



ABAC Adjudication Panel Determination No. 126/16

Product: Smirnoff
Company: Diageo
Media: Outdoor
Complainant: Confidential
Date of decision: 20 December 2016
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns outdoor advertising for Smirnoff by Diageo (“the Company”) and arises from a complaint received 15 November 2016.
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 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”) – 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 – which places restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. Within this framework, some of the requirements go to the placement of alcohol marketing, while others go to the content of the marketing. The ABAC is a content code, which means the standards of good marketing practice within the Code apply irrespective of where the marketing occurs (e.g. in print, in digital formats, or by broadcast mediums). Equally, the fact that the marketing is placed in a particular medium or in a particular location will not of itself generally be a breach of the ABAC. In contrast, the placement codes applying to outdoor sites or free to air television don’t go to what is contained within alcohol marketing but the codes will be potentially breached if the marketing occurs at particular timeslots or is placed near a school.
 4. For ease of public access, the Advertising Standards Bureau (ASB) provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the ASB, 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 the ASB 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 ASB 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 15 November 2016.
8. The Panel endeavour 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 has been determined within this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for these marketing communications (15047).

The Marketing Communications

10. The complaint is about two outdoor advertisements, one at Southern Cross train station and the other at North Melbourne train station.

'Pride' Advertisement

11. The first advertisement is a collage of images, including two women hugging and smiling, two women kissing, two men embracing and a group of silhouetted people dancing and a person wearing heavy makeup.
12. Centre and left side of the collage features the tagline in large white print against a red background "Pride and no Prejudice".
13. On the right side of the collage is an image of the top half of an opened bottle of Smirnoff with a neon sign over the top of the bottle "We're Open". In the left corner is a small 'Drink Wise' logo.

'Dance' Advertisement

14. The second advertisement is a collage of images, including different images of people dancing and smiling.
15. At the top of the collage is the tagline in large white print against a red background "Can Dance, Can't Dance, Just Dance.".
16. On the bottom half of the collage is an image of the top half of an opened bottle of Smirnoff with a neon sign over the top of the bottle "We're Open". In the left corner is a small 'Drink Wise' logo.

The Complaint

17. The complainant is concerned that the advertising:
 - Breaches section 3(a)(ii) of the ABAC showing irresponsible or offensive behaviour that is related to the consumption or presence of alcohol by:
 - The construction of the slogans in three parts contrasted against a background of partygoers is clearly designed to communicate the different states experienced by a consumer as they drink alcohol throughout an episode of drinking;
 - The suggestion that individuals will go from a state of "pride", to "no pride" to "prejudice" breaches this item as it encourages

individuals to drink to the point of offensive behaviour toward others.

- Breaches section 3 (a)(i) of the ABAC encouraging excessive consumption by:
 - Expecting individuals will go from feeling proud, to not feeling proud, to feeling prejudicial;
 - Causing individuals to go from being able to dance, to being unable to dance, to 'just wanting to dance' presumably being past the point of caring that they can no longer dance.
- Breaches section 3 (c)(i) suggesting the consumption or presence of alcohol may create or contribute to a significant change in mood or environment by:
 - The construction of the slogans in three sections, which communicates the "stages" a drinker will experience during a session of alcohol consumption, clearly communicating that a change in mood will be associated with consumption of the product, mainly through the apparent loss of inhibition;
 - Representing the use of the properties of alcohol as an intoxicant as a primary marketing point and emphasising the change in mood associated with intoxication.
- Alcohol is a leading cause of avoidable harm across all age groups in Australia, and excessive consumption of alcohol is a risk factor for numerous mental and physical illnesses.

The ABAC Code

18. 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;
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
 - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;

The Company's Response

19. The Company responded to the complaint by letter dated 25 November 2016. The principal points made by the Company were:

