

ABAC

**ABAC Complaints Panel
Determination No: 38/09**

**Confidential Complaint
Product: Skinny Blonde Beer
Advertiser: Brothers Ink Pty Ltd**

Professor The Hon Michael Lavarch – Chief Adjudicator
Professor Elizabeth Dangar - Member
Professor Fran Baum – Member

11 May 2009

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns a Fan Club page on “Facebook” for Skinny Blonde Beer by Brothers Ink Pty Ltd (“the Advertiser”) and arises from a confidential complaint received 19 April 2009.

The Quasi-Regulatory System

2. 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.
3. The ASB and the Panel both assess complaints separately under their own rules. However, for the ease of public access to the complaints system, the ASB receives all complaints about alcohol beverage advertisements and forwards a copy of all complaints to the Chief Adjudicator of the ABAC.

4. The Chief Adjudicator of the ABAC then determines if the complaint raises issues which are solely within the province of the AANA Code of Ethics. If not, then the complaint will be forwarded to the ABAC Adjudication Panel for consideration. If only AANA Code issues are raised, then the matter is determined by the ASB.
5. The complaint raises a concern under the ABAC Code and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

6. The complaints are in the form of a confidential email received on 19 April 2009.
7. 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. This complaint has been determined within the 30 day timeframe.

Pre-vetting Clearance

8. 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 Fan Club page.

The Advertisement

9. The advertisement takes the form of a Fan Club page on the "Facebook" social networking website.
10. The page is found at www.new.facebook.com/group.php?gid=6094982918. It is entitled "Skinny Blonde Fan Club" with category "Global". Under the heading "Basic Info", the "Type" is "Entertainment & Arts - Nightlife" and the "Description" is "Skinny Blonde is the tastiest low carb beer on the market. Whilst the majors are peddling watery rubbish we bring you real beer flavour in a tasty dry beer. Try it on tap at the – Beach Road Hotel, Occidental, Captain Cook, Annandale Hotel & Bungalow 8". A contact email address is then supplied.
11. The next section of the site is headed, "Recent News". The following text is included "Its been years in the making but now the most ground breaking beer in the world is making its debut in bottles. Pick up a 6 pack or carton from the Beach Road Hotel bottle-o in Bondi and be the first to behold the majesty that is Skinny Blonde."
12. The next section of the site is "Members". A selection of the 439 members is shown and all members can be viewed by selecting "See All". It is difficult to determine the age of the members, however, on viewing the photographs a number of the members could be adolescents or children.
13. Below the Members is a heading "The Wall" on which a selection of the 31 posts are featured. The posts are comments by members on the site and the beer.

14. The next part of the site is “Photos”. A selection of the 47 photos on the site are displayed.
15. The last section of the site is headed “Links”. The first link featured is for “The Bondi House DJs”. The second link is to a youtube video referred to as “Miracle Beer Diet” with the description “Lose weight with this amazing new diet plan! Written and directed by Jed Gillen.” The link has been removed from the site but may be found at <http://www.youtube.com/watch?v=hD3deQmyRHw>. The video is a humorous take on diet ads. A young, slim, blonde woman is explaining how drinking a few beers results in putting on weight but drinking a lot of beers results in weight loss when vomiting and other side effects ensue. At the end of the video a message is displayed “The preceding video was a joke. If you think that drinking beer will make you thin then you are an idiot”.

The Complaint

16. The complainant argues that:
 - (a) The Fan Club site for Skinny Blonde beer serves as an advertisement for the beer;
 - (b) The site is open for anyone to join, including minors;
 - (c) It appears minors may already have joined the group; and
 - (d) The video at the bottom of the page glorifies binge drinking and encourages drinking their low carb beer in excess to avoid getting fat.

The Code

17. 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 –
 - i) must not encourage excessive consumption or abuse of alcohol;
 - ii) must not encourage under-age drinking;
 - iii) must not promote offensive behaviour, or the excessive consumption, misuse or abuse of alcohol beverages;
 - b) not have a strong or evident appeal to children and adolescents and accordingly
 - ii) children and adolescents may only appear in advertisements in natural situations (eg family barbecue, licensed family restaurant) and where there is no implication that the depicted children and adolescents will consume or serve alcohol beverages;

18. The ABAC also provides in relation to internet advertisements that its standards apply “to internet sites primarily intended for advertising developed by or for producers or importers of alcohol products available in Australia and to banner advertising of such products on third party sites.

