



ABAC Adjudication Panel Determination No. 125/17

Product: Heineken 3
Company: Heineken Lion
Media: Digital (Instagram)
Complainants: Cancer Council Victoria
Date of decision: 10 January 2018
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 a digital advertisement for Heineken by Heineken Lion (“the Company”) and arises from a complaint received 19 December 2017.
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. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
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 19 December 2017.
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 the marketing communication.

The Marketing Communication

10. The Instagram post is a photograph of a smiling man and a laughing woman sitting in a park or garden on a picnic rug holding two open bottles of Heineken with a six pack with the four remaining bottles on the rug next to a platter of food.
11. Next to the photograph is a caption “heineken_au Keen to impress on your first date? Stay on top of your game with #Heineken3 @menstylepower #HaveltAll”



The Complaint

12. The complainant believes the post is a clear breach of clause 3(c)(ii) of the ABAC Code as the post directly states that Heineken 3 will help you “impress on your first date” and “stay on top of your game” and therefore directly implies that Heineken 3 will lead to achievement of personal and sexual success.

The ABAC Code

13. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (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 22 December 2017. The principal points made by the Company were:
 - The advertisement was not submitted to AAPS and we are currently investigating whether the Heineken advertisement on Instagram went through Lion's internal review and approval processes.
 - The caption, 'Keen to impress on your first date? Stay on top of your game with #Heineken3' is designed to convey the message that alcohol should be consumed in moderation and as Heineken 3 is low in alcohol it helps drinkers to consume in moderation. It is not intended to suggest that the consumption or presence of alcohol is a cause of, or contributes to the achievement of personal, social or sexual success.
 - However, as there was nothing explicit in the post to draw the viewer's attention to the fact that Heineken 3 is a mid-strength beer, the post has been removed to avoid any possible mis-interpretation that alcohol consumption, or its presence is a cause of, or contributes to the achievement of personal, social or sexual success.

The Panel's View

15. The complaint argues that an Instagram post by the Company is in breach of section (c) (ii) of the Code. This section provides that an alcohol marketing communication must not suggest the presence or consumption of alcohol is a cause or contributor to the achievement of sexual or social success.
16. In the complainant's view, the post is to be interpreted as meaning that the product will assist in creating a favorable impression on a first date. The Company replies that its intention was to promote a low alcohol strength product by facilitating a user to consume in moderation. It is noted that section a(iv) of the Code permits the encouragement of the choice of a low strength beverage compared to a typical strength beverage.
17. In assessing if a marketing communication has breached a Code standard, the Panel is to adopt the viewpoint of the probable understanding of the advertisement by a reasonable person. This means the values, opinions and attitudes found in a majority of the community is to be the benchmark.
18. The key concept in the Section (c) standard is causation. It is permitted to depict attractive and confident people in alcohol marketing. It is not permitted to suggest a cause of the person being attractive, confident or successful is the use of alcohol.

19. The standard is cast quite widely. Alcohol does not have to be implied as the primary cause of success. It cannot be implied as playing any role in the achievement of success.
20. The Company makes the point that its intention was almost the opposite to the interpretation taken by the complainant. The Company stated that it wanted to promote the low alcohol nature of the product and that choosing the beer would be appropriate on a date as it would be a responsible choice. The intention of the marketer is however not the test. Rather it is how a reasonable person viewing the marketing material would understand the advertisement.
21. On balance, the Panel believes the advertisement does breach the section (c) Standard. A reasonable interpretation of the text combined with the image of the use of the product is that alcohol will contribute to being socially successful by impressing a partner on a date and will assist a person 'stay on top of their game'. Such an interpretation is not consistent with the section (c) Standard.
22. Accordingly, the complaint is upheld.