- We wish to confirm our longstanding support and commitment to upholding the ABAC Responsible Alcohol Marketing Code (ABAC), as well as our best-practice global marketing standards, the Diageo Marketing Code (DMC).
- The two advertisements in question are 'Pride and No Prejudice' and 'Can Dance, Can't Dance, Just Dance', two of six creative executions that make up the Smirnoff "We're Open" outdoor campaign. The advertisements were created by the Smirnoff global brand team in the United Kingdom and repurposed for use in Australia by Leo Burnett on behalf of Diageo Australia.
- Inclusivity is at the centre of Smirnoff's brand purpose, which celebrates how inclusivity makes the world more fun. The "We're Open" campaign is an invitation to accept everyone and a provocation to be more inclusive. The 'Pride and No Prejudice' and 'Can Dance, Can't Dance, Just Dance' advertisements sit alongside the other campaign creative executions, which include the following bold statements of inclusivity: 'The Right Dress Code Is The One You're Wearing', 'Drink Responsibly, Dance Irresponsibly', 'We Still Say I do' (previously 'You Say I Do, We All Say I do') and 'Whether You're Coming Out Or Going Out'.
- As the advertisements in question are from the same campaign, the content is similar. The advertisements in question feature a collage background of people dancing and socialising in various environments. In the 'Pride and no Prejudice' creative execution, the words 'Pride and No Prejudice' and 'Can Dance, Can't Dance, Just Dance' are placed over the images in large, red text boxes and a Smirnoff bottle with a 'We're Open' neon sign at the top appears to the right of the text. The second creative execution follows the same format, with the tagline 'Can Dance, Can't Dance, Just Dance' in place of 'Pride and No Prejudice'. The DrinkWise 'Get the facts DrinkWise.org.au' logo appears on the bottom left-hand side of the advertisements.
- The Smirnoff We're Open creative execution has the tagline "Pride and No Prejudice" and there are no variations of the tagline under the campaign. The complainant describes the tagline of "Pride-No Pride-Prejudice" and base a large part of their complaint on the structure of the tagline comprising three consecutive statements. The tagline described by the complainant is inaccurate both in its wording and structure. While the tagline "Can Dance, Can't Dance, Just Dance" contains three consecutive statements, no other tagline from the "We're Open" campaign follows this same three part structure. Diageo finds it concerning that the complainant has misinterpreted the bold statement "Pride and No Prejudice" as a statement encouraging offensive behaviour

towards others. However, Diageo does not believe that a reasonable person would misunderstand or misinterpret the ad as anything other than promoting a positive message relating to inclusivity.

- Diageo does not believe that the “Pride” advertisement breaches **Part 3(a)(i)** and **(ii)** of the Code. As outlined above, the tagline or slogan described by the complainant for the “Pride” advertisement is neither accurate in the words that comprise it nor its construction as three consecutive statements. Therefore, the link between the “construction of the slogan” and the “different states experienced by a consumer” as described by the complainant does not exist. The advertisement tagline is “Pride and No Prejudice” and the images shown in the collage do not depict or imply different states experienced by a consumer as they drink alcohol. They show people enjoying themselves and having fun in an inclusive environment, including two women kissing, two men kissing, and two women smiling. Across the images the level of enjoyment depicted is consistent and does not imply or suggest different states experienced by a consumer as they drink alcohol throughout an episode of drinking.
- As outlined above, the tagline or slogan described by the complainant for the “Pride” advertisement is neither accurate in the words that comprise it nor its construction as three consecutive statements. The advertisement tagline “Pride and No Prejudice” does not suggest a change in state of mind. Therefore, it cannot be said by a reasonable person that the tagline is in any way encouraging individuals to drink excessively to achieve those feelings and to drink to the point of offensive behaviour towards others.
- The tagline “Pride and No Prejudice” is a statement from Smirnoff to accept everyone and a provocation to be more inclusive, including of people who identify as lesbian, gay, bisexual and transgender. Diageo does not believe that a reasonable person would believe that the tagline suggests a change in state of mind or encourages excessive consumption leading to a point of offensive behaviour.
- The “We’re Open” sign is a statement from Smirnoff to accept everyone and a provocation to be more inclusive. The placement of the sign over a bottle of Smirnoff is to show that inclusivity is at the core of the Smirnoff brand. Diageo does not believe it could be said by a reasonable person that the “We’re Open” sign over a bottle of Smirnoff encourages excessive consumption, leading to a point of offensive behaviour.
- The images shown in the “Pride” advertisement are displayed in a collage format. Within the images, people are depicted socialising and enjoying themselves in an inclusive environment, including two women kissing, two

men kissing, and two women smiling. This collage does not depict or imply different states experienced by a consumer or offensive behaviour towards others. Furthermore, within the images Smirnoff is not present. Diageo does not believe that the collage of images of people socialising in the advertisement encourages either the misuse of alcohol or irresponsible behaviour as per **Part 3(a) (i) or (ii)** of the Code.