Arguments in Favour of the Complaint

19. In favour of the complaint it is alleged that:
- (a) the advertisement encourages underage drinking and has a strong or evident appeal to children and adolescents by a combination of:
 - locating the advertisement on a social networking site (Facebook);
 - allowing anyone, including minors, to view the site and join the fan club;
 - not in any way discouraging minors from viewing and joining the site by including age requirements;
 - including humorous postings and links; and
 - including photographs of minors as members of the fan club.
 - (b) the advertisement promotes excessive consumption and misuse and abuse of alcohol beverages by glorifying binge drinking and encouraging drinking low carb beer to avoid getting fat by a combination of:
 - the use of the word “skinny” in the description of the beer; and
 - the inclusion of a link to a YouTube video entitled “Miracle Beer Diet”.

The Advertiser’s Comments

20. The Advertiser responded to the complaint and questions posed by the Panel by way of letter dated 24 April 2009. The points made by the Advertiser in relation to the advertisement were:
- (a) We had no intention of breaching the ABAC in creating the Skinny Blonde Fan Club on Facebook. In fact we did not view this as an “advertisement” for an alcoholic beverage as such as it is simply one of many fan sites to be found on Facebook.
 - Facebook has as a large part of its make up the ability to create fan pages which pages allow members of the Facebook community to become fans of whatever the subject matter of the page is. This could be a person, a product, a political or social issue, an event, a charity – in fact anything that the imagination can come up with – even down to a thought or a feeling. There are over 650,000 fan pages on Facebook – with the largest fan page being held by Barack Obama.
 - The decision to establish the Skinny Blonde Fan Club was at least partly informed by currently available fan clubs on Facebook. A search

on Facebook for the term “beer” will return over 500 results. Most of these are fan clubs devoted to beer – either generally as a beverage or with reference to specifically named brews. Such a search will not return the Skinny Blonde page. We deliberately did not include any reference to “beer” in the title or tags of the page so that this page would not be able to be located on the basis that it is an alcoholic beverage. It is truly designed to be targeted to “fans” of the product – who we believe to be friends or people of legal drinking age that have come across the product in proper licensed outlets. As there has been very limited marketing activities undertaken by the Skinny Blonde label there is no general market awareness of this product or brand at this stage of its product life cycle.

- We currently only have a very modest amount of fans (438 members) of whom most if not all are known to us as friends or friends of our friends. In other words far from being an advertisement this web page works as a congregation point for our circle of friends who have been enthusiastically supporting our endeavours.
- Our activities appear to mirror the approach by other leading beer brands in Australia which also informed our view that this use of Facebook was acceptable. A quick survey reveals pages for Carlton Draught (over 9,000 members), VB (over 2000 members) and Tooheys New (over 2,000 members).
- It is interesting to note that these sites’ member numbers are largely dwarfed by sites created in respect of those beers that include “beer” in the title of the page itself – for example Budweiser and Bavaria beers (both over 13300 members) and Becks (over 14500 members). Thus having regard to the above we query whether this use of Facebook in fact constitutes an advertisement of an alcoholic beverage at all.

(b) **Issue 1 – encouragement of underage drinking** - In the event that the Skinny Blonde Fan Club is found to be an advertisement for an alcoholic beverage to which the ABAC applies:

