



ABAC Adjudication Panel Determination No. 44/16

Product: Thirsty Camel
Company: Thirsty Camel
Media: Radio/Digital
Complainant: Confidential
Date of decision: 15 April 2016
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a radio and digital advertisement for Thirsty Camel (“the Company”) and arises from a complaint received 15 March 2016.
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 and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 15 March 2016.
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 not obtained for this marketing communication.

The Marketing Communication

Radio

10. The radio advertisement is delivered by radio hosts, Hamish and Andy on Fox FM:

A: And um Hame, today Thirsty Camel came to us, Thirsty Camel that have the bottleshops everybody, you might know them, thirstycamel.com.au, we should point out

H: It's your nearest local, its your nearest shop

A: Because they came to us and they said we want to play a game with you for next week, do you have a game in mind and we came up with this

H: And we said Yeees.. How about this and this is where it would be interesting getting everyone's feedback. We came up with the concept, well let's rewind it a bit, first of all props to people that can do three drinks from the bar, three pints

A: Holding three pints that is

H: Pretty good, its always a good

A: When you see someone coming through on their way back to a table

H: It's like seeing someone with a pram

A: With three pints you part ways, don't you

H: Not going to get in your way you've got a difficult situation ahead of you and the least I can do as a citizen is help you out. For gods sake we are living in a community here, what sort of person obstructs someone with three drinks. Then Andy and I were talking about how good each of us thought we were at carrying three drinks and stability and I was saying, I pride myself on knowing if I am swinging it one way, if someone's coming at me and I need to swing drinks one way, being able to absorb all the angles, the tilt, my legs, my full body is able to make sure I don't spill a drop. Something I am quite proud of. And you're the same, I am not saying you are a bad three drinker, and we thought could we make a competition out of this for Thirsty Camel

A: With the grand prix coming up, people have heard of hot laps

H: Sure

A: Supercars big for their hot laps we wanted to do a wet lap. Essentially what it is is you're a passenger in a supercar

H: V8 supercar

A: Yep we'll get a professional driver

H: You're not allowed to drive we already looked into that

A: On a racecourse and you'll be holding three pints full to the brim, as you go around you've got to try and tactically keep as many mls as possible in those pints. At the end however many mls you have left over, its \$5 per ml. You win \$5 per ml

H: Now that \$5 per ml of beer or whatever, that's expensive, that's a good price

A: If you manage to keep it all 100% we've done the maths here, you get \$8,520.00

H: That's pretty good

A: So half, even just half, you'll get 4 grand

H: So then it starts getting tricky, then we started talking tactics. This is when we'd be interested in getting everyone's take on it, 131060. Do you think you'd be especially good at this game, how good are you at carrying drinks because I once heard a guy saying he was easily, four is big but a lot of people can do four. I've heard someone saying before that they were confident with five, they get the bartender to put the fifth on top and its just not a worry for them, so if you think you're especially incredible at carrying drinks from the bar this is the contest for you but 13 10 60, how would you approach this challenge

A: Yes what comes to mind, what are your tactics, because again we haven't tested this game

H: And would you register, is this finally your sport

A: Yes register at hamishandandy.com, make sure you go there and its Hamish & Andy driving you home

Digital

11. The following communication appears on the hamish & andy website:

Ride a hot lap in our Wet Lap!

We all know all the Thirsty Camel Bottleshops have a great range of drinks and are so local there's practically one EVERYWHERE!!! We also know they are speedy and can have a little fun...so let's all have some fun with Hamish & Andy's Wet Lap!!

Register your details below and tell us what beverage you would choose to take on a hot lap in a secret fast car, driven by a secret fast car driver in a secret location...

But this isn't just any old hot lap... It's a WET LAP!

Whilst in the passenger seat – you will hold 3 pints of your beverage of choice. You will need to hang on to these filled to the brim cups for dear life because the aim of the game is to spill as little as possible!

We're looking for 3 lucky and tactical contestants and for every milliliter that is left in your pints at the end of your hot lap is worth \$5! So there's some mega cash up for grabs.