- Diageo does not believe that the “Dance” advertisement breaches **Part 3(a)(i) and (ii)** of the Code. The tagline in question “Can Dance, Can’t Dance, Just Dance” comprises three statements, which are separated by commas rather than dashes or other symbols that may indicate time progression, as inferred by the complainant. The tagline itself is a statement of inclusion encouraging people to dance regardless of their ability. In environments where people might choose to drink Smirnoff, dancing is an activity that often happens, however there is often an expectation for people to be a good dancer in order to take part. This tagline was developed in direct response to this and offers a statement of inclusion. Diageo does not believe that a reasonable person would think that this statement is communicating the different states experienced by a consumer as they drink alcohol. The tagline does not communicate different states experienced by a consumer as they drink alcohol and in no way suggest or depict excessive consumption. The images shown in the collage do not suggest or depict different states experienced by a consumer as they drink alcohol or excessive consumption. They show people enjoying themselves and having fun in an inclusive environment, including people dancing and smiling. Across the images the level of enjoyment depicted is consistent and does not imply or suggest different states experienced by a consumer as they drink alcohol throughout an episode of drinking. Furthermore, the advertisement does not depict any person drinking an alcohol beverage. The “We’re Open” sign is a statement from Smirnoff to accept everyone and a provocation to be more inclusive. The placement of the sign over a bottle of Smirnoff is to show that inclusivity is at the core of the Smirnoff brand. Diageo does not believe it could be said by a reasonable person that the “We’re Open” sign over a bottle of Smirnoff encourages excessive consumption, leading to a point of offensive behaviour.
- The images shown in the “Dance” advertisement are displayed in a collage format. Within the images, people are depicted socialising and enjoying themselves in an inclusive environment, including people dancing and smiling. This collage does not depict or imply different states experienced by a consumer or offensive behaviour towards others. Furthermore, within the images Smirnoff is not present. Diageo does not believe that the collage of images of people socialising in the

advertisement encourages either the misuse of alcohol or irresponsible behaviour as per **Part 3(a) (i) or (ii)** of the Code.

- Diageo does not believe that the advertisements “Pride and No Prejudice” or “Can Dance, Can’t Dance, Just Dance” breach **Part 3(c)(i)** of the Code by suggesting that the consumption or presence of Smirnoff may create or contribute to a significant change in mood or environment. As outlined in Diageo’s responses above, the construction of the slogans do not communicate the “stages” a drinker will experience during a session of alcohol consumption. As such, it cannot be said that the ads are therefore communicating to the viewer that a change in mood will be associated with the consumption of the product.
- As stated in an above response, the “Pride” tagline as described by the complainant (“Pride-No Pride- Prejudice”) is inaccurate both in its wording and structure. The actual tagline is “Pride and No Prejudice” and is a statement from Smirnoff to accept everyone and a provocation to be more inclusive, including of people who identify as lesbian, gay, bisexual and transgender.
- The statement “Can Dance, Can’t Dance, Just Dance” is a statement of inclusion encouraging people to dance regardless of their ability. The fact that there are three statements does not mean that it is illustrating “stages”.
- Diageo does not believe that a reasonable person would believe that the either the “Pride” or “Dance” taglines communicate “stages” a consumer will experience while consuming alcohol or a change in mood associated with the product. Furthermore, the images in each of the advertisements depict people enjoying themselves and having fun in an inclusive environment. We note as well that the collage of images is not a sequence and does not imply progression of time. Across the images the level of enjoyment depicted is consistent and does not imply or suggest different states experienced by a consumer as they drink alcohol throughout an episode of drinking. Neither of the advertisements depict any person drinking an alcohol beverage.
- Diageo does not believe that either the “Pride” or the “Dance” advertisements in question emphasise a change in mood associated with intoxication for the reasons set out in this letter. The ads neither depict nor encourage people to consume Smirnoff excessively, misuse or abuse of alcohol, be that through the taglines or through the images.