- We strongly dispute that the mere location of the Fan Club on Facebook is of itself evidence of encouragement of underage drinking or of any design to appeal to children or adolescents. No evidence has been presented by the complainant that Facebook is designed as a site to target children and adolescents. It is interesting to note in this regard that minors do not constitute a large part of the Facebook community. We acknowledge that subject to the restriction discussed below minors can access Facebook. However we submit that the population of Facebook is an aging one. In support of this: There is an express prohibition on those under 13 being able to join the site. As for the 13 – 17 year olds access is restricted to those that are part of a recognised school community. As a result of this to the extent that minors can access Facebook we submit that these are a small part of the Facebook community. Facebook has more than 200 million active users worldwide. More than 2/3 of users are outside of college – and

considering this is across all of the Facebook community this again provides evidence that the participation of minors in this social networking site must be minimal as a matter of possibility and fact. The fastest demographic as of 2009 is in the 35 and older age bracket. This is consistent with the fastest growing demographic as at January 2008 which was the 25 year olds and over bracket. All of this lends support to the proposition that one cannot draw a conclusion about the target audience of the Skinny Blonde page in question merely because of its location on Facebook, nor that its affect would be in contravention of the ABAC.

- One must be a member of Facebook to access any of its content. Thus to say that 'anyone' can view the site is not correct. Further this page is not actively advertised in a traditional sense throughout the Facebook site – it must be found and joined via means provided within the Facebook community. Means offered to do this are by searching, but more importantly via a viral awareness campaign – by the administrator's friends joining and then by friends of those friends also joining. As already noted the name of the Fan Club does not contain any reference to an alcoholic beverage. Therefore it would not be easy for a minor to stumble across this Fan Club. Further the Fan Club has largely attracted our known friends who are aware of our activities and are joining the club in order to show support for these activities and wish us success in our endeavours. Having said that we acknowledge that membership of the Fan Club was open to the whole Facebook community and that community obviously does have minors as a part of it, no matter how small that part is. In recognition of this the Fan Club is no longer open to automatic membership. Now potential fans must ask to join the club and will be vetted by us for age and suitability prior to acceptance of the application to join.
- We submit that there is nothing that encourages minors to view the Fan Club and join. We reiterate that it is not enough to infer such encouragement by its location on Facebook itself. There are many legitimate activities on Facebook for all ages and the statistics demonstrably show that Facebook is overwhelmingly an adult site. In any event we have taken steps to ensure that no minors join the fan club by changing the automatic access to the page to a vetted one.
- We strongly disagree that the posting of humorous postings and links is evidence of an intention to encourage underage drinking or that any posting was targeted towards minors at all. There is no evidence that any humour – including the cited video – is in any way a special or targeted appeal to minors – and further we completely reject the implication that humour is something that only appeals to those under 18. On the contrary we submit that alcohol related humour is specifically targeted by definition at those over 18. We also submit that humour is a very common feature in alcohol related advertising and therefore is not unacceptable in a general sense.

- Photos included on the webpage of members of the Skinny Blonde Fan Club are randomly selected as part of the operation of Facebook itself. Added to this is the fact that members of Facebook select whatever photo they wish to represent themselves to the public as part of their profile. This may include an actual photo of themselves, a landscape, an animal, a cup of coffee or a baby photo etc. No inference can be drawn from the photo as to the actual age or indeed identity of the member. Thus the fact that a member's photo is that of a baby does not mean the member is a baby. Any member of the Facebook community (who are the only ones that can access this page in any event) would be aware of how Facebook works in this regard. There are two ways you may be able to join a fan club on Facebook – it may be completely open to all comers – ie you just click on the “become a fan” button and you are added as a fan. Alternatively the administrators can require that applications to become a fan be accepted by them. In this second process applications can be rejected for any reason whatsoever. As such we do not see how any inference could be drawn from such photos that this would encourage underage drinking or increase the appeal to children.

(c) **Issue 2 - promoting excessive consumption, misuse and abuse of alcohol by glorifying binge drinking low carb beer.** The link to the video is just that – a link to YouTube which is a publicly accessible site displaying video posts of its members which are uploaded from around the world. This video would be accessible by anyone in Australia that has access to an internet connection. In other words it is not content that is generated by or resident on the Skinny Blonde Fan Club page. A brief viewing of this video shows that it is clearly home made and a very obvious lampoon at the foibles of excessive drinking. In fact this video amounts to a very obvious implied criticism of the behaviours depicted. There is no subtlety involved in the presentation. Even if one were not able to discern the true purpose of the video when watching it there is a disclaimer at the end of the presentation which makes this perfectly clear: “The preceding video was a joke. If you think that drinking beer will make you thin, then you are an idiot” In order to avoid any further issue with this we have removed this from the webpage as it is not an integral part of the site, does not portray any particular message we need to be associated with and was only posted with humour in mind.

