



ABAC Adjudication Panel Determination Nos 79, 81 & 83/24

Products:	Various
Company:	Terra Australis Distillery – Herbal Lore Liqueurs
Media:	Outdoor Sign, Website and Print
Date of decision:	3 July 2024
Panelists:	Professor The Hon Michael Lavarch (Chief Adjudicator) Professor Richard Mattick Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from three complaints received from a single complainant on 23 and 30 May 2024. The complaints relate to advertising by Terra Australis Distillery – Herbal Lore Liqueurs (“the Company”) using an outdoor sign, internet and print and raise concerns about:
 - the placement of the outdoor sign;
 - suggestions made that alcohol offers a therapeutic or health benefit and contributes to an improvement in mood; and
 - emphasis of the strength of the alcohol.
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 23 and 30 May 2024.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint and this determination was made within the target 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 complaint relates to the following:

Outdoor sign



Image 1



Image 2

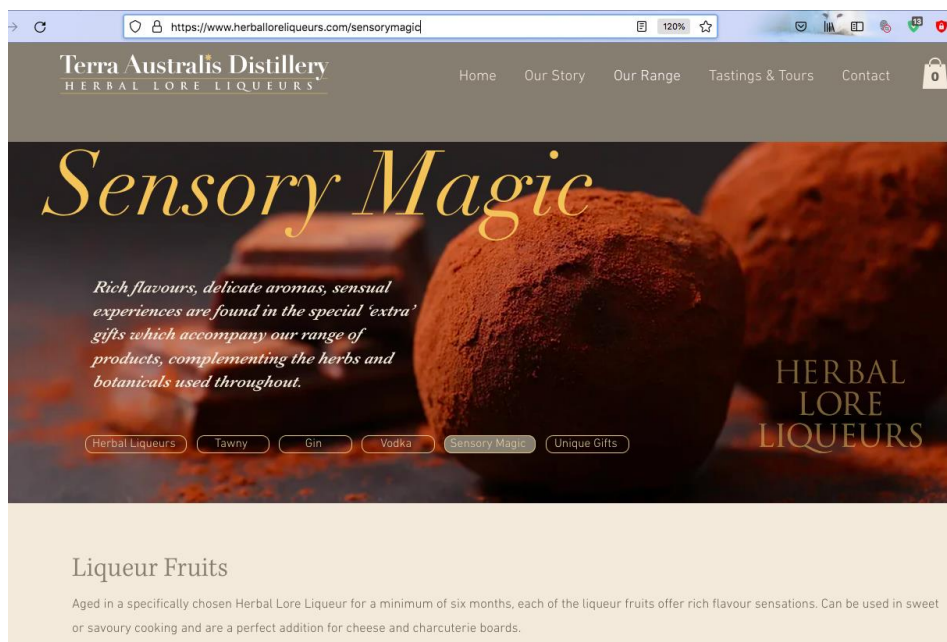


Image 3

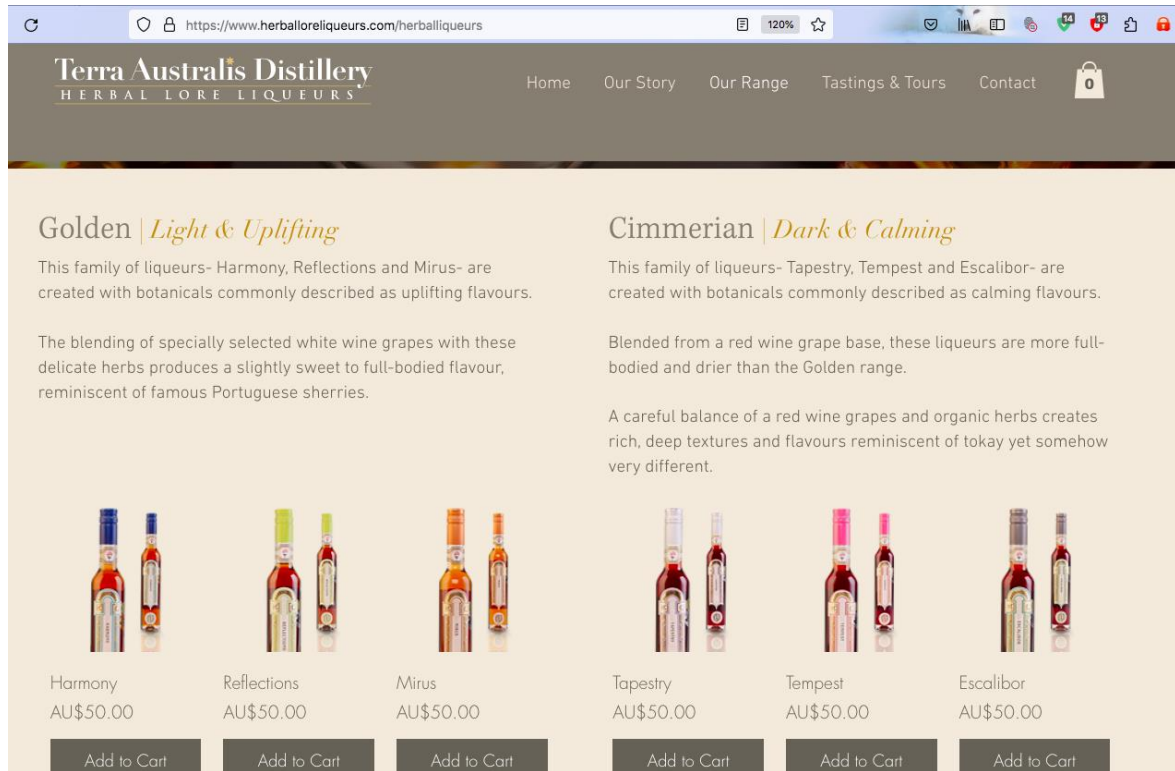


Image 4

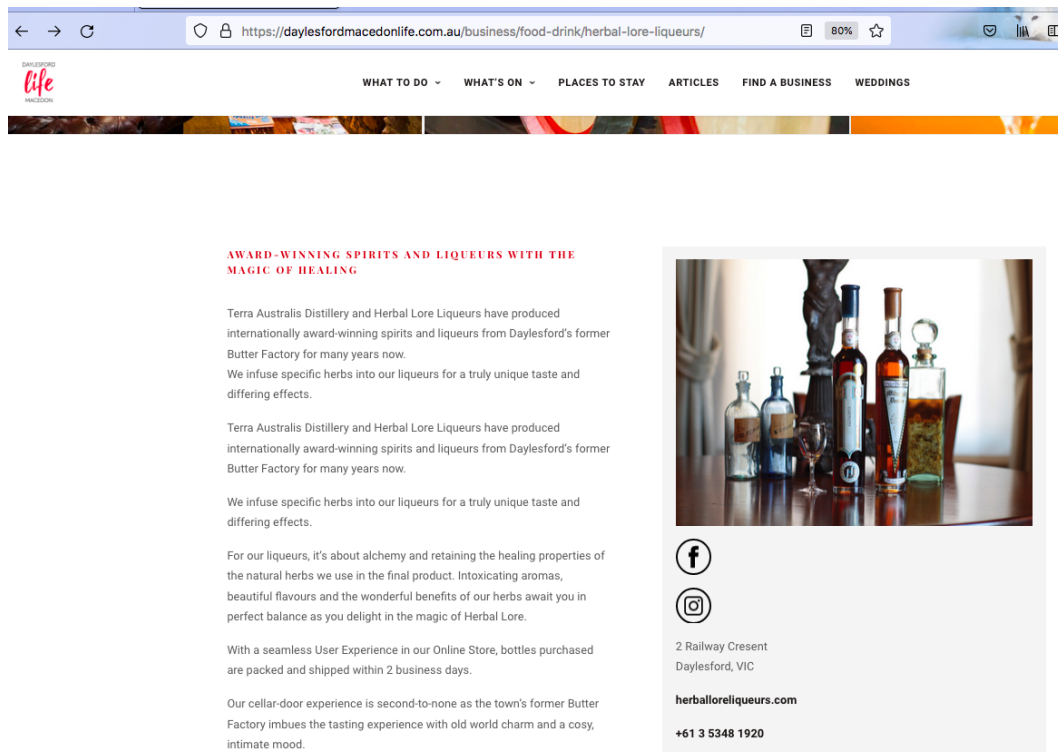


Image 5

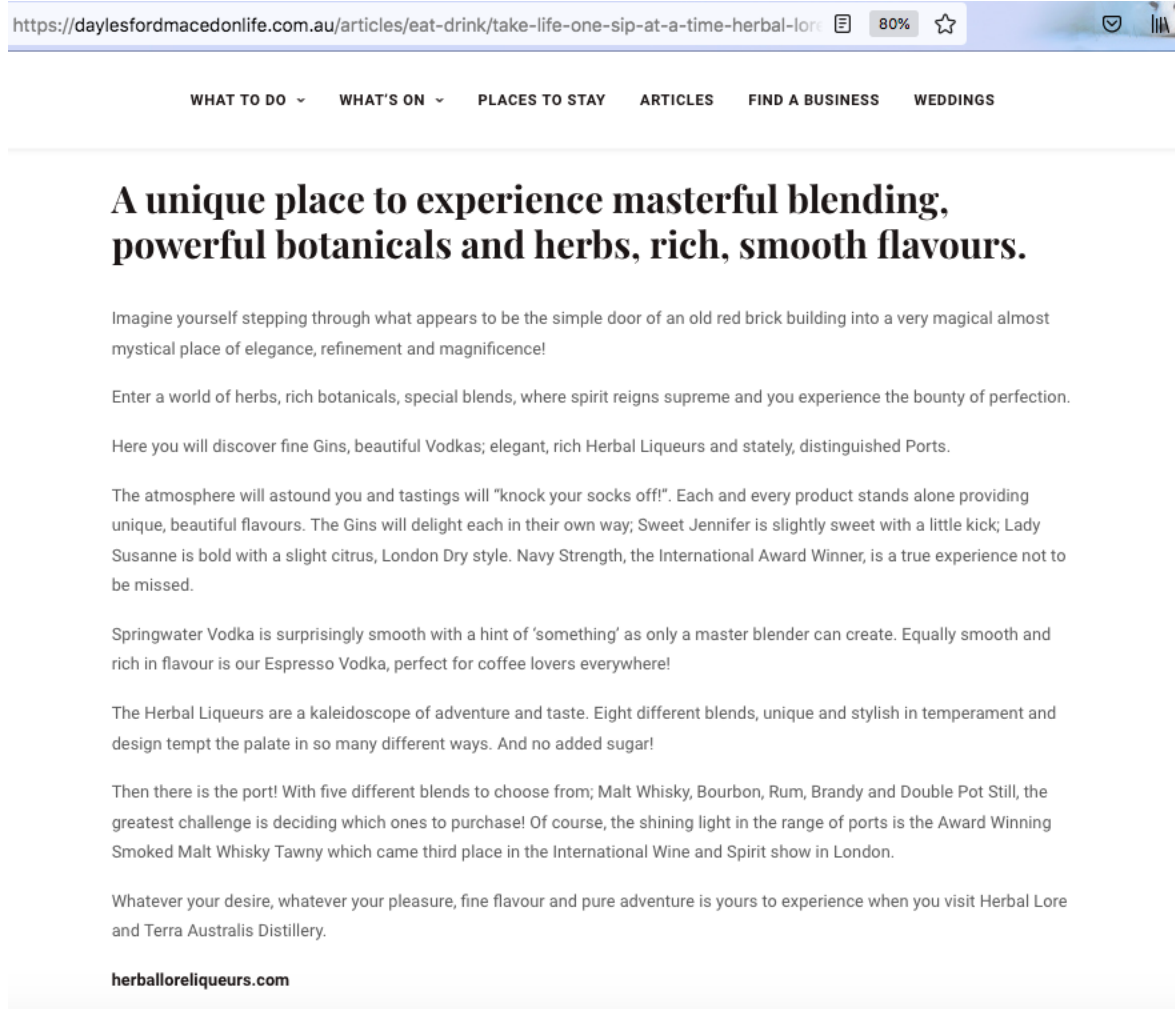
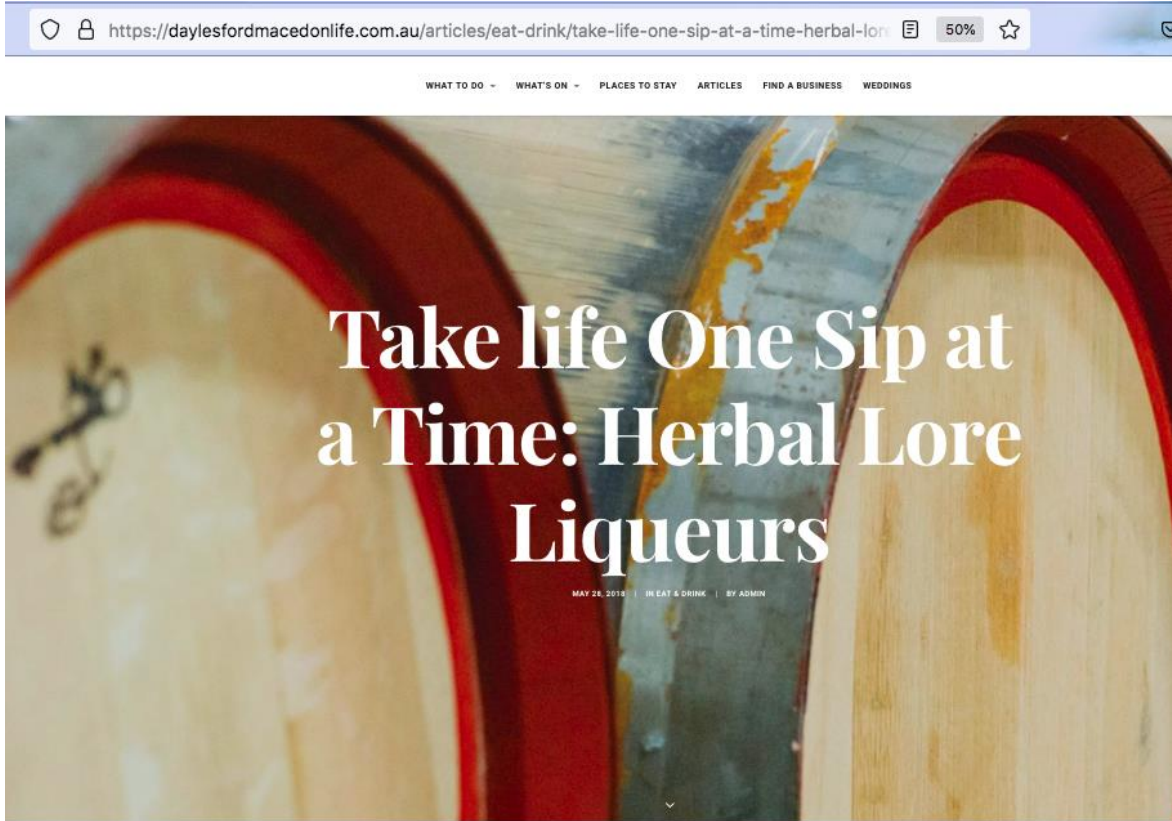


