

ABAC

**ABAC Complaints Panel
Determination No: 38/14**

**Complaint by Christina Slater
Product: Jägermeister
Advertiser: Mast-Jägermeister SE**

Professor The Hon Michael Lavarch – Chief Adjudicator
Ms Jeanne Strachan – Member
Professor Louisa Jorm – Member

12 August 2014

Introduction

1. This determination by the Alcohol Beverages Advertising Code (“ABAC”) Adjudication Panel (“The Panel”) concerns three advertisements on Facebook for Jägermeister by Beam Global Australia Pty Ltd (“Advertiser”) and arises from a complaint received 16 June 2014.

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 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.

4. 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.
5. The complaint raises concerns under the ABAC and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

6. The complaint was received on 16 June 2014.
7. 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 not been determined within the 30 day timeframe due to the unavailability of the Chief Adjudicator.

Pre-vetting Clearance

8. The quasi-regulatory system for alcohol beverages advertising features independent examination of most proposed alcohol beverage advertisements against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for this advertisement.

The Advertisement

9. The complaint refers to three advertisements that are posts by the advertiser on the Jägermeister Australia Facebook page and appear in both the "Timeline" and "Photos" sections of the page.
10. The first post was on 3 June 2014 and features a static cartoon style picture of five people with human bodies wearing male clothing and animal heads sitting at a table in a dark dimly lit bar or nightclub. The person that is turned looking out from the table has a stag's head. A person with a woman's body and a doe's head is shown walking past the table carrying a tray with a bottle of Jägermeister and a number of shot glasses. The picture has the caption "Tag A Mate Who Thinks He's A Boss" and the option to Like or Comment. The post also includes the following text "He's the self-proclaimed king of the crew, but he'd be nothing without the rest of you! Who's the stag amongst your brood? Jägermeister. Strange. But True." Various user generated comments follow.
11. The second post was on 10 June 2014 and features a static cartoon style picture of a dimly lit bar or nightclub. A person with a man's body and an owl's head wearing jeans and a white T-shirt with a yellow smiley face on it is

featured in the foreground and appears to be dancing or moving energetically on his own with his arms outstretched forward. There is a man with a bird's head sitting behind him on a bar stool looking at his watch and four people standing behind him and watching him, a man with a goat's head standing next to the bar holding a drink, a woman with a panther head and a woman with a cat's head each holding a drink and a woman holding a tray with a bottle of Jägermeister and a number of shot glasses. In the background three men with animal heads can be seen dancing in a line. The picture has a caption "Tag A Mate Who Goes Home Last" and the option to Like or Comment. The post also includes the following text "Whilst most are departing... there are those who are just starting. Look after one's self, Night Owl. Jägermeister. Strange. But True." Various user generated comments follow.

12. The third post was on 13 June 2014 and features a static cartoon style picture of a dimly lit bar or nightclub with a tree in the foreground. A person with a man's body and fox's head wearing male clothing is hiding behind the tree in the foreground and peering around the tree at a group of 4 people with male bodies and animal heads standing talking at the bar. The picture has a caption "Tag A Mate Who Never Buys A Round" and the option to Like or Comment. The post also includes the following text "When it comes time for his shout, he is mysteriously never about....Know you, of the dodger? Jägermeister. Strange. But True." Various user generated comments follow.

The Complaint

13. The complainant is concerned that:
 - (a) There is no safeguard in place to make sure underage children do not see the ads, as both sons (14 & 16) that have not lied about their age on Facebook have seen the ads;
 - (b) The advertiser is encouraging 'viral' tagging of the image, not considering that older kids 18+ could very easily tag and share this ad being used to sell alcohol with their much younger friend;
 - (c) The advertiser is using animal cartoons to sell alcohol;
 - (d) The advertiser is selling an alcohol that is usually drunk as shots to a young audience who are generally more irresponsible and this could end in violence.
 - (e) The advertiser is implying that drinking Jägermeister could make you a "boss", or that you could attract buxom ladies.