(d) To conclude we believe that we have not violated the ABAC for the reasons stated in this submission. We wish to assure you we are and intend to be upstanding and long term members of the brewers' community in Australia and recognise the importance of social responsibility in the advertising and distribution of alcohol. As such we reiterate that despite our belief that we have not violated the ABAC we have nonetheless taken the following steps as a precaution to ensure that we fulfil this responsibility:

- closed access to the Skinny Blonde Fan Club on Facebook so every member will be vetted by us as administrators before being able to access the page;

- removed the link to the Youtube video

The Panel's View

21. This complaint raises a jurisdictional issue, as well as the substantive issue of the consistency of the advertisements with the ABAC standards. These issues will be addressed in turn.

The application of the ABAC to non-Code signatories

22. The ABAC scheme is an initiative of peak industry bodies covering members in the alcohol beverage industry. The advertiser is not a member of one of the ABAC sponsors and has not become a signatory to the scheme. As such, the advertiser has not given a prior commitment to abide by the standards contained in the ABAC or to be bound by a decision of the Panel.
23. That said, the advertiser has fully cooperated in the Panel process and has indicated its commitment to social responsibility in advertising. Accordingly the Panel has proceeded with this determination.

Is the “Skinny Blonde Fan Club” an “advertisement for an alcohol beverage” within the meaning of the ABAC?

24. The ABAC is a code of practice for “alcohol beverage advertising”. The advertiser, disputes that the “Skinny Blonde Fan Club” is an “advertisement”. This raises the question of whether the page on the website falls within the ambit of the ABAC scheme.
25. The ABAC provides in its preamble that the industry sponsors of the scheme are committed to the goal of “all advertisements for alcohol beverages” complying with the spirit and intent of this code. “Internet advertisements” are defined in the Code as “internet sites primarily intended for advertising developed by or for producers or importers of alcohol products available in Australia..”. The term “advertising” is not defined by the ABAC.
26. The essence of the argument made by the advertiser is that it did not view the Fan Club page on Facebook to be an “advertisement” as such. Rather, it saw the page as opportunity for a small group “who we believe to be friends or people of legal drinking age” to congregate in support of the endeavours of the product producers. In other words, the Fan Club page acts as a virtual meeting place and it is no more an “advertisement” than an actual meeting of people in a venue who come together through a common interest or connection.
27. It is fair to say that the ABAC was framed with a more traditional media and form of advertising in mind *i.e.* an overt ad published or broadcast in the “old” media of print or television or radio. The ABAC scheme came into operation in 1998 and was extended to the internet in 2004. Social networking sites such as Facebook came into existence either after this time or have become widely used only in the last few years.
28. The Panel undertook a limited review of the position in New Zealand and the United Kingdom to assess if a Facebook Fan Club page had been considered as “advertising”

in either country as the regimes applying to alcohol beverage advertising in both jurisdictions are similar to Australia. In New Zealand, the Advertising Standards Authority, in Complaint 07/664 dated 9 January 2008, dismissed a complaint about a Facebook site because it was considered as American-sourced advertising and beyond the jurisdiction of a New Zealand body to make a decision. It was implicit, however, that the site was “advertising” within the meaning of the scheme in that country.

29. In the United Kingdom, the Advertising Standards Authority advised only “paid” advertising on a Facebook site, and not the webpage itself, would be considered as advertising. In contrast, the Code Advice and Compliance Manager of the Portman Group gave an opinion that under the Portman code, a Facebook Fan Club page for an alcohol beverage would be captured. There had, however, been no actual determination on point as no complaint has to date been received under the Portman code scheme about “Facebook” pages.
30. While of interest, the overseas experience is not decisive. The Panel must apply the ABAC. The Panel considers the Skinny Blonde Facebook page to be “advertising” within the meaning of the ABAC. In reaching this conclusion, the Panel has had regard to:
 - The fact that the Fan Club page was developed by the producers of the product and the producers exercise control over the content of the page and how the product is described and portrayed in visual terms.
 - The content of the page features a picture of a bottle of the product and a description of its characteristics in a manner, if found elsewhere *i.e.* a direct producer website, would be taken by a reasonable person as advertising.
 - The information on the Microsoft webpage about Facebook Fan Club pages refer to the pages as an effective way of promoting a brand.