The Panel's View

20. This is the second determination the Panel has made in relation to the Company's "We're Open" outdoor advertising campaign. The earlier determination (114/16) dated 4 November 2016 dealt with an execution entitled "The right dress code is the one you're wearing", while this determination concerns two further executions in the campaign. The Company describes the overarching theme of the campaign as social acceptance of difference and inclusivity. Somewhat ironically, the complainant has taken one of the executions as linking alcohol use to the encouragement of social prejudice.
21. The complaint deals with two executions entitled "Pride and no prejudice" and "Can dance, can't dance, just dance". The complainant argues that both executions breach sections 3(a) and 3(c) of the ABAC. These sections establish standards for alcohol marketing which collectively require that marketing must not:
 - Encourage excessive alcohol consumption;
 - Encourage irresponsible or offensive behavior related to alcohol use; or
 - Suggest that alcohol may cause or contribute to a significant change in mood.
22. In assessing whether an ABAC standard has been breached by an advertisement, the Panel is to have regard to the probable impact of the advertisement upon a reasonable person taking the content of the advertisement as a whole. The reference to a "reasonable person" is drawn from the Australian Common Law system and means that the benchmark is to be assessed against the attitudes, opinions and beliefs held commonly in a majority of the community. A person who holds a different interpretation is not "unreasonable", but their viewpoint may not be that shared by a majority of the community.
23. The complainant's basic argument is that the advertisements can be interpreted as depicting "the different states experienced by a consumer as they drink alcohol throughout an episode of drinking". These "states" relate to the "three part" straplines in each of the advertisements, and by implication suggest that the partygoers shown in the advertisements are drinking excessively and losing their inhibitions and hence alcohol is altering their mood.
24. Section 3(c)(i) of the Code provides that an advertisement must not suggest that alcohol causes or contributes to a significant change in mood. The key concept in this standard is that of causation. It is permitted to associate an alcohol product with a particular mood e.g. happy and engaged – but it cannot be suggested that alcohol caused or contributed to a shift in the mood e.g. from sad and disengaged to happy and engaged.
25. The Company rejects the "different stages" interpretation advanced by the complainant. In the Company's view, the advertisements depict people socialising and enjoying themselves in an inclusive environment. The level of

enjoyment depicted is consistent and does not imply or suggest a different state is experienced by a consumer as they drink. Further, it's argued that the advertisements do not depict any person actually drinking an alcohol beverage. In the Company's argument, the advertisements do not predict a journey from one mood to another, but rather the mood is established and remains constant.

26. The Panel does not believe the advertisements' breach the section 3(c)(i) standard. In reaching this conclusion, the Panel has noted:
 - The advertisements depict images of highly engaged partygoers, however the images do not suggest a shift in one mood to another mood, but rather depict an established mood consistent with attendance at a party or night club; and
 - The "Pride, no prejudice" ad does not use straplines which reflect the "three part" stages argument of the complainant, who was mistakenly of the belief that the straplines used in the ad were pride, no pride, prejudice;
 - The "Can dance, can't dance, just dance" advertisement has straplines which would more likely be interpreted as referring to the inherent dancing ability of a partygoer rather than reflecting a change in mood contributed by alcohol use.
27. Section 3(a)(i) of the Code provides that alcohol marketing must not encourage excessive consumption of alcohol. The complainant argues that the advertisements imply excessive alcohol use as this would be the cause of the change of a partygoer's feeling from pride to prejudicial or "just wanting to dance" due to being beyond caring that they could no longer dance.
28. The Company contends the ads do not depict alcohol use and that, taken as a whole, no reasonable inference can be drawn about excessive alcohol consumption.
29. The Panel does not believe that the ads breach this ABAC standard. It is noted that the ads do not show alcohol consumption and, given the Panel does not accept the three stages argument as to a change in mood advanced by the complainant it equally follows that the implicit linkage to excessive alcohol usage is also not considered by the Panel to be the reasonable interpretation to be given to the advertisements.
30. The final concern raised by the complainant relates to the "Pride, no prejudice" advertisement and concerns section 3(a)(ii) of the Code which requires that alcohol marketing not encourage irresponsible or offensive behavior that is related to alcohol use. The complainant's argument is largely based on a mistaken belief as to the straplines used in this advertisement. As stated, the advertisement does not use the straplines "pride, no pride, prejudice" and the Panel believes there is nothing in the content of the advertisement which is suggesting irresponsible or offensive behavior. It is noted that the ad does show various same sex couples and, while same sex relationships might be

challenging to some members of the community, such depictions cannot be fairly regarded as offensive against broad community standards.

31. Accordingly the complaint is dismissed.