The Code

14. The ABAC Part 1 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 or adolescents...
- (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;

The Advertiser's Comments

15. The Advertiser responded to the substantive issues raised in the complaint and questions posed by the Panel by way of letter dated 30 June 2014. The principal points made by the Advertiser are as follows:
- (a) Both Mast-Jaegermeister and its distributor, Brown-Forman Australia take very seriously their responsibility to market their products in accordance with applicable laws, as well as the ABAC Code, and above all, responsibly, to Australian consumers, and it is always a matter of serious concern for us to receive a complaint that we are falling below the high standards we set for ourselves in this regard.
 - (b) The advertisements did not receive AAPS pre-vetting approval as the volume and frequency of posts made to the branded Facebook page mean that it is difficult in practice to submit them to the Pre-vetting Services. However, the posts were subject to careful pre-vetting by employees who have received responsible marketing training.
 - (c) Both Mast-Jaegermeister and Brown-Forman work to ensure that their communications are targeted exclusively to consumers above the legal purchase age. Following the complaint the age access settings on the page were investigated and it was noted that two options are available to limit access of those under the age of 18 from viewing the Facebook page: an "18 and older" setting and an "alcohol" setting. Owing to an administrative error, at the time the posts were made, the page was set only to restrict access to "18 and older" instead of our standard practice of setting as "alcohol". While the "18 and older" setting provides primary protection against underage access – that is, access to the page itself – it does not provide protection from secondary access, i.e. via tagging. Secondary protection is achieved by setting the page to "Alcohol". The "Alcohol" setting not only prevents underage consumers from viewing alcohol brand pages, but it also restricts promoted post ads, hashtags and any sharing/tagging

that an above-legal-purchase-age consumer might do, so that if such a consumer has underage friends and they share or tag a post from an alcohol brand page set to “Alcohol”, the post will not share through to their underage friends. On discovering the oversight, the “Alcohol” setting was immediately engaged and no underage consumer will now be able to view a tag. Fortunately there was no primary engagement with the page by underage consumers. While not compliant with our internal guidelines, we do not believe reliance on the “18 and older” setting constitutes a violation of the Code.

- (d) When we chose to pursue a graphic visual style with animal characters for these posts, we knew it was incumbent on us to take special care to ensure that the images would not be appealing to children or in any manner similar to a children’s cartoon, and we briefed our creative agency accordingly. We consider that the characters depicted are successfully drawn in a graphic style which strongly appeals to adults, and not to those under the legal purchase age. The lead characters in the ‘thinks he’s a boss’ and ‘never buys a round’ posts, in particular are dressed in a notably formal style, and all the settings depicted are of an adult nature – this is clear throughout the campaign (which extends beyond the posts complained, and includes featuring characters in the setting of their own homes). We acknowledge that the lead character’s dress in the ‘goes home last’ post is not of a similarly formal nature; although the owl’s style of dress is also considered appropriate from an age appeal perspective – it wears a t-shirt of a style popular in the 1980’s, which would have little relevance, if any, to adolescents of today. In summary, we do not believe the use of a graphic design in each of the advertisements warrant a conclusion that they appeal to children or adolescents.
- (e) We do not consider that the female gender of the waitress character has any bearing on the question of whether or not the consumption occasion presented is or is not mature, balanced and responsible. While the Stag character is certainly looking towards the waitress as she approaches, and while the gentle humour of the piece is the inference that the Stag feels he may be attractive, it is our view that neither the scene depicted, nor any implied dynamic between the two characters, fails the test of maturity, balance and responsibility required in the Code. The joke is on the Stag – he may think he’s a boss, but the viewer is invited to speculate that, in the context of his group of friends, he might be gently teased or mocked for thinking too much of himself. There is indisputably no excessive use, misuse or abuse of alcohol depicted or implied. When designing the visual we were conscious that, if we were to depict our product in a bottle, we should include visual cues to emphasise that such a manner of service is appropriate only where there is to be sharing among a group. It was therefore a deliberate decision to show many glasses rather than few, lest the visual be misinterpreted as an endorsement of sharing a bottle among only a couple of people. It is also worth noting that one could easily conclude that the waitress was walking

past the group at the table on her way to provide the bottle and glasses to another group not included in the visual of the post. There is nothing to suggest that she is bringing the bottle and glasses to the group depicted in the ad.

