



ABAC Adjudication Panel Determination No 112/23

Product: Tooheys New
Company: Lion
Media: TV - On Demand
Date of decision: 11 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 a television advertisement for Tooheys New (“the product”) by Lion (“the Company”).
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 5805).

The Marketing

10. The complaint relates to a television advertisement, a link to and a summary of which is provided below:

<https://www.youtube.com/watch?v=dG9vtCXYBEQ>

The ad is accompanied by the "I feel like a Tooheys" song.

It starts with footage of a closely fought rugby match.



Once the song reaches the chorus, the scene changes to the teams after match celebrations in the changerooms.



Complaint

11. The complainant objects to the marketing as follows:

- *The link of alcohol consumption and active participation in a sport seems to promote and condone a culture of excessive drinking by young men (especially in the end sequence when they are celebrating as a group).*

- *It makes drinking appear as an appropriate indeed necessary/required part of 'team' membership.*
- *I am concerned this normalises the idea of alcohol consumption and sporting prowess. I believe young people in particular might be influenced to think they need to consume alcohol in order to 'fit in' and be accepted by a group such as a sports team.*

The ABAC Code

12. 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;
- (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;
- (c)(iii) if an Alcohol Beverage is shown (visibly, audibly or by direct implication) as a part of a celebration, imply or suggest that the Alcohol Beverage was a cause of or contributed to success or achievement.

The Company Response

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

- We refer to your letter dated 7 July 2023 (Letter) in relation to a complaint received by ABAC about the Tooheys "Charge Down" TVC (Advertisement) being displayed during an SBS On-Demand replay of the television show "Deep Water: The Real Story".
- 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 by of Part 3(a)(i) and 3(c)(ii) of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel.

- Our responses to the questions in your letter are set out in the following sections. It is unclear whether a full length or cut down version of the Advertisement was seen by the complainant. The full 45 second version can be seen at this link: <https://www.youtube.com/watch?v=dG9vtCXYBEQ>, and references to video times in this Letter are made by reference to this version.

AAPS Approval

- The Advertisement was submitted for review through the Alcohol Advertising Pre-Vetting Service (AAPS), and received a certificate of final approval (AAPS Approval No. 5805).

Responsible and moderate portrayal of Alcohol Beverages

- For the following reasons, we do not consider that the Advertisement breaches Part 3(a)(i) of the ABAC Code:
 - the celebration section of the Advertisement is split into three sections:
 - head patting sequence (0:33 to 0:35) – which depicts team mates recognising the protagonist’s impressive charge down in the previous scene. Notably, the protagonist is left of screen and there is no alcohol shown or consumption suggested;
 - can grab and drink sequence (0:36 to 0:43) – the can is being grabbed by the coach, this is demonstrated by the person wearing a different outfit to the protagonist (i.e. long sleeve blue jacket compared to the protagonists’ jerseys short sleeve) and passes the can to the protagonist who is now right of screen; and
 - continued team celebration sequence (0:44 to 0:48) – the protagonist is now left of screen again and there is no alcohol shown or consumption suggested.
 - the blocking of the protagonist (i.e. movement from the left to right to left) in the celebration scene of the Advertisement makes it clear that these are three separate parts of a celebration, and not a continuous sequence that implies that the group is encouraging or chanting in relation to the consumption of the product – they are celebrating the win depicted in the previous scene, and having a Tooheys New as part of the celebration. There is no suggestion of peer pressure to consume the beer quicker than the standard rate, or an increase to the energy of the celebration after the

consumption shot. Similarly, the music / lyrics “I Feel Like a Tooheys” are not synced up to the player’s movements i.e. mouth shapes of the players or timing of their bouncing so the reasonable person would not assume they are singing the Tooheys jingle;