All thanks to Thirsty Camel, Never go thirsty, with hundreds of Thirsty Camel Bottleshops conveniently located...everywhere!

Quench your thirst and head in store today.

Thirsty Camel for thirsty people

**You must be 18 years or over to participate.*

The Complaint

12. The complainant objects to the marketing as he believes that alcohol and driving or fast cars should not be advertised together.

The ABAC Code

13. Part 3 of the ABAC Code 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.
 - (d) show (visibly, audibly or by direct implication) the consumption of an Alcohol Beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company's Response

14. The Company responded to the complaint by letter dated 1 April 2016. The principal points made by the Company were:
 - Southern Cross Austereo (SCA) is the official promoter of the 'Wet Lap' Tactic. SCA is not a signatory to the ABAC Scheme. Thirsty Camel was aware of the competition. SCA made it clear to Thirsty Camel that the tactic would only be executed as follows:

- SCA made it clear that their legal team confirmed that the proposed tactic was not in breach of any laws.
 - The tactic would take place in a controlled environment not on a public road. Hence it was conducted at a professional race track at Calder Park, Victoria under supervision by the appropriate safety staff.
 - The driver would be a professional driver.
 - At no point would contestants / passenger consume any beverages prior to, during or after the 'lap'.
 - At no point would the driver consume any beverages prior to, during or after the 'lap'.
- Thirsty Camel made a financial contribution in relation to the competition and was aware of the way in which the competition would be promoted, i.e. via the marketing communications referred to in the complaint.
 - Thirsty Camel believe they did not breach section (a)(ii) of the code, as the tactic was conducted in a controlled environment on a professional race track (Calder Park), with the car driven by a professional driver. Hamish and Andy at no point encouraged others to replicate this tactic. They throughout the tactic reiterated that this was being conducted in a controlled environment / professional race track by a professional driver and in fact actively reiterated that this was being conducted in a controlled environment on a professional race track by a professional driver, and not to attempt this at home. They also reinforced to listeners throughout the tactic that they, and Thirsty Camel as the tactic partner, did not condone or promote drink driving.
 - It was made clear that no consumption of alcohol during the tactic would be accepted. The competition was repeatedly said to be testing balance, at no stage was the consumption of alcohol even mentioned, the car was simply the means by which balance was tested. The aim of the activity was for each contestant to try and conserve as much liquid as possible (i.e. the aim was not to try and spill the drinks). The Marketing communication also makes no specific mention to alcohol. The competition states "the passenger must hold 3 Pints of their beverage of choice". They in fact could choose any beverage to participate e.g. water, Gatorade, sports drinks, milk, soft drinks etc. Alcohol was not specifically mentioned on the competition form.

15. SCA responded to the complaint by letter dated 1 April 2016. The principal points made were:

- SCA broadcast the content on its Hit Network. SCA was responsible for the creation of the content and as the promoter of the competition was also responsible for its development and administration.
- While SCA is not a signatory to the ABAC Code, we wish to take this opportunity to set out our position in response to the above complaint. SCA is of the firm belief that the content and any associated promotional material did not breach the ABAC Code.
- The ABAC Code applies to marketing communications in Australia generated by or within the reasonable control of a Marketer except for exceptions, including Sponsorship.
- Sponsorship is defined as “any agreement or part of an agreement involving payment or other consideration in lieu of payment by a Marketer to support a sporting or cultural property, event or activity, in return for which the sponsored party agrees to be associated with or promote the sponsor’s alcohol beverage or outlet”.
- The content was an activity that was developed by SCA and run by SCA for the purpose of making entertaining and interesting content for the Hamish & Andy show. In order to facilitate the production of the content Thirsty Camel sponsored the relevant content segments and was given naming rights and on-air mentions in exchange for its financial support.
- As the promoter SCA was legally responsible for the administration and promotion of the competition that formed part of the content.
- In light of the way in which the content was developed and and the nature of the agreement between SCA and Thirsty Camel, SCA is of the view that the content and any associated promotional material is properly characterised as a “sponsorship” and therefore the ABAC code should not apply. Even if, contrary to SCA’s view, the ABAC Code does apply to the content, we do not consider that there has been any breach.
- There was no consumption of any alcohol beverage at any stage during the content, nor was it shown in any associated promotional material. No irresponsible or offensive behaviour that is related to the presence of an alcohol beverage was shown or encouraged, in particular:
 - The car was at all times driven by a professional driver on a private race track, with both the driver and the contestant passenger wearing full driving suits and helmets;

