



ABAC Adjudication Panel Determination No 110/23

Product: Tooheys New
Company: Lion
Media: Billboard
Date of decision: 3 August 2023
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 4 July 2023 in relation to billboard advertising for Tooheys New (“the Product”) by Lion (“The Company”). The billboard was located on the New England Highway, Whittingham, NSW.
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 the 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 meet 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 4 July 2023.
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 an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the content of the marketing (Approval Number 5673).

The Marketing

10. The complaint relates to the following billboard marketing:



Complaint

11. The complainant objects to the marketing as follows:
 - *I feel this sign will encourage drink driving and I thought that alcohol was not allowed to be advertised.*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (d) A Marketing Communication must NOT 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 coordination, such as the control of a motor vehicle, boat or machinery or swimming.

The Company Response

13. The Company responded to the complaint by letter emailed on 18 July 2023. Its primary comments were:

- Thank you for raising this complaint and providing the opportunity for us to respond to the issues raised by the complainant. Lion – Beer, Spirits & Wine Pty Ltd (Lion) reiterates its commitment to the ABAC Scheme and that it takes its obligations to responsibly promote its products seriously.
- For the reasons set out below, and with respect to the complainant, we submit that there has been no breach of Part 3(d) of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel.

AAPS Approval

- The Advertisement was submitted for review through the Alcohol Advertising Pre-Vetting Service (AAPS), and received final approval (AAPS Approval No. 5673).

Safety

- For the following reasons, we do not consider that the Advertisement breaches Part 3(d) of the ABAC Code:
 - The Advertisement contains the phrase “HOW DO YOU FEEL?” and the image of two cans. A reasonable consumer is likely to understand the Advertisement to be referring to the broader Tooheys campaign that uses this tagline, which is evocative of a general want state – “HOW DO YOU FEEL?” with the response being “I FEEL LIKE A TOOHEYS”;
 - There is no additional information in the Advertisement that a reasonable consumer would understand to show or encourage (either directly or by implication) consumption before or during the operation of a motor vehicle; and
 - It is commonplace for alcohol advertisements to be placed on billboards alongside highways.
- As a responsible marketer, Lion has demonstrated a long-standing commitment to upholding both the letter and spirit of the ABAC and AANA Codes. Lion maintains strict internal and external processes to help ensure this compliance.

The Panel's View

14. Earlier in 2023, Lion revived and rejuvenated its 1970s era marketing campaign jingle "I feel like a Tooheys or two" for a new campaign for Tooheys products. The current campaign includes the placement of roadside billboards, one of which depicts images of two cans of Tooheys New, accompanied with the strapline "How do you feel?". The complainant saw this billboard on the New England Highway, Whittingham, (near Singleton in the Hunter Region of NSW), and expressed the following concerns:
 - I feel this sign will encourage drink driving; and
 - I thought that alcohol was not allowed to be advertised.
15. To address the complainant's second concern first, alcohol advertising, including on roadside billboards, is permitted in Australia, subject to an amalgam of laws and codes of practice that regulate and guide the content and the placement of marketing. As mentioned in paragraph 2, the regulatory regime includes the ABAC Code, which is an alcohol-specific code of good marketing practice.
16. The complainant's first concern raises Part 3 (d) of the Code. This provision provides that an alcohol marketing communication must not show (including 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 coordination, such as the control of a motor vehicle, boat or machinery or swimming.
17. In response to the complainant, the Company contends that the billboard is consistent with the ABAC standard, arguing:
 - a reasonable consumer is likely to understand the advertisement to be referring to the broader Tooheys campaign that uses the "How Do You Feel?" tagline;
 - there is no additional information in the advertisement that a reasonable consumer would understand to show or encourage (either directly or by implication) consumption before or during the operation of a motor vehicle; and
 - it is commonplace for alcohol advertisements to be placed on billboards alongside highways.
18. The consistency of a marketing communication with an ABAC standard is assessed from the standpoint of the probable understanding of the marketing item by a reasonable person. This means the benchmark is based on the attitudes, opinions, values and life experiences shared commonly in the

community. If a marketing communication could be interpreted in several ways, it is the most probable interpretation which is to be preferred over a possible but less likely understanding of the marketing message.

19. The Panel does not believe that the billboard breaches the Part 3 (d) standard. In reaching this conclusion the Panel noted:
 - the advertisement does not show alcohol consumption;
 - it is unlikely a reasonable person would understand the ad as a call to consume the product and then drive a car;
 - merely placing the ad in sight of a roadway would not be understood as endorsing alcohol consumption while a motor vehicle is being used absent of any messaging within the ad making a suggestion of drinking then driving.
20. The complaint is dismissed.