- the Advertisement only depicts the consumption of one (1) Tooheys New product and the protagonist’s consumption would be no more than a 1/4 or 1/3 of the can. It is standard industry practice for consumption shots to be slightly prolonged to allow registration of the product’s brand (for example, see 0:49 to 0:53: <https://youtu.be/n6VTzSsJ1dU?t=49>, and 0:23 to 0:27 https://youtu.be/B_g_hurGKAc?t=22). In this context, the length of the sip is unlikely to be considered “sculling” by a reasonable consumer, and we submit that this is not showing, implying or encouraging excessive consumption;
- similarly, around 8 cans of Tooheys New are shown in the esky, which means there is 1 drink (1.4 standard drinks) available per person based on the number of players present. The Australian Alcohol Guidelines (AAG) provide that the consumption of no more than four (4) standard drinks per day reduces the risk of harm from alcohol-related disease or injury. The depicted number of drinks is well below the recommended maximum daily consumption, and therefore we submit that the Advertisement is not showing, implying or encouraging misuse or abuse of alcohol, or consumption inconsistent with the Australian Alcohol Guidelines; and
- the sequence depicted at the end of the Advertisement reflects a post-match locker room celebration of a win, which is a traditional activity for sporting teams – for example, see: <https://www.penrithpanthers.com.au/news/2023/03/09/allam-homes-team-song-round-2/> and <https://www.newcastleknights.com.au/news/2023/03/26/team-song-round-4-win/>. The rituals of these events include water splashing, spraying of alcohol and non-alcoholic drinks, singing team songs and doing so in a circle, often with key players at the centre of the circle. For these reasons, we respectfully submit that the Advertisement is a responsible depiction of a traditional activity for sporting teams.

Responsible depiction of the effects of alcohol

- For the following reasons, we do not consider that the Advertisement breaches Part 3(c)(ii) of the ABAC Code:
 - We repeat the comments in response to “Responsible and moderate portrayal of Alcohol Beverages” above;

- the game sequence runs for most of the Advertisement (0:00 to 0:32), and a reasonable person would understand the sporting success as being caused by the team's skill and player's daring to make the charge down;
- the celebration sequence of the Advertisement is separate from the game sequence, and shows the protagonist consuming the Tooheys New relatively briefly (compared to the total length of the Advertisement and celebration sequence). There are no other members of the team that are shown to be drinking, or cues that indicate a change in social dynamic as a result. From this, a reasonable person would understand the consumption of Tooheys New as an incidental part of the post-match celebration, and there is no suggestion that it is a pre-requisite for meaningful participation in the celebration or team; and
- for these reasons, we respectfully submit that the Advertisement does not depict the presence or consumption of alcohol as causing or contributing to sporting or social success, rather it shows that alcohol can be part of a responsible celebration.

Concluding comment

- 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

Introduction

14. This determination has arisen from a complaint about a television advertisement for the beer Tooheys New. The advertisement is centred around a very close and hard-fought rugby league match. The final play of the game is shown with a charge down of an attempted field goal resulting in the home team winning by a single point. The ad then moves to the dressing room as the home team celebrates their win. In part the celebration shows alcohol consumption with the scene accompanied by the "I feel like a Tooheys" song.
15. The complainant is concerned that the ad:
 - promotes and condones a culture of excessive drinking (especially in the end sequence when they are celebrating as a group);

- depicts the consumption of alcohol as an appropriate or necessary/required part of 'team' membership;
 - creates a link between alcohol consumption and sporting prowess; and
 - influences the likely viewer to believe that they need to consume alcohol in order to 'fit in' and be accepted by a group such as a sports team.
16. These concerns raise the following Code standards requiring that an alcohol marketing communication must not:
- 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 – Part 3 (a)(i);
 - 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 – Part 3 (c)(ii); and
 - imply or suggest that alcohol shown as part of a celebration was a cause of or contributed to the success or achievement being celebrated - Part 3 (c)(iii).
17. In assessing if a Code standard has been breached, the Panel adopts the standpoint of the probable understanding of the marketing item by a reasonable person. This means the attitudes, values and life experiences shared by most members of the community is the benchmark. If a marketing communication can be interpreted in several ways, the most probable understanding is to be preferred over a possible but less likely interpretation.

Responsible and moderate portrayal of Alcohol Beverages

18. The complainant contends that the ad promotes and condones a culture of excessive drinking. In response the Company argued that:
- the advertisement depicts the consumption of only one Tooheys New product and the protagonist's consumption would be no more than a 1/4 or 1/3 of the can;
 - around eight cans of Tooheys New are shown in the esky, which means there is 1 drink (1.4 standard drinks) available per person based on the number of players present, which is not excessive and is within the Australian Alcohol Guidelines; and