Image 5a



**A unique place to experience masterful blending,
powerful botanicals and herbs, rich, smooth flavours.**

Imagine yourself stepping through what appears to be the simple door of an old red brick building into a very magical almost mystical place of elegance, refinement and magnificence!

Enter a world of herbs, rich botanicals, special blends, where spirit reigns supreme and you experience the bounty of perfection.

Image 6



Terra Australis Distillery

Nestled just on the edge of the township of Daylesford, one will find the Old Butter Factory. This steadfast, stately piece of history has become the home of Terra Australis Distillery.



AWARD-WINNING SPIRITS AND LIQUEURS WITH THE
MAGIC OF HEALING



Image 7

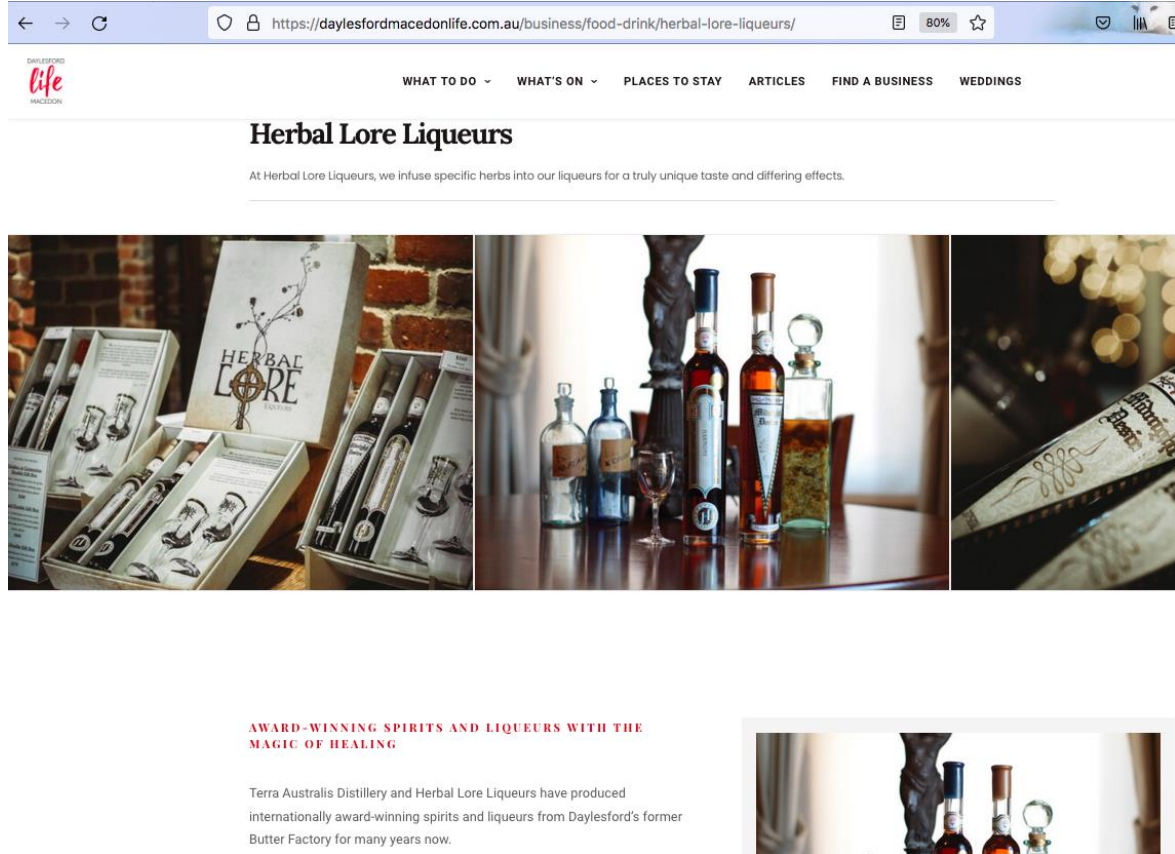


Image 8 (Print)



Complaint

11. The complainant objects to the marketing as follows:
- *The [outdoor] sign is in proximity of a school or within 150 metres of the historical Glenlyon Primary School which is located on the same road at 17 Barkly Street, Glenlyon VIC 3461.*
 - *The outdoor sign does not meet town planning requirements.*
 - *[The advertising suggests] that they all have some kind of a flow-on effect to people's health as having therapeutic benefits from the herbs which are in their liquor such as those concocted in their ports and wines and also mentions causing other effects as a consequence. They stated "natural healing methods" and "Healing". Healing is the process of making or becoming sound or healthy again. i.e. a therapeutic benefit.*
 - *It implies that the consumption of their alcohol products will feel improved health benefits.*
 - *[The advertising suggests] ...that their alcohol has a therapeutic benefit to a person's mood.*
 - *The words health, healing and calming are used multiple times in their marketing of their alcohol.*
 - *Their mention of "magic and power" emphasises their alcohol products as having some kind of alcohol strength.*
 - *The web page for Terra Australis Distillery has photos of their alcohol products eg. Gin with the description which states that "Award-winning spirits and liqueurs with the magic of healing".*
 - *I'm objecting to their use of language contained in their advertisement because it specifically states that their alcohol beverage "offers"..."energy".*
 - *The advertisement for this bottle of liquor does encourage the choice of a particular Alcohol Beverage which is 'Midnight Desire' in a 375ml bottle as it clearly makes emphasis to its alcohol strength with "energy". The advertisement also conveys a therapeutic benefit because of the "herbal botanicals" that they claim are in their alcohol beverage to create "energy". The use of this language can be perceived as a way of aiding the reader's capacity for work or vigorous activity with strength with the consumption of their liquor.*

