



ABAC Adjudication Panel Determination No. 162/20

Product: Beer
Company: Capital Brewing Co
Media: Radio
Date of decision: 26 November 2020
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Richard Mattick

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns radio marketing for Capital Brewing Co (“the Company”) and arises from a complaint received 2 November 2020.
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 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 meeting 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 2 November 2020.
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 independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this marketing communication.

The Marketing Communication

10. The complaint relates to a radio advertisement, as transcribed below:

Voice Over: Our capital.

Where all the important stuff gets done.

There's parliamentary high court places where the laws of the land are made.

We've got brand new science people at Questacon inventing flying cars.

And don't forget the Defence Force cadets training hard for the war against New Zealand.

After a long day doing important stuff - you deserve a cold beer.

And not just any beer. Your beer.

Brewed here by Capital Brewing Company.

It's brewed fresh by locals and at every bottle shop in town.

Sound Effect: Bottle opening.

Voice Over: You know what to do. Crack a Capital.

The Complaint

11. The complainant objects to the marketing as:
 - The ad references the Australian Defence Force and cadets in a war with New Zealand. This represents a brand safety concern for Defence reputation. This is a breach of Government advertising guidelines.
 - This alcohol ad refers to children (Defence Force cadets) which is inappropriate. It also states these children are in a war with New Zealand which is a breach of the UN and Geneva Conventions.
 - Permission from the Defence Force has not been granted for association with this company. This is defamation and misappropriation of Defence's brand.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (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
 - (b)(ii) depict a person who is or appears to be a Minor unless they are shown in an incidental role in a natural situation (for example, a family socialising responsibly) and where there is no implication they will consume or serve alcohol.

The Company's Response

13. The Company responded to the complaint by email dated 11 November 2020. The principal points made by the Company were:
 - We did not use the Alcohol Advertising Pre-vetting Service as we were under the assumption that our ad abided by the ABAC code.
 - When writing the ad, we were unaware that "Cadets" were under the age of 18 and assumed that they were of legal drinking age. As they are in fact under the age of 18 we admit that we have breached Part 2 (a)(ii) of the code.

- This ad was written with a tongue-in-cheek tone of voice as you can hear from some of the other lines in the spot; "Our Capital, where all the important stuff in Australia gets done. There's the Parliamenty and High Courty Places where the laws of the land get made." "We've got brainy science people at Questacon inventing flying cars."

By no means was there any malice by saying that "the Defence Force Cadets were training hard for the war against New Zealand". This was in fact written by a Kiwi and he was also unaware that "Cadets" are under the age of 18.

- As we admit to breaching the code the ad was pulled from the air more than 2 weeks ago when we were first aware of the complaint.

The Panel's View

14. The National Capital, Canberra is the location of many Australian institutions including the Federal Parliament, the High Court, the National Library and the Royal Military College, Duntroon. Also based in Canberra is a craft brewery - Capital Brewing Co. Launched in 2016 with beers brewed initially in Sydney, the Company established its permanent facilities in the suburb of Fyshwick in late 2017. The Company uses it Canberra location as a thematic in its marketing including in a radio ad broadcast in the ACT which is the basis of the current complaint.
15. The ad adopts a light-hearted style to associate the Company's beer with Canberra landmarks of Parliament, High Court and Questacon. The ad then goes on to reference the "Defence Force cadets who are training hard for the war against New Zealand". It is the reference to cadets and the war against New Zealand which has drawn the complaint. The complainant raises several concerns:
 - the ad is a breach of government advertising guidelines and raises a "brand safety concern" for the Australian Defence Force (ADF) reputation;
 - defence force cadets are children, and this is inappropriate in an alcohol ad; and
 - referring to the cadets being in a war with New Zealand would be a breach of the UN and Geneva Conventions.
16. To an extent, the complainant's concerns are not issues which fall within the scope of the ABAC Scheme, such as breaches of government advertising guidelines or the reputation of the ADF. The ABAC Scheme is centered on the responsible

portrayal of the use of alcohol in marketing and two ABAC standards are raised by the complaint namely:

- does the ad encourage offensive behaviour related to alcohol use - Part 3 (a)(ii); and
- does the ad depict a minor engaging with an alcohol beverage - Part 3 (b)(ii).

