

ABAC

ABAC Complaints Panel Determination No: 8/10

Complaint of Alcohol Policy Coalition Product: Skinny Blonde Beer Advertiser: Brothers Ink Pty Ltd

Professor The Hon Michael Lavarch – Chief Adjudicator
Jeanne Strachan – Member
Professor Fran Baum – Member

12 March 2010

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns the company website and a product label for the product Skinny Blonde Beer. Skinny Blonde Beer is produced and marketed by Brothers Ink Pty Ltd (“the Advertiser”).
2. The determination results from a complaint by the Alcohol Policy Coalition which is a coalition of public health agencies, namely:
 - Australian Drug Foundation
 - Cancer Council of Victoria
 - Turning Point Alcohol and Drug Centre
 - Vic Health

The Quasi-Regulatory System

3. Alcohol advertising in Australia is subject to an amalgam of laws and codes of practice which regulates and guides the content and, to some extent, the placement of advertisements. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol advertising as quasi-regulation. The most important provisions applying to alcohol advertising are found in:
 - (a) a generic code (the AANA Advertiser Code of Ethics) with a corresponding public complaint mechanism operated by the Advertising Standards Bureau (ASB);
 - (b) an alcohol specific code (the Alcohol Beverages Advertising Code) and complaints mechanism established under the ABAC Scheme;

- (c) certain broadcast codes, notably the Commercial Television Industry Code of Practice (CTICP) which restricts when direct advertisements for alcoholic drinks may be broadcast; and
 - (d) The Outdoor Media Association Code of Ethics which includes provisions about Billboard advertising.
4. The complaints systems operated under the ABAC scheme and the ASB are separate but inter-related in some respects. Firstly, for ease of public access, the ASB provides a common entry point for alcohol advertising complaints. Upon receipt, the ASB forwards a copy of the complaint to the Chief Adjudicator of the ABAC Panel.
 5. The Chief Adjudicator and the ASB independently assess the complaint as to whether the complaint raises issues under the ABAC, AANA Code of Ethics or both Codes. If the Chief Adjudicator decides that the complaint raises solely issues under the Code of Ethics, then it is not dealt with by the ABAC Panel. If the complaint raises issues under the ABAC, it will be dealt with by the ABAC Panel. If the complaint raises issues under both the ABAC and the Code of Ethics, then the ABAC Panel will deal with the complaint in relation to the ABAC issues, while the ASB will deal with the Code of Ethics issues.
 6. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

7. The complaint is in the form of a letter dated 22 December 2010 received by ABAC on 14 January 2010.
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. In this case, the complaint raised new issues about the application of labelling and packaging extension to the ABAC and has not been determined within the timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed advertisements against the ABAC prior to publication or broadcast. The Advertiser is not a Code signatory and pre-vetting approval was not obtained for the website advertisements.

The Advertisement

10. The complaint refers to a version of the website located at www.skinnyblonde.com.au at the time of the complaint.
11. On entering the website the Skinny Blonde logo is shown and the user is asked to select whether they are over or under 18 years. On selecting that they are over 18 years the user is taken to the homepage of the website.

12. By selecting menu items “About the Beer” and then “What’s News” users are taken to a page on the website that provides links to various articles and a link to stockists. The page also contains the following statement next to a picture of the logo and 2 x 375ml bottles of the product, “The rumours are true, the Brothers are the first in the world to create it. “A girl on a label that tells you your beer is too warm.” Skinny likes it in a nice cold fridge, but once you drink her down watch for the fireworks”.
13. The web page contains a link to an article featured in Zoo weekly which describes the attributes of the label and contains pictures of the label with and without the bikini. The page also contains links to a number of other articles under the heading “Recent Press” that also describe the features of the beer label.

Name and Packaging

14. The label features a 1950’s style picture of a buxom attractive blonde woman wearing a red bikini with the text “Skinny Blonde”, “Brothers Ink”, “100% beer”, “350ml”, “5% ALC/VOL”. As the beer warms up the woman’s bikini disappears and she is seen topless. There is also a label on the neck of the bottle that features a head and shoulders picture of the woman with the text “Low Carb Lager” and “Skinny Blonde”.

