



ABAC Adjudication Panel Determination No. 14/15

Product: Adelaide Casino
Company: Adelaide Casino
Media: Television
Complainant: Nicola Poplawski
Date of decision: 2 March 2015
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Jeanne Strachan
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns a television advertisement for Adelaide Casino (“the Company”) and arises from a complaint received 19 January 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 complaint raises concerns under the ABAC Code and accordingly is within the Panel's jurisdiction.

The Complaint Timeline

7. The complaint was received on 19 January 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 complaint has been determined with 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 this marketing communication (13824).

The Marketing Communication

10. The complaint refers to an advertisement broadcast on free to air television.
11. The advertisement opens with a smartly dressed woman entering a building and removing her jacket and then meeting a man at a bar. They each pick up a glass of champagne and are shown sitting at a table with partially consumed glasses of champagne.
12. The next scene shows the couple entering a restaurant, named 'Sean's Kitchen', sitting at a table with glasses of wine and being served food and images of food and a chef working.
13. In the next scene, the couple is shown on an escalator and then sitting at a bar each raising a glass of wine. Following this, the couple is shown walking through a room of gaming machines, followed by a close up of someone pressing a button on one of the machines.
14. The scene then moves to show three men each drinking a beer, then eating burgers as horse racing is playing on a television screen. A screen then shows horse racing, a football and a cricket ball.
15. In the following scene two women walk past a room named the 'Barossa Room - Grange – Platinum' and through a gaming machine room. Then a gambling table and roulette wheel are shown.
16. The next scene sees the two of the three men and two women shown earlier sitting together with drinks at a bar. The scene changes to a live band, a plate of oysters, pizza and four drinks and then staff wearing a Madame Hanoi uniform and food being prepared.
17. A series of gambling scenes are displayed followed by a view of the outside of the Adelaide Casino with Adelaide Casino logo and the tagline "A Whole New Game".
18. In the last scene there is the text and accompanying voiceover "Don't chase your losses. Walk away. Gamble Responsibly."

The Complaint

19. The complainant is concerned that the television advertisement:
 - a) depicts gambling and alcohol consumption as glamorous activities that will increase a person's enjoyment of life with minimal reference to

potential adverse effects of gambling or alcohol consumption apart from the brief statement at the end of the ad;

- b) was broadcast at 10am on a week day during school holidays during Australian Open coverage and therefore would have been seen by children 14 years and under;
- c) as the warning about the dangers of gambling is ambiguous for this age group the ad does not meet the AANA Code for advertising and marketing communications to children; and
- d) a person 14 years and under may interpret the ad as saying that alcohol consumption could contribute to successful gambling and as such is in breach of section c)(i) of the ABAC Code.

The ABAC Code

- 20. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (c)(i) suggest that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment;
 - (c)(ii) show (visibly, audibly or by direct implication) the consumption or presence of an Alcohol Beverage as a cause of or contributing to the achievement of personal, business, social, sporting, sexual or other success;

The Company's Response

- 21. The Company responded to the complaint on 13 February 2015. The principal points made by the company were:
 - (a) The objective of the advertisement is to promote the Adelaide Casino. The key message of the advertisement is that it's a whole new game at Adelaide Casino with its two new restaurants, new Premium Gaming areas and new décor, hence the tagline "*A Whole New Game*".
 - (b) Section 2 specifies that the ABAC Responsible Alcohol Marketing Code (**Code**) applies to all Marketing Communications in Australia generated by or within the reasonable control of a Marketer, however the Code does not apply to the placement of a Marketing Communication, except to the extent that placement may impact on how the Marketing Communication is understood in accordance with section 4.
 - (c) Section 4 notes that compliance of a Marketing Communication with the Code is to be assessed in terms of the probable understanding of the Marketing Communication by a reasonable person to whom the material is likely to be communicated, and taking its content as a whole.