- there is no suggestion of peer pressure to consume the beer quicker than the standard rate, or an increase to the energy of the celebration after the consumption shot.
19. The ad does not expressly show excessive alcohol consumption as only a single beer is shown consumed in the dressing room scene by the 'hero' player and the esky from where the beer is taken is filled more with ice than it is with cans of beer. In essence the complainant is contending that the dressing room scene is invoking or implying excessive consumption as part of the celebration culture of the team. The question is whether such an implication can be reasonably drawn and would the complainant's interpretation of the ad be shared by most members of the community.
20. This question highlights the distinction between a direct implication and an extrapolation. As a starting proposition an item of marketing is to be assessed on what it actually depicts. Then there will often be gaps or silences in the communication which can be filled by direct implications even though not shown or stated. For instance, in the current ad, an esky with multiple beers is positioned in the dressing room with multiple players celebrating their win. The scene shows only one player actually drinking, and the viewer is left to fill in the gap of what then happens. Conceivably:
- no other beer is consumed by anyone; or
 - the hero player proceeds to drink all of the beers; or
 - all of the players drink a beer; or
 - some players have a beer and some don't; or
 - a variation of any of these things or something altogether different might occur.
21. A direct implication of placing multiple cans of beer in an esky in a team's dressing room is that alcohol consumption will occur. It can also be reasonably implied that the beers will be consumed by several players and not a single player. Beyond this, the probable understanding of the ad begins to diverge depending on the individual viewpoint of an audience member.
22. The complainant's contention that the ad is encouraging excessive alcohol consumption requires more than a direct implication and needs a series of extrapolations. These extrapolations might be as follows:
- that rugby league players will mark a success in the game with alcohol use; and
 - this alcohol use will involve excessive consumption because -

- rugby league players are heavy drinkers or the culture of rugby league (or maybe male team sports more generally) involves excessive alcohol use to celebrate and to build bonds between players; and
 - the ad is referencing and endorsing this aspect of rugby league culture or maybe male team sports more generally.
23. The greater the number of extrapolations, the less likely the understanding of an individual viewer will necessarily be shared by community members as a whole. This is of course not an exact science and reasonable minds can differ on how a marketing communication would most probably be understood by the 'reasonable person'. This is why the ABAC Adjudication Panel consists of three members of different backgrounds to consider how ads would be most likely understood in light of the complainant's concern and the applicable ABAC standard.
24. The Panel does not believe that a reasonable person would interpret the ad as showing or encouraging the consumption of an excessive amount of alcohol. This is due to:
- the ad does not show excessive consumption and the quantity of alcohol shown in the ad is not excessive based on the number of people present;
 - the context of the celebrations and the high spirits of the players is clearly centred on the sporting victory, rather than alcohol use; and
 - the interpretation of the ad as encouraging excessive alcohol consumption requires a series of extrapolations which cannot be reasonably drawn from what the ad actually depicts.

Responsible depiction of the effects of alcohol

25. The second limb of the complainant's concern is that the ad shows a causal link between alcohol and the achievement of sporting and social success. The Company submitted that:
- a reasonable person would understand the sporting success as being caused by the team's skill and player's daring to make the charge down;
 - the celebration sequence of the advertisement is separate from the game sequence;
 - only one member of the team is shown to be drinking;

- there are no cues that indicate a change in social dynamic as a result of alcohol being consumed;
 - a reasonable person would understand the consumption of alcohol as an incidental part of the post-match celebration, and there is no suggestion that it is a prerequisite for meaningful participation in the celebration or team; and
 - the advertisement does not depict the presence or consumption of alcohol as causing or contributing to sporting or social success, rather it shows that alcohol can be part of a responsible celebration.
26. The key concept in the Part 3 (c)(ii) standard is causation. It is permitted to place alcohol with successful people provided it is not suggested that alcohol was the cause of or contributed to the success of a person. Equally, alcohol can be associated with a sport but it is not permitted to suggest that alcohol was the cause of achievement or success in the sport.
27. Again, the complainant's contention is based on reading into the ad various extrapolations about alcohol and its role in a sports team i.e. that a person needs to consume alcohol to 'fit in' and be accepted by the team. This is a fair concern to raise, but the question is whether the ad actually shows this, or a reasonable person would take this interpretation from the ad.
28. The Panel does not believe that a reasonable person would interpret the ad as breaching Part 3 (c)(ii) or (iii). In reaching this conclusion the Panel noted that:
- there is no suggestion that alcohol use occurred prior to the actual game or alcohol played a role in the team winning the game;
 - the celebration is based on the success in the game and is shown as commencing prior to the introduction of alcohol into the dressing room scene;
 - the celebration itself is established as occurring because of the hard-fought win in the game and alcohol is not the reason the celebration is occurring;
 - it is unlikely a reasonable person could take from the actual content of the ad the various extrapolations required to draw the conclusion that alcohol use is a necessary prerequisite for social inclusion.
29. The complaint is dismissed.