The ABAC Code

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

- (a)(iv) encourage the choice of a particular Alcohol product by emphasising its alcohol strength (unless emphasis is placed on the Alcohol product's low alcohol strength relative to the typical strength for similar products) or the intoxicating effect of Alcohol.
- (c)(i) suggest that the consumption or presence of Alcohol may cause or contribute to an improvement in mood or environment.
- (c)(iv) suggest that the consumption of Alcohol offers any therapeutic or health (including mental health) benefit, is needed to relax, or helps overcome problems or adversity.

13. Part 4 of the Code provides that:

- (a) An Alcohol Marketing Communication must comply with code provisions regulating the placement of Alcohol marketing and an Alcohol Alternative Marketing Communication must comply with code provisions regulating the placement of Alcohol Alternative marketing that have been published by Australian media industry bodies (for example, Commercial Television Industry Code of Practice and Outdoor Media Association Placement Policy).

The Company's Response

14. The Company responded to the complaint by letter emailed on 12 June 2024. Its primary comments were:

- It is our desire to address the various issues as completely as possible to ensure there is understanding by yourself, and the Panel of the matters raised as well as what we feel may be the motivation and intention behind the complaints themselves.
- First of all, please be assured that contrary to the complainant's regular commentary, we are very much in favour, desirous and more than willing to be compliant with the regulations. In fact, as a result of the prior complaint issued last year, we immediately withdrew the advertisement which was in our local newspaper (The Local) from our portfolio of ads, and we re-wrote the contents of our website so as to remove all reference to the healing and

possible therapeutic effects of herbs. We feel we have accomplished this successfully, and have been very mindful, and careful, to avoid any reference to such descriptive terms with all our advertising. Our commitment is such that we were shocked to receive these complaints from you. We, as before, are concerned that these complaints stem more from personal vendetta as opposed to true concern for public safety.