- The professional driver had no contact with any alcoholic beverage at any time;
 - The aim of the activity was for each contestant to try and conserve as much liquid as possible (not spill the drinks);
 - The activity was repeatedly said to be testing balance, and the car was simply the means by which the balance was tested;
- These factors were reinforced to listeners by our announcers, Hamish & Andy, throughout the content, along with the message that they did not condone or promote drink driving.
- Section 4 states that compliance with the ABAC Code is to be assessed in terms of probable understanding of the Marketing Communication by a reasonable person to whom the material is likely to be communicated, and taking its content as a whole. In light of all the above we do not believe that any reasonable person would have been encouraged to replicate an activity that took place in what was clearly a highly controlled and artificial environment, and the aim of which was not to associate alcohol with motor vehicles but to test the contestant's balance.
- No consumption of alcohol was shown as taking place at any time before or during any part of the content by any of the participants including the professional driver, the contestants (who were passengers and therefore not in control of the vehicle), or the announcers, Hamish and Andy.
- Further, consumption of alcohol was not expressly or impliedly suggested as a tactic that could be used to succeed in the competition. The object of the competition was to keep as much liquid in the cups as possible, and so any consumption of alcohol would have had the direct opposite effect on a contestant's ability to succeed. There was in fact a considerable financial incentive for the contestants *not* to consume any alcohol before or during the activity.
- The content did not create a direct association between the use of a motor vehicle and the consumption of alcohol for the same reasons (although we would query whether section 3(d) in its ordinary meaning would extend to prohibit such an association where the consumption of alcohol did not in fact occur before or during the operation of a motor vehicle).
- While we do not consider that there has been any breach of the ABAC Code, these concerns have been raised with members of the content team for the Hamish & Andy show and they will be taken into account when planning new material in future.

The Panel's View

Introduction

16. Hamish Blake and Andy Lee are Australian media personalities who have established a popular following since they began as hosts of a FM radio show in 2003. The pair are currently the hosts of 'Hamish and Andy for the drive home' show broadcast on Fox FM from 4pm to 6pm each weekday. Fox FM is owned by SCA, which operates a number of FM radio stations nationwide.
17. In March 2016, the Company entered into a 'sponsorship' arrangement with SCA to promote the Company's brand via the Hamish and Andy program. The promotional device selected was a competition involving participants endeavouring to spill as little as possible of the contents of three cups of liquid while seated in a car driven around a racing track by a professional driver. The participants won money for the volume of liquid that remained in the cups after a lap of a racecourse.
18. The complaint relates to this competition and in particular a radio show segment which the hosts framed the competition around a common experience of a person juggling multiple glasses of beer in a hotel. In the complainant's view, the competition and how it was framed in the broadcast and in accompanying digital material is highly irresponsible. It is argued that alcohol and driving should never be associated.
19. The complaint raises the consistency of the marketing material with two ABAC standards of good practice, namely that marketing should not show:
 - Irresponsible behaviour related to alcohol use; and
 - The consumption of an alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness, such as the control of a motor vehicle.
20. The determination will deal with these two issues and a preliminary point raised by SCA that the marketing activity falls within an exclusion in the ABAC Code relating to 'sponsorship'.

Preliminary points

21. The ABAC Scheme is centered on the commitment of alcohol industry participants meeting standards of good alcohol marketing. This commitment is established by the participant's membership of one of the three alcohol industry peak bodies which underpin the Scheme or through a company becoming a direct signatory to the Scheme. The Company is not a Code signatory, but has over time engaged co-operatively in Panel determinations and accepted Panel decisions.
22. SCA is not an alcohol company, but a media organisation. The ABAC Scheme does not purport to directly bind media organisations which might print or broadcast alcohol marketing, as the Scheme imposes obligations on alcohol companies and relies on their actions in controlling marketing to the public via

media channels. This means that the Panel's decision will affect Thirsty Camel rather than SCA.

