



ABAC Adjudication Panel Determination 61 & 62/24

Product: Third Wave Café
Company: Third Wave Café
Media: Email, Digital - Instagram
Date of decision: 16 May 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Jeanne Strachan

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from two complaints received on 15 and 16 April 2024 in relation to email and Instagram marketing by Third Wave Café (“the Company”).
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 the 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 meet 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 complaints raise concerns under the ABAC Code and accordingly are within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaints were received on 15 and 16 April 2024.
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 Advice

9. A component of the ABAC Scheme is an advice service by which an alcohol marketer can obtain an independent opinion of a proposed alcohol marketing communication against the ABAC standards prior to public release. Pre-vetting advice is separate from the complaint process and does not bind the Panel but represents best practice on behalf of alcohol marketers. Pre-vetting advice was not obtained for the marketing.

The Marketing

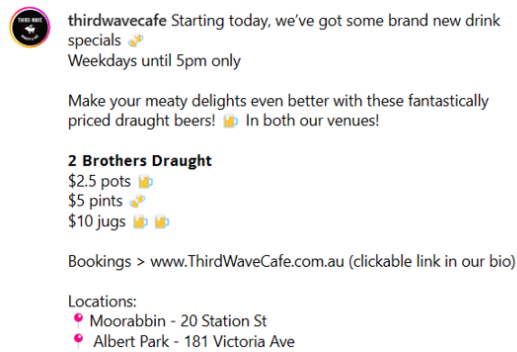
10. The complaints relate to the following:


Email marketing



Instagram marketing

The Instagram is posted along with the following text, and shows two people standing at a bar.



<p>Man: <i>“Hey guys, are you an alcoholic like Monica?”</i></p> <p><i>In Albert Park and Moorabbin we have a brand new drinks special that is during the week day until 5pm.</i></p> <p><i>That’s \$2.50 posts, \$5 pints and \$10 jugs of 2 Brothers Draught.</i></p> <p><i>Monica, how is it?”</i></p> <p>Monica: <i>“It’s amazing”</i></p> <p>Man: <i>“And how’s the drinking habit going?”</i></p> <p>Monica: <i>“Hmmm”</i></p> <p>Man: <i>“Yeah good. Alright come on down.”</i></p>	
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Complaints

11. The complainants object to the marketing as follows:

Email marketing

- The ad offers \$2 pots, \$5 Pints and \$10 jugs every weekday until 5pm.

- Extremely cheap alcoholic beverages for multiple hours every weekday which could be promoting binge drinking and goes against healthy diet.

Instagram marketing

- In the Instagram reel on the Third Wave Moorabbin Instagram page, posted Monday 15th of April, the gentleman calls their staff member an alcoholic before visually and verbally promoting \$2.50 pots, \$5 pints and \$10 jugs of 2 Brothers Draught.
- The gentleman then asks the staff member, Monica, how their drinking habit is going, and she replies "good."
- Makes light of alcoholism and promotes binge drinking.

The ABAC Code

12. Part 3 of the Code provides that An Alcohol Marketing Communication must NOT:

(a)(i)	show (visibly, audibly or by direct implication), encourage, or treat as amusing, consumption inconsistent with the Australian Guidelines to Reduce Health Risks from Drinking Alcohol, such as: (A) excessive Alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day); or (B) Alcohol consumption while pregnant or breastfeeding;
(a)(ii)	show (visibly, audibly or by direct implication), encourage, or treat as amusing, rapid Alcohol consumption, misuse or abuse of Alcohol or other irresponsible or offensive behaviour that is related to the consumption or presence of Alcohol.

The Company Response

13. The Company responded to the complaint by email on 3 May 2024. Its primary comment was:

- We have no intention of continuing to use those video and digital assets to promote our business.