- As per your request, herewith answers to your questions as you have them listed.
 - Question 1: No, we did not submit our revised work for approval. We felt we understood what was being asked of us and responded accordingly re-writing the content and changing advertisements as mentioned previously.
 - Question 2: In relation to the Daylesford Macedon Life website, we actually did not even know there was an ad for us on their website. We had a gentleman who was handling marketing for us last year. It was probably set up by him while liaising with the tourism group. He died last year unexpectedly after only a short time with us. We have been unable to follow up, or follow through, a number of aspects of his work. Please be assured, we have requested removal of this ad from their website. We have at this writing, not had a response from their office.
 - Question 3: This is regarding the outdoor billboard concerns. The sign for our business sits on private land and is moveable, that is, not fixed at any point. It is behind a fence and is not in any way on public land, public access or an obstruction to anyone in any way. The complainant mentions that it sits on a trailer which is unregistered. It is on private land not on a nature strip nor on a road. What is the relevance? The complainant also mentions the size of the sign. This strongly suggests they either have very long arms in order to measure it, or they entered this property without permission. This is trespassing.
 - The second point mentioned in this section raises a number of questions for us. It is the concern that our sign is within 150 metres line of sight of a school. The complaints raised feature strongly a local input; that is, signage which is local as well as newspaper ads. Yet, it is suggested our sign is near a school which is information neither you or the Panel would necessarily question. Except, the sign is not near a school. The Glenlyon Primary closed in 1993. It is currently a private residence and has been for a number of years. It is a property owned by the people who own 'The Local' newspaper,

and is a heritage listed property; perhaps that is why they have left the 'Glenlyon Primary School' sign sitting at the front.

- Questions 4 & 5 (Image 1): Regarding the concerns raised with the section of our website titled 'Our Story'. This section is simply intended, no hidden agendas, to share Roger's story and life circumstances which led to his interest in working with herbs and botanicals. Prior to this, Roger had no interest in herbs. We do not purport, nor are we suggesting in any way, that Roger used alcohol for healing, relaxation, recovery or overcoming problems. Nor are we suggesting for anyone else to do so.
- With reference to 'emphasis on alcohol strength', there is no 'emphasis'. Any mention of alcohol strength is simply noted as general information. It is a question asked frequently as most people are not aware of the varying strengths of products. There is no link, intended or otherwise, between alcohol strength and herbs or botanicals. Herbs and botanicals and all references to them are intended as separate, distinct information, and are not to be confused with any basic information about alcohol (i.e. strength). Also, we have re-written our content removing any reference linking our products to therapeutic benefits.
- Question 6 (Image 2): The section titled 'Sensory Magic' does not suggest that the consumption of alcohol offers therapeutic or health benefits. The word sensory and sensorial is simply referring 'to the senses'; we have 5 of them - sight, smell, taste, touch and sound.
- Our products are designed for an experience in each of these areas. People love our labelling and packaging and are attracted to the 'sight' of what we do in this way. People enjoy the aroma and flavours of our products - the smell and taste components. Our glassware featured in our gift boxes is enjoyed by all for the weight and 'feel' of their quality - the touch component. People enjoy listening to our stories, experiences and descriptions. This helps people to understand why we do what we do – the hearing component. Creating and enjoying a sensory experience as I have outlined does not imply our products are needed, or are to be used for, therapeutic benefit or otherwise. They are simply an experience of sight, smell (aroma), taste (flavour), sound and touch.
- Question 7 (Image 3): Referring to that part of our website noted in image 3, we are not suggesting that the consumption of alcohol offers therapeutic or health benefit, is needed for relaxation, or is used to overcome problems or otherwise. The specific words in question are used simply, and only, to describe flavours; that is, the

taste of the products. Their usage is descriptive only of flavour, and no other implications are intended or implied.

- Question 8 (Image 4): This particular section regarding Daylesford Macedon Life website was somewhat of a shock. As discussed in question 2, we had not realised there was anything about us on their website. The only way we can explain it, is that it may have been organised, prior to the previous complaint, by a person who was handling our marketing; he was in regular contact with Daylesford Macedon Tourism. Unfortunately, he died quite unexpectedly, and we were unable to follow up or follow through with any of his work. We were left completely in the dark. Our website was the only aspect we were able to address.
- Since this complaint has occurred and we have been made aware of our presence on their website, we have contacted Daylesford Macedon Tourism (as previously noted) requesting its removal until we are able to rectify the concerns. It is our desire and intention to follow through with compliance as we have stated previously. Therefore, reference to 'the healing properties of herbs' will be deleted.
- Question 9 (Images 5 and 5a): With further reference to Daylesford Macedon Life website and in particular images 5 and 5a, we do not encourage the choice of a particular product based on its alcohol strength. In fact, alcohol strength is only mentioned as general information since people like to know the percentages. Alcohol strength is not featured or mentioned within these two images. It does not form part of the descriptive narrative. We're not promoting alcohol strength.
- The descriptive words used for herbs and botanicals are only used to describe their varying flavours and aromas. We use many herbs and botanicals, and they are all very different. Some are sweet; some are dry; some are light; some are strong; some are mellow; some are powerful, and the list goes on!
- As mentioned previously, these words are used purely as descriptions of flavours and aromas (taste and smell). These descriptive words for herbs and botanicals are regularly used, for example, with cooking. Because they are commonly used with food and with cooking, people can more easily relate to them. This assists them in understanding what our products smell and taste like. It gives them a point of reference.
- Question 10 (Images 6 and 7): With further reference to the Daylesford Macedon Life website regarding images 6 & 7, we were,

