



ABAC Adjudication Panel Determination No. 88/20

Product: Fireball Whisky
Company: Southtrade International
Media: Digital (Facebook)
Date of decision: 23 July 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a promotion for Fireball Whisky which is distributed by Southtrade International (“the Company”) and arises from a complaint received 22 June 2020.
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 Code”) – 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 and Policies – which place 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 marketing 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, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, 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 Ad Standards 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 Ad Standards Community Panel 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 22 June 2020.
8. 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 complaint was completed in 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

10. The complaint relates to a video segment on Facebook Live posted by @browncardigan to a playlist titled "Live at Club Dunny" with the caption "Mere days after the birth of his new bub, TV host Karl Stefanovic sat down with Dunny for a scoop-of-an-interview (suck it Daily Mail), discussing iso survival and turning up to breakfast tv a little turnt up".
11. The segment opens with the following banner followed by an interview between the host, Dunny and Karl Stefanovic, which included the following exchanges and visual imagery relating to alcohol consumption and Fireball Whisky:
 - throughout the interview there is a row of bottles of Fireball Whisky on a table near Mr Stefanovic in the background, including a close up of the bottles after which Mr Stefanovic says "looking after your sponsors, because you don't..";
 - Karl holds up a bottle of Fireball Whisky, Dunny asks "Are we gonna have a shot together?", Karl comments that he hasn't cleared this with Channel 9 and then says "but I'll have a shot with you". Applause. Dunny opens a bottle of Fireball Whisky and pours a shot. Karl says "I'd like to thank Fireball for me being here tonight" as he opens a small bottle of Fireball Whisky. Dunny says "yes same". Dunny drinks from a shot glass and Karl appears to drink from the bottle off camera and then holds up the bottle partially empty.
 - Dunny asks "...you know that fateful day when you rocked up to work half cut the next day". Karl winks and Dunny continues "was there like a moment in that night where you were like, fuck we may as well keep going..its like 3am". Karl says "No it was 4am, we started at 5...we've got a very big decision to make tonight, we either keep going or do we get some sleep... and I said, you know what I think we should go to bed, that was a huge mistake..". Dunny says "I feel like if you keep going they don't notice as much as then if you go to sleep and rock up a bit like eeeeh, but if you keep going their like, how many times have you like kept going and then you've like gone to work the next day and their like, you look great, we saw you on Instagram live a bit shambled or whatever and ..". Karl continued, "I'm telling you right now, everyone in the world would have noticed that morning because there was lots of this [holds up a bottle of Fireball Whisky]" Dunny asks "How much Fireball did you have that night" and Karl responds "Its not really my cup of tea but because I'm on your show it was my cup of tea [holds up bottle of Fireball Whisky again]."
 - Dunny sings Karl a song using his guitar with Fireball Whisky branding that includes the lyrics "... when coronavirus ends we'll go on a bender, you know you really wanna, and we'll both rock up to the Today show together and be half cut..".



The Complaint

12. The complainant objects to the marketing as the tone and content of the interview encourages excessive drinking, drinking to a point where it carries over into your work and discusses the merit of continuing to drink to push through until the next day. All of these behaviours are inappropriate for alcohol advertising.

The ABAC Code

13. Part 2(b) of the ABAC Code provides that the Code does NOT apply to:
 - (v) Sponsorship
14. Part 3 of the ABAC Code 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
15. Part 6 of the ABAC Code includes the following definitions:

Marketing Communications means marketing communications in Australia generated by or within the reasonable control of a Marketer (apart from the exceptions listed in Section 2(b)), including but not limited to brand advertising (including trade advertising), competitions, digital communications (including in mobile and social media), product names and packaging, advertorials, alcohol brand extensions to non-alcohol beverage products, point of sale materials, retailer advertising and Marketing Collateral.

Sponsorship means 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. Sponsorship also includes naming rights of events or teams and the inclusion of a brand name

and/or logo at an event venue or on uniforms of participants (excluding branded merchandise).

