



ABAC Adjudication Panel Determination No. 59 & 66/15

Product: Lowenbrau Keller
Company: Urban Purveyor Group
Media: Digital and Outdoor
Complainants: Confidential and Grainne Bell
Date of decision: 22 May 2015
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 two outdoor advertisements and a post on the Lowenbrau Keller Facebook page and arises from complaints received 28 April and 4 May 2015.
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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 28 April and 4 May 2015.
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 complaints have 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 not obtained for these marketing communications.

The Marketing Communication

Outdoor Advertisements

10. The first advertisement is a prominent image of a smiling woman holding four full beer steins and wearing traditional German style dress that accentuates her chest. The caption underneath the image is “Wunderbra” and “Lowenbrau.com.au”.
11. The second advertisement is a prominent image of two young blonde women each holding a full beer stein with the Lowenbrau logo with one woman shown drinking from the stein. Both women are wearing traditional German style dress that accentuates their chest. The caption underneath the image is “Make Mein a Dubbel” and “Lowenbrau.com.au”.

Digital Advertisement

12. The social media post by Lowenbrau Keller includes the text “Bigger is better – don’t you agree? We’ve got big biers, big meals and ... big fun. #Beer”. The post also includes a photograph of a woman holding a partially consumed stein of beer. The photograph has been cropped to show the woman only from neck to midriff. She is wearing traditional German style dress and has large breasts that are partly revealed by her low cut dress.

The Complaint

13. The first complainant is concerned that the advertisements:
 - (a) Sexually objectify women;
 - (b) Promote sexual harassment by:
 - depicting a close up picture of one of their waitresses breasts, next to the caption “We’ve got big beers, big meals and ... big fun” which practically invites punters to come to Lowenbrau to touch their employees inappropriately;
 - promoting a sexist view of women as sexual objects for men’s pleasure, inviting men to ogle women’s breasts while drinking beer.

14. The second complainant is concerned that the advertisement depicts a girl that either is or looks like she is under 18 years of age, in an image that has been photo-shopped to provide the girl with large breasts.

The ABAC Code

15. 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)(i) have Strong or Evident Appeal to Minors;
 - (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; or
 - (b)(iii) depict an Adult who is under 25 years of Age and appears to be an Adult unless:
 - (A) they are not visually prominent; or
 - (B) they are not a paid model or actor and are shown in a Marketing Communication that has been placed within an Age Restricted Environment.

The Company's Response

16. The Company did not respond to the complaint.

The Panel's View

Introduction and background

17. Lowenbrau Keller is described on the Company's website as an "authentic Munich style restaurant...offering quality imported beers in a traditional bier hall environment". The restaurant is located in Sydney's Rocks district.
18. It seems that in or about April 2015 the Company commenced a marketing campaign which featured outdoor advertising on bus shelter sheds and placements on the back of Sydney buses. It is this campaign and the Company's digital marketing platform, such as its Facebook page, which has attracted a range of public complaints. This determination deals with two complaints, which specifically raise issues under the ABAC.
19. In July 2014, the ABAC Scheme was substantially revised and its reach expanded. A notable change was the extension of the Scheme to the advertising conducted by alcohol beverage retailers. In Determination 14/15 the Panel held that this extension incorporates both on-premise and off-premise retail outlets and, as such, advertising by the Lowenbrau Keller restaurant falls within the reach of the ABAC Scheme.

20. At its heart, the ABAC Scheme is based on the commitment of alcohol industry participants to comply with the standards of good marketing practice set down in the Code. Lowenbrau Keller is not a signatory to the ABAC Scheme and, hence, has made no contractual obligation to comply with the ABAC standards. Further, the Company has decided not to take up the Panel's invitation to respond to the two complaints.
21. While the Panel has decided to make a determination consistent with its approach that all public complaints concerning alcohol marketing should be considered, it needs to be noted that the Company has not committed itself to the ABAC Scheme nor participated in the Panel's processes. Accordingly there is no indication that the Company will accept the Panel's decision.