as previously discussed, unaware we were on their website (see response to question 2 & 8). Otherwise, we would have made the necessary changes to the content in compliance with the regulations as had been requested from the Panel after the earlier complaint from last year. With the sudden, unexpected death of a previous staff member (as discussed in question 2 & 8), we were unable to ascertain all that he had done or not done. We could not follow through with projects and ideas he proposed. There was limited information available. We worked through, and edited where needed, what we did have. As also stated, we have since requested the removal of our content and will make the specific changes needed, namely the two references for 'The Magic of Healing'.

- Complaint 83/24 (Image 8): This complaint is in reference to an advertisement printed in our local newspaper 'The Local', issue #306, 20th May 2024. There are a number of points raised throughout this complaint which we will address as best as possible. This, of course, is in addition to answering the questions you have outlined.
 - Question 1: As discussed in the earlier part of this communication referring to complaint 79/24, we did not submit this advertisement for approval. We felt we understood the guidelines with which we needed to comply and have steered clear of language which refers to any healing or therapeutic benefits. We have not used any 'healing' or 'therapeutic' language in this said advertisement.
 - Question 2: The language, the words, in this advertisement do not suggest, directly or indirectly, that consumption or presence of alcohol may cause or contribute to any health of therapeutic value, improvement of mood and/or environment or any other related concern. These words have been chosen to simply describe flavours.
 - Specifically, we use herbs and botanicals throughout our range of products to create unique flavours and aromas. Advertising includes these words to demonstrate we use the real thing - not artificial flavours or colourings.
 - We used the word 'energy' in this advertisement referring only to a basic law of physics – that all things are energy. Everything is energy; everything has energy. The complainant has chosen a very narrow, very limited descriptive view of the word energy, I feel, to make an erroneous point. Energy is far more than his words express. We work with herbs and botanicals in our production process to bring out the best in flavour and aroma. That's working with their energy. We create beautiful products in this way.

- Question 3: As described above in question 2, we work with herbs, botanicals and their energy to create perfectly blended products with beautiful flavours and aromas. This is an expression of the law of physics as mentioned above. We are not encouraging the choice of a product based on alcohol strength. Alcohol strength is strength of alcohol, as mentioned earlier, and is used in our advertising where people may wish to know the percentage of alcohol which is present. It does not play a core role in advertising; rather it is a supportive role providing information.
- We have a number of concerns relating to the nature of these complaints. The tone and general thread are very similar to that which was expressed in the complaint received last year. We have worked as carefully as possible to comply with the regulations as given to us. Apart from the incident with the Daylesford Macedon Life website - which will be withdrawn and edited - we feel we are working within the boundaries with our advertising. The complainant seems to want to find fault in whatever we do and uses half-truths, misleading and inaccurate information as well as onerous assumptions to make their point. Consistently throughout the complaints they make assumptions that are not accurate, innuendos which have no basis (and are simply not true), connections between things that are not meant to be connected or linked, and do not just flow from one to the other (as they claim). They draw conclusions from bits of information which don't add up. The emotional undertones pervade all sense of logic and common sense.
- Thank you for your patience, and for taking the time to read these words. If there are any queries or anything that requires further clarification, please contact us.

The Panel's View

15. This determination arises from two complaints about the marketing of Terra Australis Distillery. One complaint goes to an outdoor sign and the other to various websites and print marketing copy for the Distillery and its liqueurs.
16. The concern about the outdoor sign in large measure goes to issues outside the scope of the ABAC Scheme such as whether the sign is meeting town planning requirements. The ABAC issue raised is that the sign is located within 150 metres of the Glenlyon Primary School. The ABAC Placement Standard in Part 4 (a) of the Code in effect prohibits alcohol advertising on signs within 150 metres of the sightline of a school.
17. The Company advised that the Glenlyon School closed in 1993 and the website of the Victorian Education Department confirms this. It now appears the old school building is a boutique accommodation venue.