- (f) These posts are of adult appeal and were placed in a medium protected from access by those under the legal purchase age. We do not therefore consider these posts were at material risk of being seen by an inexperienced or otherwise vulnerable audience. Finally, while our consumers sometimes choose to consume our product as a shot, this factor is in no manner relevant, or an aggravating factor, in the analysis of the compliance of these posts.
- (g) In relation to the second advertisement, we do not consider that there is anything in the image that necessarily implies that the owl has had excessive alcohol, and note the accompanying copy suggests that he is starting his night, which would not necessarily be consistent with the idea that he has already consumed excessively. Whilst we recognize that the Owl is depicted in a high energy state, and with sweat flying off him, this image was conceived to present him dancing, in juxtaposition to his friends who are standing around. We believe that this is how the image would be received by our consumers who view the advertisement on our Facebook page.
- (h) We consider that the effective communication device in the first advertisement is to recognize that the Stag – the representation of the self-appointed Alpha of the group – who believes himself to be “a boss”. The inference is that his friends may not share that view. There is no link between the consumption or presence of the brands and this belief – it is inherent, merely part of his character. Again, the dynamic between the Stag and the Waitress is not one which clearly suggests social or sexual success – the joke is on the Stag.
- (i) Data was supplied that:
 - i) 86% of engagements came from the 18-24 year age group, 14% with the 25-34 age group and no engagements with any other age group; and
 - ii) of the people that like the page, 17% of women and 28% of men were in the 18-24 year age group, 20% of women and 25% of men were in the 25-34 year age group, with small percentages in older age groups and none in the 13-17 year age group.

The Panel's View

16. On 1 July 2014, the ABAC Responsible Alcohol Marketing Code (“New Code”) came into operation. This Code replaced the Alcohol Beverages Advertising Code (“Old Code”) which had been operation since 1998. The transitional arrangements from the Old to New Code provide that complaints received prior to 1 July 2014 will be decided under the terms of the Old Code. As this

complaint was received on 16 June 2014, it has been determined under the provisions of the ABAC.

17. The complaint has two principal elements. Firstly, it is pointed out that the advertisements were accessible via Facebook, without any apparent age gateway limiting access to over 18 year olds. Secondly, it is argued that the content of the advertisement is also concerning in several respects, notably its appeal to children, encouragement to excessive consumption, and the implication that use of the product may lead to the achievement of sexual or social success.
18. Dealing firstly with the accessibility of the advertisement to under 18 year olds. The advertiser explains that it had set site access restrictions to “18 and older”, but had not utilised the additional restriction option of ‘alcohol’. The apparent significance of this is that primary access to the site containing the advertisements would be restricted to over 18 year olds (on the basis that a user had correctly identified their age), but secondary level access via tagging had no age restriction. Given the theme of the advertisements was to encourage a user to “tag a mate”, this failure is conceded by the Advertiser to have been a mistake which it states has now been rectified.
19. The complainant points out that her sons, aged 14 and 16, had access to the advertisements and that viral tagging of the advertisements had been encouraged. The issue, therefore, is whether this availability to under 18 year olds of the advertisement was a breach of the ABAC.
20. The alcohol industry sponsors of the ABAC Scheme have produced a best practice guide for the responsible marketing of alcohol beverages in digital marketing platforms. This guide provides that alcohol product marketers should utilise age gateway technology and take all reasonable measures to limit the potential for alcohol marketing material reaching under 18 year old digital media consumers. That said, the guide does not create any binding obligations on an advertiser beyond the general provisions which are contained in the ABAC proper.
21. The ABAC is at its heart a code which is not focused upon the placement of alcohol advertisements. Rather, the Code is concerned about the content of advertisements, regardless of where the advertisements might be seen (e.g. in electronic media, in digital media, or in print media). This means that the mere placement of an alcohol advertisement in a medium which might be reasonably accessed by underage persons will not of itself lead to a breach of the Code provisions. Rather, a breach of the Code will occur if the content of an advertisement has strong or evident appeal to children or adolescents. This means that the fact that the advertiser failed to utilise the additional level of age gateway technology available via the Facebook site does not amount to a breach of a Code provision.
22. Turning now to the content of the advertisements and the consistency of this content with the ABAC provisions. The complaint raises three specific concerns about the advertisements, namely:
 - (a) They have appeal to children due to the use of cartoon like figures;