17. In assessing the consistency of an alcohol marketing communication against an ABAC standard the Panel adopts the probable understanding of the marketing material by a reasonable person to whom the material is likely to be communicated and taking the content of the marketing communication as a whole. The “reasonable person” test is drawn from the common law system and means:

- the benchmark is based upon the life experiences, values and opinions held commonly in a majority of the community;
- if the marketing communication can be understood in several ways, the most likely interpretation is to be preferred over a possible but less likely interpretation; and
- a person who has a different interpretation of the message in a marketing item is not “unreasonable” but possibly their take on the marketing would not be shared by a majority of the community.

18. The Company responded to the complaint by advising that they did not appreciate “cadets” were under the age of 18 and it was assumed they would be of lawful drinking age. It is pointed out the ad is “tongue in cheek” using expressions such as “Parliamentary and High Courty places where the laws of the land get made”. The ad references “flying cars” and the mention of the war with New Zealand was in a similar comedic mode with no malice intended. Given the age of cadets, the Company said it accepted the breach in relation to Part 3 (b)(ii) of the Code and has withdrawn the ad.

19. As a decision-making body, the Panel takes guidance from the rules of procedural fairness and this involves, in part, giving the respondent to a complaint the opportunity to comment on the complaint and to give answers to questions posed by the Panel arising from the nature of the complaint and the relevant provisions of the ABAC potentially enlivened by the complaint. The Panel considers the marketing communication, the complaint, the Company's response, Code provisions and other relevant materials such as past Determinations when making its decision. Often a Company when replying to a complaint will argue the marketing communication is consistent with the ABAC and no breach has occurred. Sometimes a Company will submit a breach has occurred and explain

the circumstances. In either event, the Panel is responsible to form its own decision and the view submitted by a respondent alcohol company, while always considered, is not decisive but is one input into the decision-making process.

20. Notwithstanding the Company submitting the ad did breach the ABAC standard in Part 3 (b)(ii), the Panel believes the ad is consistent with the ABAC standards. The ad begins by framing itself as talking about “Our Capital” and then references well known Canberra based national bodies as its theme i.e. Parliament, High Court and Questacon. It then moves to the crucial sentence – “And don't forget the Defence Force cadets training hard for the war against New Zealand”. The complainant took this to mean the Australia wide ADF sponsored cadets, open to persons aged 13 to 17. The Panel does not believe a reasonable person would understand the ad as meaning this.
21. The radio ad was broadcast to an audience in the ACT. The ad references Canberra based institutions. The Panel believes a reasonable person would take the “Defence Force cadets” to mean officer cadets attending the Canberra based Royal Military College Duntroon. This meaning is consistent with the balance of the ad and the other Canberra based institutions referenced. Also, the “training for war” reference makes far more sense if referring to a Duntroon officer cadet than the under 18, often high school based, “cadets”.
22. If it is assumed the ad would be taken as referring to Duntroon, then the basis of the complaint falls away as:
 - the vast majority of Duntroon officer cadets are adults, and the ad would not be taken as referring to minors;
 - the “war with New Zealand” is clearly intended to be light-hearted akin to the reference to Questacon and “flying cars” given New Zealand is a close, long standing and committed Australian ally and the history of good-natured banter between residents of both Nations; and
 - a reasonable person would not take the ad as encouraging offensive behaviour related to alcohol use.
23. While dismissing the complaint, the Panel recognises that the interpretation taken by the complainant regarding the reference to 'cadets' meaning school age children was a possible interpretation (although in the Panel's view, not the most likely interpretation) and that the Company acted quickly to withdraw the ad. It is noted any ambiguity can easily be addressed by altering the reference to 'Defence Force Cadets' to say, 'Officer Cadets', 'Duntroon Cadets' or ' Trainee Officers' if the ad was to be used again.