- (d) A 'Marketer' is defined in section 5 as a producer, distributor or retailer of Alcohol Beverages.
- (e) We do not consider that the advertisement is a marketing communication in Australia generated by or within the reasonable control of a producer, distributor or retailer of Alcohol Beverages as no specific and recognisable brand of alcohol is used anywhere in the advertisement and the depiction of alcohol in the advertisement is merely incidental to the promotion of Adelaide Casino. We accordingly submit that the advertisement falls outside the scope of the Code.
- (f) In support of our position, we refer to ABAC Adjudication Panel Determination No. 81/14, in which the Panel notes the following:
- in paragraph 29: *"On the basis that a product placement is capable of being a marketing communication for ABAC purposes, the next issue [is] whether this particular marketing communication is from a 'marketer' to which the ABAC scheme applies. The Code in Part 2(a) is stated to apply to all marketing communications in Australia generated by or within the reasonable control of a marketer. A 'marketer' is defined in Part 4 to mean a producer, distributor, or retailer of alcohol beverages"*;
 - in paragraph 30: *"...the Panel's review of the music clip could not establish any identification of Dom Perignon as a specific and recognisable brand used within the clip"*;
 - in paragraph 36: *"As the marketing communication is not generated by or within the reasonable control of a marketer of an alcohol product that appears to have any connection to Australia, it follows that the ABAC does not apply to the music video clip and the portrayal of the alcohol product within the clip"*; and
 - in paragraph 37: *"In these circumstances, the complaint must be dismissed on the basis that the ABAC scheme does not apply to the video clip and, hence, the Panel is not empowered to make a decision"*.
- (g) If however, contrary to our view, the Panel finds that the advertisement is in fact a marketing communication in Australia generated by or within the reasonable control of a producer, distributor or retailer of Alcohol Beverages and is therefore within the scope of the Code, we note that the Code will only apply to the advertisement to the extent it regulates the content of the advertisement and not the placement of the advertisement within a particular medium, location or timeslot. In this regard we refer to ABAC Adjudication Panel Determination No. 82, 86 & 90/14, in which the first complainant alleged, inter alia, that the advertisement of alcohol on television during times when children/early teens are viewing and during sporting events gave alcohol credibility and encourages children and teens to try it. The Panel dismissed this

complaint in relation to the television advertisements, noting the following in paragraph 34(b): *“The broadcast of alcohol advertising with live sporting events, such as cricket, is not of itself a breach of the ABAC, as:*

- *The ABAC is concerned with the content of alcohol marketing communications and that content being consistent with the standards of good practice contained in the Code. The Code does not restrict where marketing communications might be broadcast or located;*
- *Part 2(b)(vi) expressly states that the Code does not apply to the placement of a marketing communication, except to the extent that the placement may impact on how the marketing communication is understood;*
- *The Commercial Television Industry Code of Practice permits alcohol advertising in conjunction with the broadcast of live sporting events.”*

(h) Assuming that the Code applies to the advertisement, which we reject for the reasons set out above, we do not accept that the advertisement breaches section 3(c)(i) or (ii) of the Code by suggesting that the consumption or presence of an Alcohol Beverage may create or contribute to a significant change in mood or environment or be a cause or contributor to the achievement of social or other success by:

- depicting alcohol consumption by glamorous people engaging in glamorous activities that will increase a person’s enjoyment of life;
- failing to include reference to potential adverse effects of alcohol consumption; and
- suggesting that alcohol consumption could contribute to successful gambling by depicting alcohol consumption and gambling at a gambling venue.

(i) We draw assistance from the Guidance Note to the Code in respect of section 3(c), which relevantly states that there *“is no intention to prevent the depiction of alcohol as incidental to a friendly and lively social environment or celebration, but the presence or introduction of alcohol cannot be seen to transform an occasion or directly contribute to its success. Similarly there is no intention to restrict the depiction of alcohol being responsibly consumed by successful or attractive people, provided there is no suggestion that it has caused or contributed to their circumstance.”*

- (j) We do not consider there is any suggestion in the advertisement that the consumption or presence of alcohol may create or contribute to a significant change in mood or environment as required under section 3(c)(i) of the Code, let alone any change in mood or environment whatsoever. Even if the Panel finds that there is a change in mood or environment in the advertisement (which we reject), we note that an *“alcohol product can be portrayed within an advertisement which shows a change of mood, provided that it is not suggested that it is the alcohol product which has been a cause or contributor of the change in mood”* (ABAC Adjudication Panel Determination No. 88/14, paragraph 26).
- (k) The depiction of alcohol in the advertisement is only incidental to the impression the advertisement seeks to convey of the social environment and amenities at Adelaide Casino. There is also no suggestion that the consumption or presence of alcohol by successful or attractive people in the advertisement caused or contributed to their circumstance. On this basis, we respectfully submit that the advertisement complies with section 3(c)(i) of the Code.
- (l) We note that there is no express requirement under section 3(c)(i) or (ii) of the Code or anywhere else in the Code to reference the potential adverse effects of alcohol consumption in the advertisement.
- (m) We also do not consider there is any suggestion in the advertisement that alcohol consumption could contribute to successful gambling, as there is no *“causation”* between alcohol consumption and successful gambling in the advertisement, which is the *“critical element of the requirement in Part 3 (c) of the Code”* (ABAC Adjudication Panel Determination No. 88/14, paragraph 26). We do not accept that the mere depiction of alcohol consumption and gambling at a gambling venue in the advertisement, not in the same frames in the advertisement and not in conjunction with any suggestion of gambling success, is sufficient to contravene section 3(c)(ii) of the Code and on this basis we respectfully submit that point (c) above does not apply.
- (n) Based on the above, we respectfully submit that the complaint should be dismissed on the basis that:
- the Code does not apply to the advertisement as the advertisement is not a marketing communication in Australia generated by or within the reasonable control of a producer, distributor or retailer of Alcohol Beverages;
 - further or in the alternative, the Code does not regulate the placement of the advertisement; and
 - further or in the alternative, the advertisement does not breach the Code, in particular section 3(c)(i) and (ii) of the Code.