The Company's Response

16. The Company responded to the complaint by email dated 3 July 2020. The principal points made by the Company were:
 - a) Fireball was a sponsor of The Club Dumni series with Brown Cardigan which was a short series of unscripted, off the cuff interviews designed to entertain Legal Drinking Age consumers in Australia during lock down. We were of this video. We were a sponsor of the show which included the use of relevant branding and some product. We allowed the host to enjoy a single FIREBALL drink with the Celebrity Guest. We requested the content did not encourage excessive consumption of alcohol, nor were any of the adults involved ever consuming an excessive amount of alcohol on the show. We were a paid sponsor of the Club Dumni COVID series – designed to be adult entertainment for an audience who accepts this type of content.
 - b) Only a single drink was consumed throughout the show by Karl (actually not even quite 1). Whilst the show was an unscripted Brown Cardigan show, Fireball would never encourage irresponsible consumption of alcohol and recommended rules and parameters for the host to stick to. We do not believe that the show encouraged excessive consumption and was a “light-hearted discussion” for an adult audience. When we produce our own content we control the messaging however with third parties we can only provide guidance on what is acceptable banter.
 - c) Given a member of the public has interpreted the content in another way, we have removed any reference from our social media platforms but are not responsible for the content found on the Brown Cardigan sites.

The Panel's View

17. This determination concerns a live internet show called 'Club Dumni' which was created initially on Friday 15 May 2020 and recordings of which are now accessible via a range of social media platforms. The complainant has viewed the show and believes it depicts the use of alcohol in a highly irresponsible manner. The complaint raises several issues about the potential applicability of the ABAC standards to the show namely:
 - is the show itself or depictions and references to Fireball Whiskey within the show an alcohol 'marketing communication' to which the ABAC scheme applies; and
 - if so, is alcohol and alcohol use portrayed in a manner consistent with ABAC standards.
18. Club Dumni was an initiative of Brown Cardigan, a social media content curator and distributor. Brown Cardigan commenced operations in 2007 as an 'image-based blog' and has evolved over time to the posting of content on social media platforms such as Facebook, Instagram and TikTok. Its basic model appears to involve

the curating of content submitted by members of the public, with the selected material posted on Brown Cardigan social media accounts. The firm has also moved into brand promotion and works with companies such as Mambo, Schweppes and Fireball Whiskey.

19. Club Dunny is a collaboration between Brown Cardigan and the Company. The show is hosted by 'internet personality' Lewie Dunn. Mr Dunn is somewhat of a renaissance man of the social media influencer era. An accomplished surfer, musician, DJ, comedian and sometime apprentice electrician, Dunny, as he is known, has built a cult following on Instagram with over 81,000 followers. Club Dunny ran for four consecutive Friday evenings from 24 April to 15 May 2020 and was broadcast from Dunny's home in Newcastle via the platform Facebook Live. The shows in part featured guest interviews, including Matty Johns, Shannon Noll and on the final show, Karl Stefanovic. Mr Stefanovic was at his home when the live streamed interview occurred.

Is the ABAC applicable to Club Dunny?

20. Simply because alcohol use or an alcohol brand is referenced in a public broadcast, such as Club Dunny, does not mean the ABAC scheme has any applicability. Rather, the ABAC applies to alcohol marketing communications generated by or within the reasonable control of an alcohol company. Generally, it is self-evident something is a 'marketing communication', e.g. a social media post on an alcohol company account or a television advertisement for an alcohol product and brand. In this case the Company's branding and products are placed within the show's set and are referenced by Mr Dunn and Mr Stefanovic.
21. The Company explains it was the 'sponsor' of the Club Dunny series with Brown Cardigan and this involved the use on the show of relevant branding and some product. It is stated that 'we allowed the host to enjoy a single Fireball drink with the celebrity guest' and that it was 'requested' that the show content not encourage excessive consumption of alcohol. Club Dunny was designed to be adult entertainment and the content was largely unscripted.
22. The Panel considered a broadly similar relationship between an alcohol company and a media content producer in Determination 78/17. In that case CUB was in a commercial relationship with a production company which produced an AFL themed sports show, 'The Front Bar', broadcast on the Seven Network. In return for the CUB 'sponsorship' the show placed Carlton Draught branding and product on the set of the show which resembled a hotel public bar. After examining the relationship and the ABAC provisions the Panel concluded:
 - the entire 'Front Bar' show was not of itself a marketing communication for ABAC purposes; however
 - the placement of Carlton branding and products within the show amounted to 'product placement' which is a form of marketing within the intended scope of a marketing communication for the purposes of the ABAC; and
 - while described as a 'sponsorship' the commercial relationship leading to the product placement in the show did not amount to a sponsorship within the meaning of that term in the ABAC.