Is the Fan Club page consistent with the ABAC standard?

31. The complaint raises a concern that the Fan Club page is appealing to under-age drinkers and glorifies binge drinking. These concerns are rejected by the advertiser who argues that a Facebook site is not of itself evidence of appeal to children or adolescents. It is argued that there is nothing in the material itself on the page which can be said to have an evident appeal to a younger audience.
32. The ABAC is a code which is directed towards the content of an advertisement as opposed to the placement of the advertisement. The issue of placement is only indirectly referred to in the ABAC preamble and becomes relevant in regard to the likely audience of an advertisement in assessing if an ABAC standard has been complied with.
33. The Facebook site, like any site which contains user-generated content, poses particular challenges to both the advertiser and the Panel in attempting to ensure the ABAC standards are satisfied. This is because the medium, by its nature, is both dynamic and consists of content sourced from multiple (potentially thousands)

individual authors. A complainant will see the page and its content at a particular point in time. By the time the Panel views the page, its content may be quite different, even if this is only a day or two after a complaint is made.

34. It is the responsibility of the advertiser to maintain its site in a manner which is consistent with the ABAC. The Panel viewing the material on the site at the time the complaint was referred, does not believe content on the page developed by the advertiser can be said to encourage under-age drinking or that its appeal to children is overtly strong. The site will have younger viewers, but its content is not targeted at children or adolescents.
35. In addition to the advertiser-generated content, the page contains user-generated content from “friends” or “fans” who have joined the Fan Club. This generally takes the form of comments and observations from the users of the page. The users often have a name and picture attached to the content which they have added. These pictures, which may or may not be of the actual user, in some instances viewed by the Panel included the faces of children.
36. The ABAC provides that children are not to be portrayed in alcohol beverage advertising unless as part of a “natural situation” and where there is no implication that the children will consume alcohol. Again, it would be fair to say that the drafters of this provision did not have “Facebook” in mind when the provision was developed. The advertiser has responded to the complaint by closing access “so every member will be vetted by us as administrators before being able to access the page”. This is an appropriate step which the Panel welcomes.
37. Notwithstanding the advertiser’s actions to strengthen safeguards, the Panel is obliged to make a decision on the complaint against the Facebook site as it was (or at least as best as it can be assessed to be) at the time of the complaint. In the Panel’s opinion, a principal policy rationale of the ABAC is that advertising should not be directed at children, nor should children be able to engage with alcohol beverage promotion. The apparent presence of children on the site, as indicated by “fans” having children’s pictures, is contrary to the intent of the scheme and accordingly the Panel believes the Page breaches this section of the ABAC.
38. The second issue raised by the complaint is whether the page glorifies and hence encourages binge drinking. This is argued to flow from the posting of a video on the page which the complainant interprets as suggesting binge drinking is either funny or has positive attributes. The advertiser argues the video is a parody of binge drinking and has the opposite message to that taken by the complainant.
39. The video is clearly intending to be humorous and is a parody of the “benefits” of binge drinking. The Panel has previously considered the use of humor in advertising and noted that it is a relevant factor in how a reasonable person would assess advertising; but humor is not an antidote which of itself will cure an ad which, taken as a whole, would breach an ABAC standard.
40. In this case, the Panel believes the video would not be taken by a reasonable viewer as promoting binge drinking. Rather, it is an attempt to show how stupid the practice actually is.

41. In summary, the Panel finds that the Facebook Fan Club Page as it appeared at the time of the complaint was in breach of section b (ii) of the ABAC. The Panel does not believe the Page, via the link to the video, promotes excessive consumption. In reaching this outcome, the Panel has been obliged to adopt a policy position on the application of the ABAC to new media, such as Facebook. The Panel believes the interaction of the ABAC with social networking media should be considered by the ABAC Scheme's Management Committee in any future holistic review of the ABAC Scheme.
42. The complaint is upheld.