18. While the ABAC Placement Standard and the Out Of Home advertising policies of the Outdoor Media Association upon which the ABAC Standard is based are silent on the matter, there is no doubt the intention of the 150-metre 'exclusion zone' for alcohol signs from schools assumes the school is operational. The standard does not cover disused school sites, and there is no breach of the ABAC requirements to position an alcohol advertisement near a former school site.
19. The second complaint goes to various advertising copy contained on the Company's website, the website of the regional tourism board - the 'Daylesford Macedon Life' and a print ad in a local newspaper. The material is shown in Images 1 to 8 in paragraph 10. The complainant contends the material:
 - suggests that the Company's products offer therapeutic or health and healing benefits and/or improve a person's mood; or
 - is encouraging the purchase of the products by emphasising the product's alcohol strength and that the product can give energy.
20. These concerns enliven the ABAC standards that require that alcohol marketing communications must not:
 - encourage the choice of a particular alcohol beverage by emphasising its strength or intoxicating effect - Part 3 (a)(iv);
 - suggest that the use of alcohol may cause or contribute to an improvement in mood or environment - Part 3 (c)(i); and
 - suggest that the consumption of alcohol offers any therapeutic or health benefit, is needed to relax or helps overcome problems or adversity - Part 3 (c)(iv).
21. In assessing if a marketing communication is consistent with a Code standard, the Panel places itself in the position of a 'reasonable person' and considers the probable understanding of the marketing material by that reasonable person. A reasonable person has the attitudes, opinions and life experiences that are shared by most people in the community.
22. The Company responded to the complaints in detail. The background of Roger McLean, the owner and 'master blender' of the Company, is explained and how he became interested in working with herbs and botanical ingredients. The circumstances of the material on the Daylesford and Macedon Life website is provided and a rebuttal is made to the points made by the complainant. It is stressed the Company seeks to market consistently with ABAC standards and it is contended that changes have been made to achieve this goal.

23. As noted in Determination 8 & 9/23 which also deals with marketing materials from the Company, marketers are entitled to choose their brand posture and to highlight how a product is created and what are its ingredients. The background of a product can be explained as can the life journey and motivations of someone involved in a product's development. What cannot be asserted is that an alcohol product provides health benefits, or that the use or presence of a product leads to or contributes to an improvement in a consumer's life or circumstances.
24. In the current case, it seems that Mr McLean's life journey including having to deal with some health issues led to a discovery of the potential use of herbs and botanicals in the distilling process of the Company's products. Mentioning this background in marketing materials is fine, but tension can arise with the ABAC standards if the description of the products made with the herbs and botanicals begins to suggest that the use of the ingredients gives the product beneficial health or related attributes.
25. A good rule of thumb is that marketing material should stick to the facts about a product's ingredients and not attribute life-improving descriptions to a product or its constituent parts. In any event, each item of marketing must always be assessed on its own merits to determine if a Code standard has been complied with.
26. For the sake of brevity, the Panel below goes to the potentially problematic descriptions in each of the images and finds as follows:
- Image 1 - on balance, the description of 'the desire to blend, respectfully, with their medicinal herbs' does not in the context of the much larger website entry breach the ABAC standards;
 - Image 2 - no breach of ABAC standards as the description 'sensory magic' would not likely be understood as suggesting the product offers health or related benefits;
 - Image 3 - the description 'calming' would probably be understood as suggesting the use of the product offers a health benefit and/or an improvement in mood and breaches ABAC standards;
 - Image 4 - the description of 'the magic of healing' would be probably understood as suggesting the product offers a health benefit and breaches the ABAC standard;
 - Image 5 - no breach of ABAC standards;
 - Image 5a - the description 'powerful botanicals' in the context of its use would not probably be understood as breaching ABAC standards;

- Image 6 - the description of 'the magic of healing' would be probably understood as suggesting the product offers a health benefit and breaches the ABAC standard;
- Image 7 - the description of 'the magic of healing' would be probably understood as suggesting the product offers a health benefit and breaches the ABAC standard;
- Image 8 - the use of the term 'energy' within the context of the print ad would likely be understood as suggesting that the product provides a health benefit.

27. It is noted that images 4, 6 and 7 were published on the Daylesford Macedon Life website. The Company explains that before the complaint they were not aware the website contained these materials about their products. It was surmised the copy may have come from a person who was previously handling marketing but who had unfortunately and unexpectedly passed away. The Panel accepts the explanation in good faith and makes a 'no fault' ruling in this instance.
28. The consequence of a no-fault ruling does not diminish that the complainant's concern has been accepted and that the offending material must be removed or modified to meet the applicable standard. It simply recognises that the Company had acted reasonably and the continuation of the material on the third party website was not something which they were aware of or had direct control over in the unusual circumstances of the untimely death.
29. Accordingly, the complaints are dismissed regarding the placement of the outdoor sign and the digital material in images 1, 2 and 5. The complaint is upheld on the balance of the images regarding Part 3 (c)(iv) of the Code. A no-fault ruling is made regarding the breaches of images 4, 6 and 7.