



ABAC Adjudication Panel Determination No 196/23

Product: Tooheys New
Company: Lion – Beer, Spirits & Wine Pty Ltd
Media: Outdoor Billboard
Date of decision: 30 December 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 8 December 2023 in relation to an outdoor billboard for Tooheys New (“the product”) by Lion – Beer, Spirits & Wine Pty Ltd (“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 8 December 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 Placement

10. The complaint relates to an outdoor billboard:



Complaint

11. The complainant objects to the marketing as follows:
 - *Billboard advertising does not visibly show the drink responsibly badge. The ad presents a viewpoint that appears to promote drinking as the standard action for all emotional states.*
 - *There is, many situations where it feels irresponsible to be promoting alcohol in this way, especially without a minimum visible and preferably obvious recommendation to drink responsibly.*

The ABAC Code

12. ABAC is transitioning to a new Code with complaints relating to a marketing communication that has been continuously in market prior to 31 July 2023 dealt with under the previous Code. As the ad on the billboard has been in the market since before 1 August 2023, this determination will be made in line with the previous Code.
13. Part 3 (c) of the Code provides that a Marketing Communication must NOT:

- (i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;

...

- (iv) suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation.

The Company Response

14. The Company responded to the complaint by letter emailed on 18 December 2023. The principal comments made by the Company 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(c)(i) or (c)(iv) of the ABAC Code by Lion and the Complaint should be dismissed by the ABAC Panel.

Alcohol Advertising Pre-vetting Service

- The product packaging was not submitted for review through the Alcohol Advertising Pre-Vetting Service (AAPS). However, the Advertisement was submitted for review through AAPS and received the enclosed certificate of final approval (AAPS Approval No. 5673).

Responsible depiction of the effects of Alcohol

- For the following reasons, we do not consider that the Advertisement breaches Part 3(c)(i) or (c)(iv) of the ABAC Code:
 - the Advertisement contains the phrase “HOW DO YOU FEEL?” and the image of two cans with one reading “I FEEL LIKE A TOOHEYS”;
 - 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” – namely, if you want a beer, you want a Tooheys product;

- there is no additional information in the Advertisement that would suggest to the reasonable consumer that the consumption or presence of the product:
 - could cause or contribute to an improvement in mood or environment; or
 - offers any therapeutic or health (including mental health) benefit, is needed to relax, or helps to overcome problems or adversity; and
- while there is no express requirement under the ABAC Code, Lion voluntarily includes responsible consumption messaging in all of our advertising, and in compliance with sizing requirements prescribed by DrinkWise Australia. We note that the Advertisement includes this messaging.
- 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

15. Earlier in 2023, Lion revived and rejuvenated its long-standing 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 Pacific Highway near Hexham, New South Wales and expressed the following concerns:
 - the billboard advertising does not visibly show the drink responsibly badge; and
 - the ad presents a viewpoint that appears to promote drinking as the standard action for all emotional states.
16. As noted by the Company, the Code does not contain a requirement to include a "drink responsibly" message. This means a failure to include such a message is not a breach of the ABAC standards. It is noted that many alcohol marketers do include a "drink responsibly" message with their marketing and the Company advises it did so in this case.
17. What the Code does require is that alcohol marketing communication must not:

- suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment (Part 3 (c)(i)); or
 - suggest that the consumption of an Alcohol Beverage offers any therapeutic benefit or is a necessary aid to relaxation (Part 3 (c)(iv)).
18. The Company contends that the billboard is consistent with the ABAC standards, arguing:
- 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 reponse being “I FEEL LIKE A TOOHEYS” – namely, if you want a beer, you want a Tooheys product;
 - there is no additional information in the advertisement that would suggest to the reasonable consumer that the consumption or presence of the product:
 - could cause or contribute to an improvement in mood or environment; or
 - offers any therapeutic or health (including mental health) benefit, is needed to relax, or helps to overcome problems or adversity.
19. The Panel’s role is to assess the consistency of alcohol marketing communications with ABAC standards from the standpoint of the probable understanding of the marketing item by a reasonable person. This means the life experiences, values and attitudes found by most people in the community is the benchmark.
20. The Panel believes that the marketing is consistent with the ABAC standards. In reaching this conclusion the Panel noted:
- the “I feel like a Tooheys” marketing campaign is of very long standing (particularly in NSW) having commenced in the 1970s. It is reasonable to assume that most adult consumers would be familiar with the strapline and will associate the brand antecedence when viewing a new campaign about the product;
 - the billboard ad would most probably be understood as suggesting that Tooheys is the preferred choice if a beer drinker is inclined to seek out a beer to consume;
 - the advertisement does not show alcohol consumption nor does it depict a mood or environment which changes after consuming alcohol;

- there is no portrayal of a stressful situation, problems or adversity, or suggestion that alcohol is needed to be able to cope with stress, problems or adversity; and
- there is no mention of or reasonable implication that the product offers a health benefit.

21. The complaint is dismissed.