23. What may impact on the decision is the argument advanced by SCA that the competition and its related promotion via the Hamish and Andy show is 'sponsorship' within the meaning of section 2(b)(i) of the Code and the Definition of the term in section 5. The importance of this is that 'sponsorship' within the meaning of the ABAC is carved out from having to meet the Code standards.
24. This argument from SCA is however misconceived. The sponsorship exclusion relates only to the direct arrangement an alcohol marketer might enter to support sporting or cultural events or activities, and does not capture the promotion of the existence of the sponsorship through advertising or other marketing. In this case, the complaint concerns not the existence of the competition, but the segment promoting the competition on the radio program and the related website materials. Equally, the competition can hardly be described as 'sporting or cultural' in nature. Finally, the benefit of the section 2(b)(i) exclusion would need to be claimed by the alcohol company to which the Code applied and not a media organisation to which the Code does not apply.

The Code standards

25. Section 3(d) of the Code provides that a marketing communication must not show the consumption of an alcohol beverage before or during any activity that, for safety reasons, requires a high degree of alertness or physical co-ordination, such as the control of a motor vehicle.
26. The Company and SCA submit that the radio segment and the website material do not breach this section as:
 - No consumption is shown or is implied;
 - Consumption did not occur and would not be implied as the point of the competition was to maximise the volume of liquid in the cups and not reduce it through consumption; and
 - The driver in control of the motor vehicle did not consume and would not be taken as consuming alcohol.
27. The Panel does not believe the marketing breaches this section. The section is directed at 'consumption' of alcohol as opposed to the presence of alcohol and to the person in control of the motor vehicle consuming the product as opposed to a passenger. In this case, the marketing material establishes that the driver facilitates the environment in which the competition occurs i.e. the moving car, but the driver clearly does not consume any alcohol.
28. Section (a)(ii) provides that an alcohol marketing communication is not to show or encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol. This standard is more widely drawn than section (d) and goes to the presence of alcohol, not only its consumption, as well as the 'encouragement' of alcohol related irresponsible behaviour.

29. The key concept in the standard is that the irresponsible or offensive behaviour is to be related to alcohol as a product. In other words, the standard is not creating a freestanding requirement of good and responsible behaviour. Standards of this general nature are contained in the generic AANA Code of Ethics which apply to all advertising and marketing irrespective of the product or service being promoted. As explained in paragraph 5, a decision as to whether marketing breaches a standard in the Code of Ethics is made by the Advertising Standards Board and not this Panel.
30. The Company and SCA respond to the argument that the marketing breached the ABAC standard by claiming that the actual event occurred in a controlled environment with a professional driver and all safety precautions were taken. Further, it is claimed that the marketing made clear that a listener or viewer should not 'attempt this at home'
31. In assessing if a marketing communication is inconsistent with a Code Standard, the Panel is to have regard to the probable understanding of the communication by a reasonable person, taking its content as a whole. The reference to a reasonable person is drawn from the Australian common law system and means that the views, opinions and values of a majority of the community is to be the benchmark.
32. The point made by the complainant is acknowledged. Advertising alcohol products or an alcohol retailer through motor vehicle centred marketing devices will invariably and properly invite close scrutiny given the enormous community and individual harm that results from alcohol related motor vehicle accidents.
33. That said, the Panel does not believe the marketing breaches section (a)(ii). In reaching this conclusion, the Panel has noted:
- The marketing communications establish that the competition will be conducted in a controlled environment with a professional driver on a race track.
 - Given the safety precautions taken resulting in the highly regulated environment which the behaviour is shown, it cannot be fairly said to be irresponsible.
 - It is clear that the driver will not be consuming alcohol or attempting to hold the cups containing the drinks.
 - Taken as a whole, a reasonable person would interpret the actual event as a staged stunt and would not take that sitting in a moving car with three full cups of liquid is being encouraged as appropriate or sensible behaviour.
34. Accordingly the complaint is dismissed.