23. The full dimensions of the relationship between the Company and Brown Cardigan and the parameters given to Mr Dunn to promote Fireball Whiskey have not been supplied to the Panel and in any event are beyond the scope of this determination. It is reasonably clear, however:
- the Company has a commercial relationship with Brown Cardigan for the promotion of its brand and this resulted in the placement of the Company's branding on Club Dunny;
 - the Company had some measure of control over how its brand would be depicted on the show;
 - the show was live to air and the Company had no editorial or creative input into how Mr Dunn conducted the show and carried out interviews with guests including Mr Stefanovic;
 - the nature of the relationship causing Fireball to be placed within Club Dunny was not a 'sponsorship' within the intended scope of Part 2(b)(v) of the Code;
 - the appearance of the Company's branding and product on the show is 'product placement' and hence a marketing communication within the meaning of that term in the ABAC; and
 - the entire show is not a marketing communication, rather it is variety entertainment program but the product placement within the show is a marketing communication to which the ABAC standards apply.

What is within product placement on Club Dunny and does this meet ABAC standards?

24. The complainant believes the tone and content of the interview with Karl Stefanovic encourages excessive alcohol consumption and promotes behaviours which are inappropriate for alcohol marketing. Part 3(a) of the Code provides that an alcohol marketing communication must not show (including by direct implication) or encourage excessive consumption of alcohol or misuse or abuse of alcohol or encourage irresponsible or offensive behaviour that is related to the consumption or presence of alcohol.
25. As explained, the Club Dunny show in its entirety is not a marketing communication and usually product placement within a wider program is quite contained. For example, if a specific brand of vodka was placed in a James Bond movie when the hero drinks a 'shaken not stirred' martini, the entire movie does not become an alcohol marketing communication. So, a subsequent plot scene which showed excessive alcohol use is obviously not subject to the ABAC scheme. Normally an interview within a variety show such as that with Mr Stefanovic would not be expected to fall within the ambit of the ABAC simply because the set the host was conducting the interview from contained alcohol product branding. However, the Stefanovic segment contained extensive product placement through:
- the placement of multiple bottles of the product shown at Mr Stefanovic's home;
 - product branding at the set used at Mr Dunn's home including on a guitar used by Dunny to sing a song to Karl;
 - the placement of product with Mr Dunn;

- the consumption of the product by both participants at one point during the interview; and
 - references to the product by both participants in the dialogue of the interview.
26. The Company points out that Club Dumni was not tightly scripted and that it had no control over the content of the interview. It had requested that content on the show not encourage excessive consumption. That may be so, but it cannot excuse the Company from all responsibility regarding how its brand and product are portrayed on the show. The Company entered into the relationship with Brown Cardigan to promote its brand. It was a collaborator on Club Dumni. It had its brand and product placed on the show. And as outlined above, its product was extensively placed and referenced in the interview, solely because of its role in bringing Club Dumni about.
27. The Panel believes the manner in which the product placement occurs within the interview is inconsistent with the Part 3 (a) standard. In reaching this conclusion the Panel noted:
- the interview contains numerous visual and verbal references to the product;
 - the consumption of the product occurs during the interview although this is not excessive (one 'shot' by both participants);
 - a major component of the interview concerns Mr Stefanovic relating an occasion he hosted an episode of the 'Today' breakfast TV show while affected by excessive consumption of alcohol prior to the airing of the show;
 - Dumni sings a song which references the pair going on a 'bender' and attending the Today program 'half cut';
 - the exchange about doing the Today program while intoxicated presents the occasion as funny and heroic; and
 - taken as a whole a reasonable person would interpret the interview and the product's role as encouraging and making light of excessive alcohol consumption and the irresponsible behaviour of attending work while affected by alcohol use.
28. Finally, it is noted that by Case Report 0211-20 the Ad Standards Community Panel made a decision under the AANA Code of Ethics concerning the Club Dumni show. While concluding the show did fall under the definition of 'Advertising' under the AANA Code, the Community Panel did not believe the show breached section 2.6 of the AANA Code. This section of that Code provides that advertising shall not depict material contrary to prevailing community standards on health and safety. In reaching that conclusion the Community Panel considered the way in which alcohol use was portrayed in the Stefanovic interview.
29. The standards in the ABAC and those in the AANA Code are drawn differently with the generic AANA Code operating differently to the alcohol specific standards in the ABAC. Given different standards are being assessed, from time to time the two complaint processes will reach different outcomes about the same marketing communication.
30. The complaint is upheld.