The Complaint

15. The complainant argues that the feature of the label that involves woman’s clothing being removed by the consumption of alcohol (which corresponds with the bottle warming up) presents an immature and irresponsible approach to the consumption of the alcohol and is offensive behaviour in breach of Part 2.1(a) of the ABAC.
16. The complainant also argues that the advertiser has failed to comply with an earlier determination by the ABAC Panel by altering text found to be in breach of the ABAC with text that has the same effect as that which preceded it. Namely the substitution of the words “watch for the fireworks” within the text set out in paragraph 12 above for the original wording “she can’t help but get her clothes off”.

The Code

17. Part 1 of the ABAC provides that advertisements for alcohol beverages must:
 - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - c) not suggest that the consumption or presence of alcohol beverages may create or contribute to a significant change in mood or environment and, accordingly -
 - i) must not depict the consumption or presence of alcohol beverages as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

18. Part 2.1 of the ABAC provides that the naming and packaging of alcohol beverages (which is also referred to within these standards as “product material”) must:
 - a) present a mature, balanced and responsible approach to the consumption of alcohol beverages and, accordingly –
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
19. Part 2.2 of the ABAC provides that these standards (Part 2 (1) (a)-(g)), apply to the naming and packaging of all alcohol beverages supplied in Australia, with the exception of the name of any product or a trademark which the supplier can demonstrate, to the satisfaction of the Adjudication Panel, had been supplied for bona fide retail sale in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009.

The Advertiser’s Comments

20. The Advertiser responded to the complaint and questions posed by the Panel by letter dated 3 February 2010. The response is lengthy and is attached as Annexure A.

The Panel’s View

Introduction

21. The ABAC Scheme is quintessentially a self-regulatory initiative sponsored by three (3) industry peak bodies covering major components of the alcohol beverage industry. The three (3) sponsoring organisations are:
 - Brewers Association of Australian and New Zealand
 - Distilled Spirits Industry Council of Australia
 - Winemakers Federation of Australia.
22. The Scheme operates because the member companies of the three peak bodies have committed themselves to advertise consistently with the terms of the ABAC and to comply with decisions of the Panel when determining public complaints about advertisements which fall within the scope of the scheme. In this case, the advertiser is not a member of one of the three scheme sponsors, nor has it become a direct signatory to the Code. Accordingly, on the face of it, the Panel has no authority to make a determination which has any binding effect on the advertiser.
23. This is the fourth occasion on which the Panel has, however, made a determination concerning advertising for Skinny Blonde beer (38/09 dated 11 May 2009, 60/09 dated 7 July 2009 and 63, 66 & 72/09 dated 21 October 2009). On each occasion, the advertiser has stated its commitment to good advertising practice and its willingness to comply with the Panel’s decision. Based on this, the Panel has proceeded to make the determination.

Label and Packaging

24. This complaint is the first received by the Panel since the extension of the ABAC scheme to alcohol beverage “naming and packaging” on 31 October 2009. Because it is the first occasion the Panel has dealt with such a complaint about a product label, it has been decided to explain the provisions inserted into the ABAC and the rules and procedures which the Panel is to apply.
25. The extension of the ABAC scheme to product names and packaging has been implemented by the Management Committee of the scheme by way of the insertion of a new Part 2 into the ABAC. This Part replicates the advertising standards contained in the original Code (now Part 1) and states “The naming and packaging of alcohol beverages – product materials – must follow the specified standards”. The standards are those which apply to product advertising more generally.
26. The new Part 2 contains a “grandfathering” provision which means that the standards are to apply to “the naming and packaging of all alcohol beverages supplied in Australia, with the exception of the name of any product or a trademark which, the supplier can demonstrate to the satisfaction of the Adjudication Panel, had been supplied for *bona fide* retail sale in the ordinary course of business in a State or Territory of Australia prior to 31 October 2009”.
27. The effect of the provision is that certain “product material” which falls within the protection of the grandfathering provision is not required to comply with the new Part 2 of the ABAC. The “carve out” is not unlimited however. It applies to:
 - The name of any product, or
 - A trademark
 - Supplied for *bona fide* retail sale in the ordinary course of business
 - In a State or Territory
 - Prior to 31 October 2009.
28. This is quite a complicated provision and requires that the “supplier” of the product carry the onus of satisfying the Panel that the complained-about product material falls within the scope of the provision. The use of the term “trademark” is notable as this is a legal expression referring to a class of intellectual property.
29. The actual ABAC provisions are complemented by rules and procedures also settled by the ABAC Management Committee, as the scheme’s governing body. The rules and procedures for naming and packaging complaints require the Chief Adjudicator to play a particular role in ensuring that a label, name or package found to be in breach of the ABAC is modified consistently with the ABAC standards. The rules contain an explanation of the term “supplier” used in the ABAC as meaning the manufacturer or distributor of the product.
30. Putting all this together, the process which the Panel will follow in considering a complaint about a product name, label or packaging involves firstly an assessment of