The Panel's View

14. This determination arises from two complaints concerning digital marketing from the Third Wave Café in Melbourne. The first complaint concerns an email that promotes the Café's drinks special on Two Brothers beer, available during weekdays up to 5 pm. The second complaint relates to a video posted on the Café's Instagram account about the same drinks special.
15. Between them the complainants raise a several concerns, namely:
 - that offering cheap drinks for multiple hours every weekday promotes binge drinking;
 - that the advertising of cheap drinks promotes binge drinking; and
 - the Instagram video makes light of alcoholism.
16. As mentioned in paragraph 2 above, alcohol as a product and the marketing of alcohol falls within a shared regulatory space between direct government regulation and a number of industry lead codes of practice such as the ABAC. The concerns raised by the complaints are at the intersection of two regulatory regimes, namely the Responsible Alcohol Advertising and Promotion Guidelines administered by Liquor Control Victoria and the ABAC.
17. The actual conduct of the promotion is a responsible service of alcohol issue for the Victorian regulator. The Victorian Guidelines go to promotions involving extreme discounts that encourage excessive alcohol consumption. This means the decision of the Café to run the promotion and offer the alcohol products at the prices advertised is a matter for Liquor Control Victoria and not the ABAC Scheme.
18. The ABAC issues raised by the complaints is whether the email advertisement and the Instagram video breach the relevant ABAC standards of responsible alcohol marketing, namely that an alcohol marketing communication must not:
 - show encourage or treat as amusing, consumption inconsistent with the Australian Guidelines to Reduce Health Risks from Drinking Alcohol such as excessive alcohol consumption (more than 10 standard drinks per week or more than 4 standard drinks on any one day) - Part 3 (a)(i); and
 - show encourage or treat s amusing, rapid alcohol consumption, misuse or abuse of alcohol or other offensive behaviour that is related to the consumption or presence of alcohol - Part 3 (a)(ii).
19. Assessing the consistency of marketing material with an ABAC standard is from the probable understanding of the marketing item by a reasonable person.

A 'reasonable person' represents the values, attitudes and life experiences found in most members of the community.

20. The Café did not seek to argue that the marketing items were consistent with the Code standards, merely advising that the material would not be continued with. No mention was made as to whether the actual availability of the discounted drinks was continuing or not.
21. The Code standard draws a distinction between the encouragement of the purchase of alcohol and its subsequent consumption. Often a discount will encourage a consumer to select one brand type over another brand type of the same product category. It might also encourage the purchase of more items than might normally be the case in order to benefit from the saving in price, particularly if the item is commonly used and can be stored and used over time.
22. In the case of alcohol, a discounted price offered by an alcohol retailer such as a bottle shop might see a shift in a consumer's purchasing choice but of itself it says little about the subsequent pattern of the consumption of the alcohol. Alcohol has a long shelf life and can be stored over time. For instance, a carton of beer can be stored, consumed over time and by multiple people. So simply offering a discount on a carton of beer does not mean binge drinking by a single individual is being encouraged.
23. This can be contrasted with discounts or 'happy hour' style promotions run by a licensed venue where there is an immediacy between the purchase and the consumption of the product. In these cases there is much higher risk that the nature of the discounted offer will encourage excessive consumption. This is why the State/Territory Liquor Authorities such as Liquor Control Victoria regulate the conduct of 'happy hour' style activities and provide direction on their promotion via the Promotional Guidelines.
24. The Panel does not believe the email advertisement is a breach of the Code standards. The email advises of the new drinks special and gives the prices and notes the offer runs on weekdays up to 5 pm. The ad itself does not promote excessive consumption. It is possible the actual conduct of the promotion could lead to excessive consumption if responsible service of alcohol requirements were not followed, but this falls within the domain of the State regulator and not the ABAC Scheme.
25. In contrast, the Panel believes the Instagram video does breach the Part 3 (a) (i) and (ii) standards. In reaching this conclusion the Panel noted:
 - the video is introduced by the man asking 'Hey guys, are you an alcoholic like Monica' and then the discount offer is outlined. A reasonable person would probably understand that the low prices are being associated with the excessive consumption of being alcohol dependent;

- while the video might be understood as being amusing rather than a serious call to be an 'alcoholic', humour of this kind treats excessive alcohol consumption as being amusing in breach of both ABAC standards;
- a similar understanding would be drawn from the later question from the man to Monica of 'how's the drinking habit going?'; and
- taken as a whole, the video goes beyond advising of the drinks pricing special and suggests a pattern of excessive alcohol use facilitated by the discounted pricing.

26. The complaint regarding the Instagram post is upheld and the complaint regarding the email is dismissed.