- (o) We also note that there has only been one complaint made in relation to the advertisement and the public response to the advertisement to date has been positive. We regret if any viewers were offended by the advertisement and would like to take this opportunity to assure the Panel and the viewers that this was never our intention and that we take our responsibilities in regard to responsible alcohol consumption seriously. We appreciate the opportunity to respond to the complaint and acknowledge our commitment to self-regulation of advertising in Australia. We sincerely hope that the Panel reviews the advertisement positively having regard to the points raised above.

The Panel's View

- 22. The complaint raises a number of concerns about a television commercial for the recently refurbished Adelaide Casino. In part, these concerns go to matters within the domain of the ASB under the AANA Code relating to advertising and children, and in part to issues under the ABAC Scheme. This determination deals solely with those concerns raised under the ABAC.
- 23. The ABAC Scheme at its heart is an alcohol industry initiative which establishes a code of good marketing practice for alcohol industry participants. As a self-regulatory approach, the Scheme only binds those companies which have made a commitment to meet the ABAC standards. Companies within the Scheme are primarily producers and distributors of beer, wine, and spirit alcohol brands, and also major alcohol product retailers, such as Coles and Woolworths.
- 24. The Adelaide Casino is not an alcohol company within the scope of the ABAC Scheme, nor is it a signatory to the Scheme. As result, the Panel cannot make a decision which the Casino is contractually bound to follow. That said, the Casino has cooperated with the Panel's process and this has enabled the Panel to make a determination.
- 25. There is another fundamental question about the Panel's ability to make a decision on the substance of the complainant's concerns. Put simply, that question is whether the television commercial, which promotes the Casino and its facilities, and in doing so displays alcohol use is an 'alcohol beverage marketing communication'. If the answer to this question is yes, then the Panel can make a decision on the substance of the complaint. If the answer is no, then the advertisement does not fall within the scope of the ABAC Scheme and the Panel cannot make a decision on the substance of the complaint.

Is the advertisement a 'marketing communication' for the purpose of the ABAC Scheme?

- 26. The Panel has considered the portrayal of alcohol in marketing which is not self-evidently brand specific product advertising on a number of occasions, and set out the factors to be considered in Determination 7/09. The issue has also been subsequently referred to in Determination 42-3/11 and Determination 81/13. In Determination 7/09, the Panel reviewed the decisions of the Panel

since the ABAC's commencement in 1998 and placed the advertisements considered by the Panel into five broad categories, namely:

- Brand specific advertisements by the producer or distributor of the particular alcohol product (Category 1)
- Advertisements from a liquor retailer which promote a particular brand of alcohol beverage (Category 2)
- Advertisements from a liquor retailer which promote the sale of alcohol from the outlet, rather than the sale of a particular brand of alcohol beverage (Category 3)
- Advertisements which are from non-alcohol entities, but which promote alcohol products in some way (Category 4)
- Material which might contain some reference to alcohol but can't fairly be said to be 'alcohol beverage advertising' (Category 5)

27. Marketing which falls within Categories 1, 2, or 3 are within the scope of the ABAC Scheme. Marketing within Category 4 may fall within the Scheme depending on the individual circumstances. Marketing in Category 5 is outside the ambit of the ABAC .The advertisement that is the subject of this complaint is clearly not in the first three categories, so the question is whether it falls within Category 4 or Category 5.
28. Category 4 involves third party entities which are not prima-facie alcohol product companies. The advertisements considered in previous Panel decisions made reference to brand specific alcohol beverage because of some relationship between the third party and an alcohol product company. Each case turned on its own facts but the critical issue considered by the Panel was whether the alcohol beverage company had a measure of control and approval over the advertisement and the portrayal of the alcohol brand in question.
29. Category 5 involves material or content with a reference to alcohol but which could not be regarded as either 'advertising' or an advertisement promoting alcohol beverages. For example, an advertisement for a lotto competition which showed a winning couple toasting their success with a glass of champagne (Determination 40/08).
30. Since the Panel's previous determinations considering these categories of alcohol advertising complaints, the Alcohol Beverages Advertising (and Packaging) Code was replaced by the ABAC Responsible Alcohol Marketing Code on 1 July 2014. Section 2(a) of the ABAC Code sets out the matters to which the Code applies, namely:

'all Marketing Communications in Australia generated by or within the reasonable control of a Marketer. This includes, but is not limited to

- *brand advertising (including trade advertising)*
- *competitions*

- *digital communications (including in mobile and social media)*
- *product names and packaging*
- *advertorials*
- *alcohol brand extensions to non-alcohol beverage products*
- *point of sale material*
- *retailer advertising and Marketing Collateral*.