whether the “product material” falls within the scope of the grandfathering provision and then, if it is not exempted because of the grandfathering provision, a consideration occurs as to whether the relevant ABAC standard has been breached. Finally, if the standard is breached, then the modified product material will be assessed by the Chief Adjudicator for consistency against the ABAC standards as a whole.

31. In this case the advertiser was asked if the label had been “supplied for *bona fide* retail sale in the ordinary course of business” prior to 31 October 2009. In short, the advertiser advised that this was the case.
32. The Panel needs to be “satisfied” of this fact according to section (2) of Part 2 of the ABAC. The Panel has previously made several determinations about advertisements for the product, the earliest being made on 11 May 2009. It is quite evident that the product with its current label was available for sale prior to 31 October 2009 and, accordingly, the label falls within the scope of the grandfathering provision and the label is exempted from complying with the substantive standards within the Code.
33. Accordingly the Panel is obliged to dismiss this part of the complaint. In doing so, the Panel makes no substantive finding on whether the label, if not exempted, would or would not be consistent with the ABAC standards.

Website’s Consistency with Section (c) of the ABAC

34. The second part of the complaint argues that the advertiser has failed to comply with Determination 63,66&72/09 dated 21 October 2009 in that an alteration to text that was found to be in breach of the ABAC has the same effect as the text that preceded it and is therefore still in breach of section (c)(i) of the ABAC.
35. The Panel found the website in Determination 63,66&72/09 dated 21 October 2009 to be in breach of section (c) of the website by reason of the description of the features of the beer and the strong causal link between consuming the product and the removal of a woman’s clothing. In making this finding the Panel noted the following features of the previous version of the skinny blonde website advertisement:
 - the depictions of bottle of the product showing the label featuring the model with and without the bikini;
 - the statement next to a picture of the logo and 2 x 375ml bottles of the product, “The rumours are true, the Brothers are the first in the world to create it. “A girl on a label that tells you your beer is too warm.” Skinny likes it in a nice cold fridge, but once you drink her down she can’t help but get her clothes off.”
36. The Panel notes that the complainant removed the pictures on its website of the bottle with a label featuring the model with and without the bikini and also altered the text in the previous paragraph by removing the text “she can’t help but get her clothes off” and replacing it with “watch for the fireworks”.
37. As the advertiser had informed the Panel it had modified the website the previous determination had been concluded and the Panel may now make a fresh decision on the modified version of the website.

38. The Panel notes the amendments the advertiser made to its website, however, it also notes:

- (a) numerous links on its website to articles that contain a description of the features of the label that involve the woman's clothing being removed on consumption of the product;
- (b) its own description of the disappearing ink technology on its page entitled "About the Beer" where it states "Daisy's red bikini slowly disappears as the beer is consumed until she reveals all".
- (c) the Zoo weekly, Nextround, Trendhunter, Patriot Room and Tasty Booze articles feature pictures of the bottles with the models bikini on and off.

The Panel is of the view that the combination of the text in paragraph 12 above together with the descriptions of the disappearing bikini on consumption on the website and by the inclusion of links to articles is in breach of section (c) of the ABAC.

39. Accordingly, the Panel upholds the complaint in relation to Part 1 of the ABAC.