The complaints

22. The Company's marketing campaign has drawn a number of complaints. In most instances, the complaints are concerned about the portrayal of women, particularly that the campaign is sexist and objectifies women. Concerns of this nature fall within the scope of the AANA Code of Ethics rather than the ABAC. This means the complaints will result in two separate determinations; one by the Advertising Standards Board dealing with the sexism and related concerns, and this determination dealing with concerns relating to alcohol as a product.
23. The ABAC issues go to separate matters, namely:
 - Do the advertisements encourage offensive behaviour, such as sexual harassment, which is related to the consumption or presence of alcohol (Part 3(a)(ii)); and
 - Does the second outdoor advertisement depict a model who is or appears to be under 18 years of age or, if the model does appear to be an adult, is nonetheless under the age of 25 years (Part 3(b)(iii)).
24. In assessing whether an advertisement is in breach of an ABAC standard, the Panel is to pay regard to the probable impact of the advertisement on a reasonable person, taking its contents as a whole. The reasonable person test is borrowed from Australia's common law system and refers to the beliefs, attitudes, and opinions which are common in a majority of the community. A person who holds a different interpretation of an advertisement is not necessarily 'unreasonable', but their interpretation may not be shared by a majority of the community.
25. The Part 3(a)(ii) standard requires that alcohol marketing not encourage irresponsible or offensive behaviour that is related to alcohol use. For instance, if an advertisement could be said to promote drunkenness or loutish or violent behaviour caused or related to alcohol consumption, then the standard would be breached. In the current case, if the Company's advertisement could be fairly said, for example, to encourage patrons of the restaurant to act inappropriately towards its staff, such as sexually harassing a staff member, then the advertisement would not meet the required standard.

26. In assessing the two outdoor advertisements, a number of observations can be made, including:
- Both advertisements depict large steins which would contain several times more alcohol per volume than a standard drink;
 - The models are wearing a style of dress which emphasises their breasts;
 - The text in both advertisements, namely 'Wunderbra' and 'Make Mein a Dubbel', also play on the models' style of dress and breasts;
 - That said, the style of the models' dress and the size of the beer steins is reminiscent to that associated with Bavarian/ Oktoberfest type events and, hence, is consistent with the restaurant's theme;
 - Excessive alcohol consumption is not depicted in either advertisement;
 - The models are not seen interacting with anyone and no offensive behaviour is depicted.
27. On balance, the Panel does not believe the two outdoor advertisements breach the Part (3)(a)(ii) standard. While the point raised by the complainant is acknowledged, to find a breach of the standard would require a series of assumptions and implications which are too long a bow to draw given the actual content of both advertisements.
28. The digital advertisement has features in common with the two outdoor advertisements, namely the style of the woman's dress and the depiction of the large beer stein. The advertisement differs from the two outdoor advertisements in that:
- The woman's face is not shown, but rather only part of her body, from her midriff to her neck, is displayed;
 - The text 'Bigger is better – don't you agree? We've got big biers, big meals and big...fun' is hardly subtle in drawing an association between the woman's breasts and the consumption of alcohol.
29. The Panel believes that this advertisement does breach the Part 3(a)(ii) standards. By not showing the woman's face, she is reduced to essentially body parts and this, combined with the text and the partially consumed stein of beer, can reasonably be taken as encouraging a disregard for the woman as a person. It is poor marketing practice to promote alcohol use in such a manner, and the concerns about alcohol fuelled ogling of women and potential sexual harassment raised by the complainant are legitimate given the nature of this advertisement.
30. The second complaint raises concern with the age of the models in the second outdoor advertisement. The ABAC standard requires models and characters who feature in alcohol marketing to:

- Be at least 25 years of age; and
 - Even if 25 years of age or older, the person cannot appear to be a minor (i.e. under 18 years of age).
31. Accordingly, the standard has a factual element (i.e. is the model as a matter of fact aged at least 25 years) and an opinion element (i.e. irrespective of the model's actual age, do they appear to be a minor). Unfortunately, due to the failure of the Company to respond to the complaint, the Panel does not have any factual information as to the age of the models.
 32. In this circumstance, the Panel must make its own assessment of the apparent age of the models and whether either model appears to be a minor. In the Panel's view, the models do not appear by their dress and general appearance to be under the age of 18. It is, however, possible that the models, or one of them, could be under the age of 25. On balance, the Panel believes that it is quite likely that one of the model's in the second outdoor advertisement is under the age of 25.
 33. Accordingly, the Panel finds that the digital advertisement breaches Part (3)(a)(ii) of the Code, and the second outdoor advertisement breaches Part (3)(b)(iii) of the Code. As stated, the Panel has not considered the broader concerns about the appropriateness of the marketing in terms of its objectification of women, as these issues do not fall under the ambit of the ABAC.
 34. The Company, while not a signatory to the ABAC Scheme, is encouraged to take on board the Panel's findings. If it wishes to meet community standards in terms of its marketing, then a good approach would be for the Company to join the ABAC Scheme and commit itself to the ABAC standards. Membership of the ABAC Scheme would enable the Company to test its major marketing campaigns through the pre-vetting service which would provide independent verification that the Company is meeting appropriate community standards.