The Code defines 'Marketer' as a 'producer, distributor or retailer of Alcohol Beverages'. Some exceptions to the applicability of the Code are provided for in section 2(b), however these exceptions are not relevant for present purposes.

31. Accordingly, in order to be considered a 'marketing communication' and therefore fall within the ambit of the Scheme, the advertisement must have one of two characteristics, namely:
 - a) the advertisement promotes a particular brand or type of alcohol; or
 - b) is retailer advertising;
32. The first characteristic of an advertisement falling within the ambit of the Scheme is that the advertisement promotes a particular brand or type of alcohol. Throughout the advertisement various types of alcohol beverages are depicted, namely champagne, wine, beer and what could be an alcoholic cocktail. While it is possible to identify the different types of alcohol that appear, the advertisement contains no references to an identifiable alcohol brand.
33. Clearly the advertisement is not 'brand advertising' but could it be considered 'retailer advertising'? The inclusion of retail advertising in the ABAC Code reflects the extension of the previous ABAC Code to include ABAC signatories that are alcohol retailers alongside alcohol producers and distributors.
34. The Company has argued that the advertisement is not within the scope of the ABAC Scheme. Essentially, it is claimed that the advertisement is not 'brand advertising' and the reference to alcohol in the advertisement is 'merely incidental to the promotion of the Adelaide Casino'. In support of its contention, the Company refers to Panel Determination 81/14, but this decision is not relevant as it turned on the advertiser in that case having no connection to Australia, which is clearly not the circumstance with the Adelaide Casino.
35. The Panel believes that the advertisement is within the scope of the ABAC given:
 - a) the Adelaide Casino is a licensed premises entitled to sell alcohol products;

- b) it is therefore a 'retailer of alcohol beverages' within the meaning of 'marketer' in section 5 of the ABAC (i.e. a business which sells alcohol beverages to a consumer);
- c) the advertisement while canvassing the facilities and activities available at the Casino, does extensively feature the availability and the consumption of alcohol products and, as such, is 'retailer advertising' within the meaning of sections 2(a) and 5 of the ABAC.

Is the advertisement inconsistent with the Code standards?

36. The complainant contends that the advertisement is irresponsible as it:
- a) Glamorises alcohol consumption as increasing a person's enjoyment of life, with minimum reference to the potential adverse effects of alcohol consumption; and
 - b) May be interpreted as saying that alcohol consumption could contribute to successful gambling.
37. For its part, the Company responds that the depiction of alcohol is only incidental to the message in the advertisement, which concerns the social environment and activities at the Casino. The Company rejects that the advertisement can be fairly said to suggest that alcohol use leads to success in life or gambling in particular.
38. The relevant ABAC standards require that alcohol marketing must not suggest the consumption or presence of an alcohol beverage contributes to a significant change in mood, nor that alcohol use is a cause or a contributor to the achievement of success. In assessing if a standard has been breached, the Panel is to have regard to the probable understanding of the marketing communication by a reasonable person.
39. The key requirement of this ABAC standard goes to the notion of causation. In other words, it is permitted that attractive people are seen using alcohol, provided it is not implied that it is because of alcohol the person is successful or regarded as attractive. An assessment as to whether an advertisement is consistent with this requirement requires examination of the content of the advertisement as a whole, and how this content can be reasonably interpreted.
40. The Panel does not believe the advertisement is in breach of the ABAC. In reaching this conclusion, the Panel has noted:
- a) The alcohol use portrayed in the advertisement is moderate, with no one individual shown consuming excessively or appearing to be effected by alcohol use;
 - b) While the advertisement does depict attractive people and settings, it cannot be reasonably suggested that these attributes have been caused or contributed by alcohol use;

- c) Further, there is no reasonable implication to be drawn from the advertisement that alcohol use can in some way lead to success in gambling;
 - d) Finally, there is no requirement in the Code that alcohol marketing provide information or a 'warning' as to the adverse impacts of the misuse of alcohol.
41. For completeness, it should also be noted, the fact that the advertisement was broadcast during a live sports broadcast is neither a breach of the ABAC, nor of the Code applying to free to air television. This is because the requirements on free to air television provide an exception for the broadcasting of alcohol advertising during live sports broadcasts. For its part, the ABAC is a content code as opposed to a placement code, which means the focus is on the consistency of the content of marketing against the requirements of the Code, rather than where and in what medium the particular marketing might be conveyed.
42. To decide the complaint, the Panel has made an assessment on the meaning of terms 'retailer advertising' and 'marketer' within the ABAC. There are implications on the potential reach of the ABAC Scheme which flow from this which should be considered by the Scheme's Management Committee.
43. Accordingly, the complaint is dismissed.