement does not use the active “Get Oktoberfested” strapline, but rather the passive and factual “Oktoberfest 2015”.

The second advertisement:

26. The second complaint concerns an advertisement featuring a group of patrons in a Company venue. Each person in the group is shown in an animated and excited mood with a number of the people holding glasses or in one case, a stein of beer. The complaint raises two points, related to the strap line “Get Oktoberfested” and that alcohol is causing or contributing to an elevated mood.

27. The Company argues that the complainant has misinterpreted the advertisement. It argues that the ad aims to 'showcase the feeling and spirit of Oktoberfest'. Oktoberfest it is contended is a celebration in itself and this celebration is marked by food, cultural activities and alcohol use as a by-product of the celebration rather than its cause.
28. The Panel noted in Determination 101/15, that while Oktoberfest activities involve cultural events with a combination of food and dining experiences, the popular perception within Australia is that the event is 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". The entry then begins with the explanation "Among the many attractions the 'liquid gold' is probably the most important thing at the Oktoberfest".
29. In assessing if an advertisement is in breach of a code standard, the Panel is to have regard of the probable understanding of the ad by a reasonable person, taking the content of the ad as a whole.
30. The Panel believes a reasonable person would take the strap line 'Get Oktoberfested' as a call to participate in activities popularly associated with the event, of which the consumption of alcohol is prominent. While it might be accepted that Oktoberfest involves more than drinking, an ordinary member of the community, exposed to popular culture portrayals of Oktoberfest in movies and television shows can fairly be expected to associate alcohol use with Oktoberfest themed events.
31. With this starting point assumption, it is reasonable that the phrase "Get Oktoberfested" involves partaking of alcohol. While the Panel does not believe the phrase can be said to be directly equated with 'get drunk' as contended by the complainant, it does invoke an encouragement of alcohol consumption.
32. Whether the ad then can be said to breach section a (i) by encouraging excessive consumption as opposed to moderate consumption rests on how the phrase sits with the advertisement as a whole. The Panel believes the second advertisement does breach section a (i). In reaching this conclusion the Panel has noted:
 - The use of phrase "Get Oktoberfested" is an active call for alcohol consumption as explained above.
 - The ad shows a group of people in a highly animated and boisterous state consistent with excessive alcohol consumption.
 - A number of the group are shown with partially consumed glasses or steins of beer reinforcing that alcohol use is occurring.
 - The main character "Tim" is shown behaving in a manner which a reasonable person could readily equate with being affected by alcohol use.

- Each of these elements, taken as a whole, amount to a reasonable person interpreting the ad as an encouragement of excessive alcohol use.
33. The second concern raised by the complainant is that the ad breaches section (c)(i) by suggesting that the presence or consumption of alcohol may create or contribute to a significant change in mood. The company refutes this concern by arguing that the mood is created by the joyous celebration of Oktoberfest which combines food, beer, culture, tradition and comradery. It is stated that the reference to “Tim” being from indoor cricket establishes that his depicted behaviour is similar to a sports player who has victoriously achieved a win for his team.
 34. The key element of the section (c) standard is that of causation. Alcohol is able to be depicted in marketing as being associated with success or the marking of an event or as part of a convivial mood. What the Standard prohibits is the suggestion that alcohol causes a change in the mood e.g. from sombre to joyful or from reserved to rowdy or emotional to calm.
 35. Over time the Panel’s decisions on this standard and the related standard embodied in section (c)(ii) have tended to be associated with marketing formats which portray a story arc, in which the introduction of an alcohol product alters the mood or environment depicted in the story prior to the introduction of the alcohol product. For example see Determinations 67/15, and 59/14.
 36. A print or outdoor advertisement does not have the same potential to depict a journey as such, and hence the notion of a ‘change in mood’ may not arise as readily. That said, the ad is to be assessed as a whole and reasonable inferences might be drawn from the ad that alcohol has caused a significant change in mood.
 37. The Panel does believe that the ad breaches Section (c)(i). In reaching this conclusion The Panel has noted:
 - The strapline ‘Get Oktoberfested’ connotes a call to partake in activities including alcohol use.
 - The demeanour of the group depicted is consistent with alcohol consumption.
 - Alcohol is shown being consumed by a number of the group.
 - The main character ‘Tim’ displays exuberant behaviour which could be reasonably taken as related to alcohol use.
 - Taken as a whole, the call to action implicit in the ‘Get Oktoberfested’ strapline, with the depictions of alcohol use and the mood of the group and the ‘Tim’ character can reasonably be concluded as suggesting alcohol may contribute to a significant change in mood.
 38. Accordingly, the first complaint regarding the first advertisement is dismissed and the second complaint regarding the second advertisement is upheld.