- (b) The advertisements encourages irresponsible consumption through a product often used as 'shots';
 - (c) The advertisements imply that use of the product might lead to the achievement of social or sexual success.
- 23. In assessing if an advertisement is inconsistent with an ABAC standard, 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 notion of a 'reasonable person' is borrowed from Australia's common law system and means that regard is to be had to the opinions, values and attitudes common in the majority of the Australian community.
- 24. The argument in relation to appeal to children relates both to the availability of the advertisement to under 18 year olds and the use of 'cartoon' like figures in the advertisements. In each advertisement drawn characters with the bodies of males or females but with the heads of animals such as deer, fox, owl and bird are shown. The characters are dressed as adults and placed in adult settings, such as a bar or nightclub, although these venues have features of being in the open, with trees and shrubs combining with indoor furnishings.
- 25. Simply using a drawn or cartoon like character of itself does not necessarily mean an advertisement will have strong or evident appeal to under 18 year olds. While some forms of animation are clearly directed towards children, other forms, such as Japanese anime, are definitely adult in character. Essentially, a case by case assessment is needed, taking the content of the advertisement as a whole.
- 26. In this case, on balance the Panel does not believe that two of the advertisements have strong or evident appeal to children or adolescents, namely the advertisements with the catch lines, "Who thinks he's a boss" and, "Who never buys a round". In reaching this conclusion, the Panel notes:
 - (a) The characters are placed in adults settings;
 - (b) The dress and demeanour of the characters are adult.
- 27. The Panel does believe the advertisement "Who gets home last" does breach section (a)(ii) and (b) of the Code. In reaching this conclusion, the Panel believes the behavior of the 'owl' character, such as the use of glow sticks, and the mood of the advertisement would have evident appeal to adolescents.
- 28. The next issue is whether the advertisements are encouraging excessive or irresponsible consumption, in breach of section (a)(iii) of the Code. The advertisements of particular concern to the complainant are the two advertisements which show a waitress carrying a tray with a bottle of the product and a number of shot glasses.
- 29. The Advertiser contends that these advertisements do not suggest excessive consumption as the product is shown with multiple glasses which indicates that numerous people will be drinking, presumably one glass each. The complainant

would contend the advertisements suggest that the main characters are going to drink multiple shots of the product.

30. The Panel believes that the advertisement “Who gets home last” does breach the (a)(iii) standard. In reaching this conclusion, the Panel notes:
 - (a) The advertisement is centered upon the ‘owl’ character whose demeanour and appearance raise a reasonable implication that the character has been affected by alcohol consumption;
 - (b) The scene suggests that the owl character is the only person dancing and that his behaviour is out of the ordinary and causing attention and amusement of other patrons, which again raises a reasonable implication of behaviour impacted by alcohol use;
 - (c) Placed immediately behind the owl character is a waitress with a bottle of the product and multiple glasses, raising an implication that the owl character has immediate access to alcohol;
 - (d) Taken as a whole, a reasonable person could easily assume the owl character has consumed excessive amounts of alcohol.
31. The Panel does not believe the other two advertisements breach section (a). While the “Who thinks he’s a boss” advertisement does show a waitress with a bottle of the product and multiple glasses, it requires a range of suppositions to conclude that excessive consumption is being encouraged. No character in these two advertisements give any appearance of having been affected by alcohol consumption.
32. The final issue concerns whether the advertisements are suggesting that the presence or use of the product might contribute to the achievement of social or sexual success, in breach of section (c) of the Code. The particular advertisement which the complainant made this argument was the, “Who thinks he is a boss”. In this advertisement we see one of the male characters with the head of a stag making eye contact with the waitress carrying the tray of the product.
33. Section (c) of the Code is based on the notion of causation, namely whether an advertisement is suggesting that the presence or use of alcohol is a contributor to the achievement of success. The Panel does not believe the advertisements are in breach of this standard. In reaching this conclusion, it has been noted:
 - (a) There does not appear to be any particular interaction between the male and female characters depicted in the advertisement which indicate that social or sexual success has been achieved or is likely to be achieved;
 - (b) Merely showing a male character noticing and smiling towards a female character is not suggestive of social or sexual success;
 - (c) In the particular advertisement pointed to by the complainant there appears to be no return of the male’s interest by the female character.

34. Accordingly, the net outcome of the Panel's determination is that the advertisement with the catch line, "Who goes home last" is in breach of section (a)(ii) and (iii), and (b) of the Code. The complaint in relation to the other advertisements and the other grounds are dismissed. It is acknowledged, however, that the complainant's concern about the accessibility of the advertisements collectively to underage persons while not a breach of the Code is legitimate and has been addressed through a change in age gateway setting adopted by the advertiser.